

# Customs charge vs security interest: High Court decides priority

The statutory charge on goods by the New Zealand Customs Service (*Customs*) outranks a General Security Agreement (*GSA*) even if Customs has allowed the goods to be released with the duty still owing.

So found the High Court in a recent decision, even though the circumstances of the case were that the bank's security interest crystallised prior to the existence of the statutory charge.

## The context

*Fisk and McCloy v Attorney-General*<sup>1</sup> concerned a camera over which the BNZ had a GSA but which Customs took statutory charge over under section 97(1) of the Customs and Excise Act 1996 (C&E Act).

## The Court's analysis

The Court put significant weight in its interpretation of the C&E Act and, in particular, sections 97, 99 and regulation 87(1), on the fact that the Chief Executive of Customs had the right to confiscate and sell goods on which duty was owing, even where those goods had been passed to a third party.

The Court's view was that, by virtue of section 97(2), "Parliament has conferred on the chief executive a broad power in relation to charged property to the extent of the unpaid duty", and that the "logical consequence" of this was

that the rights of secured creditors under section 305 of the Companies Act and sections 243 to 244 of the Insolvency Act did not apply in situations where Customs had a statutory charge over an asset.

## Implications

This case serves as a reminder that:

- not every interest in personal property will be identified on the Personal Property Securities Register (*PPSR*)
- statutory charges fall outside the Personal Property Securities Act 1999, and
- the scope, nature and priority of each charge will depend on its own statutory regime. Other examples beyond the Customs charge are the charge on proceeds obtained through legal aid grants under the Legal Services Act 2011 and the charge over proceeds of insurance under the Law Reform Act 1936.

The conclusion that the charge in this case was first ranking was not due to the fact that it was a statutory charge, but rather, to the structure of the relevant provisions in the applicable statute.

Other statutory charges will have different characteristics and their priority will need to be determined by reference to their empowering statute.

## Footnotes

1. <http://www.chapmantripp.com/publications/Documents/Fisk%20v%20Attorney-General%202016%20NZHC%20479.pdf>

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