

**GENERAL MOTORS ACCEPTANCE CORPORATION AUSTRALIA &
ANOR v SOUTHBANK TRADERS PTY LTD (M132/2006)**

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 5 May 2006

Date special leave granted: 29 September 2006

The respondent ("Southbank") was a motor vehicle wholesaler, the first appellant ("GMAC") was a financier and Auto Group ("Auto Group") a motor vehicle auctioneer. In 2002 Southbank sold 10 vehicles to Kingstrate, a motor vehicle retailer, and each contract contained a retention of title clause. Kingstrate took possession of the vehicles with the price unpaid and sold them to GMAC, who in turn bailed the vehicles to Kingstrate under a floor plan agreement enabling Kingstrate to display the vehicles in its yard. Upon learning that Kingstrate was insolvent, GMAC took possession of nine of the vehicles and registered a "security interest" pursuant to the *Chattel Securities Act 1987 (Vic)* ('the Act') in December 2002. In January 2003 GMAC sold the nine vehicles to the second appellant and in mid-January 2003, Southbank registered the security interest in the vehicles pursuant to the Act.

At trial in the County Court of Victoria, Southbank contended that GMAC converted the vehicles when it took possession of them, registered a security interest and then sold them to Auto Group. Auto Group was said to have converted the vehicles by purchasing them from GMAC and, in failing to deliver them up, had wrongfully detained them. GMAC contended that Southbank had an unregistered security interest which was, by virtue of s 7(1) of the Act, extinguished. Section 7(1) provided that:

if a secured party has-

- (a) an unregistered security interest... ;
in goods but is not in possession of the goods and a purchaser purchases ... an interest in the goods ... for value in good faith and without notice .. of the security interest from a supplier being- ...
- (c) the debtor (a term defined in s 3(1) as meaning relevantly the person who created the security interest) ...

the security interest of the secured party is extinguished.

Judge Holt noted that the question to be decided was whether the retention of title clauses were "security interests" as defined in the Act. His Honour found that on a plain reading of the definition in s 3 of the Act, the clauses in question amounted to a security interest. He found that when Southbank sold the vehicles to Kingstrate, the agreement was that Kingstrate could onsell them before paying Southbank. Southbank inserted the retention of title clause to, in effect, secure payment of the debt.

On the question of whether the retention of title clauses were extinguished under s 7(1) by virtue of GMAC's acquisition of the vehicles, the trial judge found that the security interest had been extinguished on the basis that GMAC did not have actual or constructive notice of the security interest, that GMAC purchased the vehicles in good faith and without notice and as such, Southbank's interest did not have priority over GMAC.

Southbank's appeal to the Court of Appeal (Maxwell P, Eames and Ashley JJA) was successful. The Court found that Southbank's interest was not a security interest and therefore could not have been extinguished under s 7(1) of the Act. The Court found that the retention of title clause constituted a conditional sale so that property in the vehicles did not pass to Kingstrate but remained with Southbank. It noted that the definition in s 3(1) of a "security interest" did not capture a conditional sale. To satisfy the definition of a security interest, the relevant interest had to arise pursuant to an instrument or transaction and secure payment of a debt. On the facts, no interest arose pursuant to an instruction or transaction because Southbank remained owner so that no security interest was or could have been created by Kingstrate. The issue of whether GMAC purchased the vehicles "for value and in good faith without notice" did not strictly arise because of the conclusion on the first issue. However, the Court of Appeal observed that whilst the appellant succeeded at trial on this issue, the issues of notice and good faith were appropriate to have been remitted for retrial.

The grounds of appeal are:

- The Court of Appeal erred in holding that the respondent's interest in respect of motor vehicles pursuant to a retention of title clause in contracts of sale, between the respondent and Kingstrate Pty Ltd (t/a Dandenong Suzuki) ("Kingstrate"), was not a "security interest" as contemplated by *the Chattel Securities Act* (Vic) ("the Act").
- The Court of Appeal erred in not dealing with the ground in the appellants' Notice of Contention to the effect that each of the first appellant and the respondent held a security interest in respect of the vehicles and that by the operation of section 10 of the Act the first appellant's security interest took priority over that of the respondent.
- The Court of Appeal erred in not dealing with the ground in the appellant's Notice of Contention to the effect that in the event of a finding that the respondent had no security interest under the Act, the disposition by Kingstrate, as mercantile agent, to the first appellant was valid to transfer title in the vehicles to the first appellant pursuant to section 67 of the *Goods Act 1958* (Vic).