

- 116 *Re Tyler, ex parte the Official Receiver* [1907] 1 KB 865 (CA); *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA).
- 117 *Re Thomas Horton* [1925] NZLR 739 (SC); *Re Buyers, ex parte Davies* [1965] NZLR 774 (SC); and *Official Assignee v Westpac Banking Corporation* (1993) 4 NZBLC 102,939 (HC).
- 118 High Court decision, above n 2, at [26]–[44].
- 119 *Re Thomas Horton*.
- 120 *Re Clark (A Bankrupt), ex parte the Trustee v Texaco Ltd* [1975] 1 WLR 559 (Ch D); *Re Modern Terrazzo (in liq)* [1998] 1 NZLR 160 (HC) at 188.
- 121 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 24.
- 122 *Re Cider*, above n 115.
- 123 *Re Modern Terrazzo (in liq)*.
- 124 *Re Gozzett* [1936] 1 All ER 79 (CA).
- 125 Evidence Act 2006, s 92.
- 126 Rules, r 45(1); *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1; *Erceg v Balenia Ltd* [2009] NZCA 48, [2009] NZCCLR 32; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA); *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA).
- 127 We note for completeness that no estoppel would be raised on the alleged facts: see Piers Feltham, Daniel Hochberg and Tom Leech *Spencer Bower on Estoppel by Representation* (4th ed, LexisNexis, London, 2004) at 211–213; and James Every Palmer “Equitable Estoppel” in Andrew Butler (ed) *Equity in Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2009) 601 at [19.2–19.5].
- 128 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (CA); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (CA) (although the latter case is arguably applicable on other grounds).
- 129 *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA); *Liggett v Kensington* [1993] 1 NZLR 257 (CA) in which Gault and McKay JJ considered the remedy available) not doubted on appeal: *Re Goldcorp Exchange Ltd (in rec)* [1994] NZLR 358 (PC).
- 130 *Fortex Group (in rec and in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173.
- 131 At 175–177.
- 132 At 176 per Gault, Keith and Tipping JJ.
- 133 *Re Polly Peck (No 2)* [1998] 3 All ER 812 (CA); Peter Watts “Restitution” [1995] NZ L Rev 395 at 396. It has been suggested that the existence of the established restitutionary claim recognises that the mistaken windfall is unconscionable, but that there is not sufficient unconscionability to “justify the payer’s extraction from the ‘fly-paper’ of insolvency” (that is, the general pool of creditors). Arguably, the plaintiff payer’s position is no more invidious than that of unsecured tort, contract or other claimants.
- 134 *Fortex Group* at 182 per Blanchard J.

¶98-017 Polymers International Limited v Toon
(2013) 11 NZCLC ¶98-017

High Court Auckland, CIV-2013-404-001437, [2013] NZHC 1897.
Hearing: 4 Jul 2013; Judgment: 30 Jul 2013.

Registration — Financing statement — Seriously misleading defect — Personal Property Securities Act 1999, ss 149–151, 172.

Polymers International Limited (Polymers) supplied polymer products to Interworld Plastics N Z Limited (in liq) (Interworld). In 2002, Polymers and Interworld entered into a credit arrangement on the basis that Polymers would supply material to Interworld, and as security for payment Interworld granted Polymers a security interest. Polymers registered a

financing statement under the Personal Property Securities Act 1999 (PPSA) against Interworld as debtor. The financing statement contained the following three errors or omissions:

- (a) It did not include the debtor company's unique incorporation number.
- (b) It did not correctly classify the debtor company as a "Company".
- (c) It misspelled the debtor name of Interworld Plastics N Z Limited without a gap so it read "Interworld Plastics NZ Limited", with no gap between the "N" and the "Z", rather than "Interworld Plastics N Z Limited". [3]

On 30 August 2012 Interworld went into liquidation and the first respondents, Victoria Toon and Dennis Wood, were appointed liquidators. Polymers lodged a proof of debt on the basis of being a secured creditor. The liquidators did not recognise Polymers' security in their first report to creditors as it was not disclosed in a search of the security register. Polymers sought to assert its claim; however, the liquidators identified the three errors referred to above and continued to reject Polymers' claim to having a validly registered security.

Polymers applied to the court for a declaration that its financing statement had been validly registered.

The issue was whether the two errors, omission of the incorporation number and failure to classify the debtor as a company, were seriously misleading.

Section 149 of the PPSA provides that the validity of the registration of a financing statement is not affected by any defect, irregularity, omission or error in the statement unless it is seriously misleading. Section 150 sets out certain circumstances in which a registration is invalid including if there is a seriously misleading defect, omission, or error in the name of the debtor. Section 172 sets out the search criteria for the register and includes searching by the company registration number.

It was accepted by Polymers that the two omissions or errors were made, but submitted that they were not seriously misleading.

Interworld argued that the two omissions or errors were seriously misleading, with the failure to register Interworld as a company in itself leading a search party to obtain no results.

Held: application dismissed.

1. What is required for a registration to be seriously misleading turns on the effectiveness or otherwise of information provided in the financing statement, which allows an effective search using the PPSA's search criteria: [9].
2. The name of the debtor is a critical element of the financing statement. It is the indexing point for all searches, and an error in the debtor's name will mean that the security interest will not be discovered by a searching creditor: [11].
3. The onus is on those who register to enter data correctly and keep it up to date, and the assumption by those who use the register is that such data is correct: [13].
4. The failure to register the company number was an omission of an item that the Act provided "must" be in the financing statement. A company's incorporation number is one of the limited s 172 search criteria by which searches can be conducted: [15].
5. The omission of the company's number was a serious error. It meant that those who searched the register by company number or through the Companies Office website would not discover the relevant financing statement: [20].
6. The error in Rabobank New Zealand Ltd v Stockco Ltd [2010] NZHC 271 concerned a wholly different search criterion and was distinguishable.
7. Where there is a failure to enter the incorporation number, invalidity is the likely outcome. This is in order to preserve the efficacy of the search function: [26].

- 8. The two errors (failure to include the incorporation number and to classify the debtor as a company) were interlinked, the second error augmented in seriousness the first error of inserting no number. It is doubtful whether a failure to classify the debtor company as a “company”, on its own, could be “seriously misleading” as defined in the PPSA: [28].**

[Headnote by the CCH Company Law Editors]

P Moodley for the applicant.

G Blanchard for the respondents.

Before: Asher J.

Asher J:

Introduction

1. This originating application concerns whether the registration of a financing statement under the Personal Property Securities Act 1999 was invalid because of errors and omissions in the statement that was filed.

2. Polymers International Ltd (Polymers) supplied polymer products to Interworld Plastics N Z Ltd (in liquidation). On 30 July 2002, Polymers and Interworld Plastics N Z Ltd (Interworld) entered into a credit arrangement on the basis that Polymers would supply material to Interworld, and as security for payment for that material under each contract for sale and purchase of goods, Interworld granted Polymers a security interest.

3. Polymers registered a financing statement under the Personal Property Securities Act 1999 (PPSA) against Interworld as debtor on 14 September 2007. It is accepted that the financing statement failed to comply with the requirements of the PPSA and the Personal Properties Securities Regulations 2001 (the Regulations) in three respects.

- (a) It did not include the debtor company’s unique incorporation number.
- (b) It did not correctly classify the debtor company as a “Company”.
- (c) It misspelled the debtor name of Interworld Plastics N Z Limited without a gap so it read “Interworld Plastics NZ Limited”, with no gap between the “N” and the “Z”, rather than “Interworld Plastics N Z Limited”.

4. On 30 August 2012, Interworld went into liquidation. The first respondents Victoria Toon and Dennis Wood were appointed liquidators.

5. Between March and May 2012, Polymers had supplied goods and services to the value of \$751,925.04 to Interworld. Following the liquidation, Polymers lodged a proof of debt claim form with supporting documentation with the liquidators for \$751,925.05. The liquidators in their first report did not recognise Polymers as a secured creditor, listing it with the unsecured creditors. The liquidators, having conducted a search of the securities register, did not discover any security interest in favour of Polymers. Following Polymers’ notification of its claim and assertion of priority, the liquidators identified the three registration errors referred to and continued to refuse to recognise that Polymers had a validly registered security.

6. Of the three errors and omissions the last can be put to one side. While there is undoubtedly a mistake in not putting a space between the letters “NZ” in the name of Interworld, the liquidators accept that this defect was not seriously misleading. Indeed, it is common ground that a search for debtor names automatically excludes all spaces and abbreviations in the words “NZ” in the searching process. Thus, even if the space had been included, it automatically would have been removed by the search algorithm. Polymers’ error in the way it set out Interworld’s name could not therefore mislead a searcher, and was not seriously misleading.

7. However, it is submitted by Mr Blanchard on behalf of the liquidators that the other two omissions or errors were seriously misleading. Mr Moodley for Polymers accepts that these two omissions or errors were made, but submits they were not seriously misleading in terms of the PPSA.

The statutory framework

8. The three key provisions in the PPSA that relate to errors in financial statements are ss 149-151. They provide:

149 Registration of financing statement invalid only if seriously misleading

The validity of the registration of a financing statement is not affected by any defect, irregularity, omission, or error in the financing statement unless the defect, irregularity, omission, or error is seriously misleading.

150 When financing statement seriously misleading

Without limiting the circumstances in which a registration is invalid, a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error in —

- (a) The name of any of the debtors required by section 142 to be included in the financing statement other than a debtor who does not own or have rights in the collateral; or
- (b) The serial number of the collateral if the collateral is consumer goods, or equipment, of a kind that is required by the regulations to be described by serial number in a financing statement.

151 Proof that person actually misled not necessary

In order to establish that a defect, irregularity, omission, or error is seriously misleading, it is not necessary to prove that any person was actually misled by it.

9. What is required for a registration to be seriously misleading turns on the effectiveness or otherwise of information provided in the statement, which allows an effective search using the PPSA's search criteria. Those criteria are set out in s 172:

172 Search criteria

The register may be searched only by reference to the following criteria:

- (a) The name of the debtor;
- (b) the name and address of the debtor or, if the debtor is an organisation, the name and address of the organisation and the name or job title, and contact details, of the person acting on its behalf;

(c) The name and date of birth of the debtor;

(d) *If the debtor is a company, the unique number assigned to the company by the Registrar of Companies on the registration of the company under the Companies Act 1993:*

(e) If collateral is required . . . by this Act or by the regulations to be described by serial number in a financing statement, the serial number of the collateral:

(f) The registration number assigned to the registration under section 144:

(g) Any other criteria specified in the regulations.

(emphasis added)

10. The PPSA in 1999 turned the previous chattels security system, which had been accurately described as a “quagmire”,¹ into a modern centralised register that is fully accessible online with no physical office and no paper-based records.² Creditors file an electronic record of their interest called a financing statement. Priority is measured from the time of registration. Commensurate with what is contained in the financing statement, a search responds to the entry of the name of the debtor, and reveals by general description the specified property, and gives notice that parties will enter into a transaction in respect of that property. Details of particular security transactions are not provided. It was observed of the Canadian system in Saskatoon in *Royal Bank of Canada v Touche Ross Ltd* by Tallis JA:³

The most characteristic difference between notice filing and traditional systems of registration is that notice filing is party-specific rather than transaction-specific. What is filed are not the details of a particular security but notice that certain parties have entered into, or may in future enter into, a secured transaction in relation to specified property.

11. Unsurprisingly, therefore, the name of the debtor is a critical element of the financing statement. It is the indexing point for all searches, and an error in the debtor's name will mean that the security interest will not be discovered by a searching creditor.

12. Contrary to the old system, there is now no gateway through which registrants must pass in which they have to show compliance with various requirements. There is indeed no check made for compliance. The register's operating computer software ensures only that the financing statements contain the minimum number of characters required.⁴ Further, the verification statement mandated by the PPSA is merely a notice of registration, not a certificate of compliance.⁵

13. Indeed, the system that is put in place is self-policing. Those who register are aware that the penalty for error is not rejection of the registration, but rather its later invalidity. The onus is thus placed entirely on those who register to enter data correctly and keep it up to date, and the assumption by those who use the register is that such data is correct.⁶ If it is not, the consequences can be fatal to the ultimate success of the registration, and for a good reason of substance. Erroneous data can mean that the registration will not work in practice.

The first error – failure to include the incorporation number

14. There is a direct requirement to register a company's number. Section 142(1)(c) provides:

142 Data required to register financing statement

(1) The following data *must* be contained in the financing statement in order to register it:

...

(c) If the debtor is an organisation that is incorporated, the unique number assigned to it on its incorporation:

(emphasis added)

15. This failure to register the company number was therefore not just an error in registration; it was the omission of an item that the Act provided "must" be in the financing statement. Furthermore, a company's incorporation number is one of the limited s 172 search criteria by which searches can be conducted.

16. Although not determinative of the objective question of whether the statement was seriously misleading,⁷ the evidence before me established that unsurprisingly, the consequence of the lack of the company number in the

financing statement was that a search where the incorporation number was used as the reference did not reveal the financing statement relating to Interworld. Thus, if the search criterion set out in s 172(d) was used, it would not reveal the name of the debtor. Of the 67 financing statements registered in relation to Interworld on the Personal Property Securities Register, all included the incorporation number save for the Polymers financing statement.

17. The significance of the number of the company is indicated by the Companies Office register website. Under the heading "How do I search using a debtor's details-organisation?" the website advised:

When searching for an organisation that is a New Zealand company we recommend searching using only the incorporation number (if you do not know the number, you can search the Companies Register – FREE).

18. It is also noteworthy that the register website, in its instructions for those intending to conduct a search, provides that it is possible to search a company's interests by the debtor's name or by the company's incorporation number.

19. The New Zealand registry, unlike some Canadian registries, only provides returns that exactly match what is entered, and not entries that are not exact matches. There is little margin for error. It is also relevant that a feature of the New Zealand system is the ability to search the register direct from the Companies Office. This search through the Companies Office website only responds to the entry of incorporation numbers of the company. It is not possible to search the company's interests on the Personal Property Securities Register by name via the Companies Office website. Thus, searches via the Companies Office will not reveal a financing statement entered using only the company's name.

20. Therefore, the omission of the company's number was a serious error. It meant that those who searched the register by company number or through the Companies Office would not discover the relevant financing statement.

21. In *Rabobank New Zealand Ltd v Stockco Ltd*⁸ the financing statement was registered in

the name of “A N and M J Campbell”, a partnership. It was argued that the description of the Campbells as a partnership was wrong and seriously misleading. It was argued that the name of the partnership, Awapapa Station, should have been used and that anything else was an error. Simon France J held that the registration was not seriously misleading as no partnership called “Awapapa Station” ever arose despite the fact that there was a deed of partnership signed.

22. The *Rabobank* decision has been criticised,⁹ but it is not necessary to analyse its merits as it is plainly distinguishable. The error in *Rabobank* concerned a wholly different search criterion. What might have amounted to a “seriously misleading” error was very different to that which arose in this case.

23. There is a considerable body of Canadian authority that considers whether when there are two search criteria available, both of which could reveal the registration, an error in only one of them is seriously misleading.¹⁰ In Ontario the concept of “reasonable searcher” is applied.¹¹ I have decided not to use that concept given that the Ontario legislation expressly contains a “reasonable person” test whereas New Zealand, along with the other Canadian provinces, does not. In those circumstances to apply the concept of “reasonable user” would be to create an unnecessary complexity. I agree with various New Zealand commentators that it is preferable to ask whether the error would prevent a registration being disclosed by a properly formatted search in the relevant searchable field.¹² Such a question is straightforward and objective.

24. Here, the users would be misled if they entered the company number only, or accessed the register through the Companies Office register website. If they did this they would miss the Polymers registration. Indeed, this is what happened when the liquidators carried out their search.

25. Mr Moodley pointed out that s 151 did not make registration of the company name a prerequisite. That may be so, but it is a compulsory requirement under s 142(1)(c).

26. I note that it is the view of the authors of *Personal Property Securities in New Zealand*¹³ that s 172(d) provides searchers with a simple

and alternative search option to searches in the debtor name. They note that a failure to correctly record the incorporation number “. . . will result in the registration not being retrieved by a search of the field”. Accordingly any error in this field would also appear to invalidate the registration. They also observe that a failure to include the debtor’s incorporation number is not expressly mentioned in s 150, and there may be some latitude applied in this regard. However, for the reasons I have given, I agree with the authors that to preserve the efficacy of the search function as prescribed by the Act, invalidity is the likely outcome.

The second error — failure to classify the debtor company as a “company”

27. Mr Blanchard submitted that the failure to enter Interworld as a company could in itself lead a searching party to obtain no results. If whoever filled out the statement had indicated that the statement being filled out was concerning an incorporated body, the website would have prompted the person to input the company number. Instead, the person who registered for Polymers chose “other”, and no prompt came up.

28. The two errors are to an extent interlinked to one another. The organisation type error contributed to the company incorporation number error. In this sense, the second error, which was of classification, can be seen as augmenting in seriousness the first error of inserting no number. I doubt whether on its own the second omission could be regarded as “seriously misleading”.

Result

29. The applicants have established that Polymers financial statement was not validly registered. I therefore decline the relief sought, namely a declaration that registration number F909JW90824R2R71 dated 14 September 2007 and renewed on 5 September 2012 was validly registered.

Editors note: The reference in the first sentence to applicants should be respondents.

30. The respondents have been successful in resisting this application and costs should follow that result. The applicant is to pay the respondents’ costs on a 2B basis.

Footnotes:

- 1 Stefan A Riesenfeld “The Quagmire of Chattels Security in New Zealand” (paper for New Zealand Legal Research Foundation, Auckland, 1970).
- 2 For a general description see Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at 8A.7.01; and Michael Gedye, Ronald Cuming and Roderick Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 4-5.
- 3 *Royal Bank of Canada v Touche Ross Ltd* (1984) 31 Sask R 131 at 135.
- 4 Gedye, Cuming and Wood, above n 2, at 451.
- 5 Personal Property Securities Act 1999, s 145.
- 6 Personal Property Securities Regulations 2001, reg 4.
- 7 Personal Property Securities Act 1999, s 151.
- 8 *Rabobank New Zealand Ltd v Stockco Ltd* [2011] 13 TCLR 191 (HC).
- 9 See Linda Widdup *Personal Property Securities Act: A Conceptual Approach* (3rd ed, LexisNexis, Wellington, 2013) at 322, and Gault, above n 2, at 8A.7.03(2).
- 10 See the discussion in Gault, above n 2, at 8A.7.3(3).
- 11 *Re Lambert* (1994) 7 PPSAC (2d) 240 (ONCA) at 258. See also *Stevenson v GMAC Leaseco Ltd* (2003) 227 DLR (4th) 154 (NBCA).
- 12 Gedye, Cuming and Wood, above n 2, at 477; and Roger Fenton *Garrow and Fenton’s Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 2 at 691-692. Gault, above n 2, discusses the reasonable person test at 8A.7.3(1)(a).
- 13 Gedye, Cuming and Wood, above n 2, at 484.

[¶98-018] Levin and Madsen-Ries (as liquidators of Personal Homes Limited) v Lawrence and McCullagh (as liquidators of Waterman Building Supplies Limited)
(2013) 11 NZCLC ¶98-018
Court of Appeal, CA 430/2012, [2013] NZCA 394.
Hearing: 6 Aug 2013; Judgment: 23 Aug 2013.

Company Law — Court’s discretion to order inspection of liquidation records — Company A operating business and ceasing trading — Company B acquiring Company A’s business and assets — Company C trading with Company B — Company C put into liquidation and filing notices to set aside voidable transactions with Company A and Company B — Company A going into liquidation and admitting voidable transaction claim in a reduced amount — Passing of resolution of creditors of Company A not to appoint alternative liquidators — Company A’s liquidators refusing Company C’s request to inspect liquidation files and records — Company C’s liquidators applying for an order for inspection of records — Whether there is a presumption against court ordering inspection by creditors — Whether good reason to inspect established — Whether fiduciary principles and s 256(1)(a)(i) to be considered — Companies Act 1993, s 256(1)(a)(ii).

Waterman Building Supplies Limited (Waterman), an operator of PlaceMakers Westgate, had been loss-making for some time and ceased trading in November 2008. Fletcher Division Limited (FDL) operated the PlaceMakers Westgate business from 1 December 2008 and had acquired the business and assets of Waterman and all the shares in Waterman. FDL traded with Personal Homes Limited (Personal), which had continued to purchase goods on credit from PlaceMakers Westgate.

Personal was put into liquidation on 13 November 2009. The liquidators of Personal (the appellants) had filed notices to set aside voidable transactions (under s 292 of the Companies Act 1993) with FDL and Waterman. Waterman was put into liquidation and the respondents