

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

GENERAL MOTORS ACCEPTANCE
CORPORATION AUSTRALIA & ANOR

APPELLANTS

AND

SOUTHBANK TRADERS PTY LTD

RESPONDENT

General Motors Acceptance Corp Australia v Southbank Traders Pty Ltd
[2007] HCA 19
16 May 2007
M132/2006

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 31 May 2006.*
3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for further consideration in accordance with the reasons of this Court.*
4. *The Court of Appeal of the Supreme Court of Victoria to determine the question of costs at trial and in the Court of Appeal in the light of its further disposition of the matter.*

On appeal from the Supreme Court of Victoria

Representation

D F Jackson QC with A P Trichardt for the appellants (instructed by Corrs Chambers Westgarth)

W T Houghton QC with I W D Upjohn for the respondent (instructed by Browne & Co Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

General Motors Acceptance Corp Australia v Southbank Traders Pty Ltd

Chattel Securities Act 1987 (Vic) – Meaning of "security interest" – Where respondent had entered into a conditional sale agreement for motor vehicles with a third party – Where sale agreement contained a "Romalpa clause" – Where appellant was a purchaser from the third party – Competing interests of appellant and respondent – Whether respondent held a security interest – Whether including conditional sales within the meaning of security interest is consistent with the purpose and text of the *Chattel Securities Act 1987 (Vic)* – Whether rights over property owned by the debtor must be "conferred" on the creditor for a security interest to exist – Whether an interest over goods which is reserved, not created, can constitute a security interest.

Chattel Securities Act 1987 (Vic) – Priorities – Competing interests of appellant and respondent – Whether respondent's "security interest" lost for want of registration.

Property – Chattels – Priorities – Interest of vendor under a conditional sale.

Statutory construction – Legislative history – Relevance of textual differences between original and re-enacted versions of statute – Relevance of common law concepts when construing statutory definitions.

Words and Phrases – "security interest".

Chattel Securities Act 1987 (Vic), ss 3(1), 3(3), 7(1), 7(6).
Goods Act 1958 (Vic), ss 27, 31.

- 1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. The principal question in this appeal is whether a vendor of motor vehicles sold by way of conditional sale, on terms that property in the vehicles did not pass to the purchaser until the purchase price was paid in full, had a "security interest" in the vehicles within the meaning of the *Chattel Securities Act* 1987 (Vic) ("the Act" or "the 1987 Act").

The facts

- 2 The facts giving rise to the litigation may be stated shortly. Those relevant to the principal issue are not in dispute. If that issue is decided in favour of the appellant, there are some questions of law and fact that remain outstanding. It is convenient to put these to one side for the moment.

- 3 The respondent, Southbank Traders Pty Ltd ("Southbank"), is a motor vehicle wholesaler. In late 2002, Southbank sold ten motor vehicles to a retailer, Kingstrate Pty Ltd ("Kingstrate"), then trading as "Dandenong Suzuki". The sale agreement contained what is sometimes called a "Romalpa clause"¹, pursuant to which the vendor retained title to the goods so long as the purchase price remained unpaid. The clause provided:

"(1) Property in the vehicle(s) to which this invoice relates shall not pass to the purchaser until such time as the vehicle(s) to which this invoice relates, and all other vehicles supplied by the vendor to the purchaser, have been paid in full.

(2) Until property in the vehicle(s) to which this invoice relates passes to the purchaser, or until the vehicle(s) is or are sold by the purchaser as agent for the vendor as hereinafter provided:

...

(d) the vendor may at any time recover or resell the vehicle(s) to which this invoice relates and may at any time enter upon the purchaser's premises by its servants or agents for that purpose.

1 After *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; [1976] 2 All ER 552.

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- (3) Until property in the vehicle(s) to which this invoice relates passes to the purchaser, the purchaser shall not sell, encumber or dispose of the vehicle(s) except as hereinafter provided:
- (a) the purchaser may sell the vehicle(s) in the ordinary course of its business to a bona fide purchaser for value, but only as agent for the vendor;
 - (b) the purchaser shall hold the proceeds of any sale on trust for the vendor and shall keep the proceeds separately and apart from the purchaser's own moneys; and
 - (c) the purchaser shall account to the vendor for the proceeds on demand."

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Kingstrate took possession of the vehicles. While the purchase price was still unpaid, Kingstrate purported to sell the vehicles to a financier, General Motors Acceptance Corporation, Australia ("GMAC"). GMAC in turn entered into a floor plan agreement with Kingstrate, by which Kingstrate, as bailee of the vehicles, was able to display them to the public. One vehicle was sold to a member of the public and is not the subject of this appeal. In December 2002, GMAC registered a security interest under the Act. At that time, Southbank had not registered a security interest. It registered a security interest in January 2003. In May 2003, the respondent, Southbank, sued GMAC for conversion of the nine vehicles, or, alternatively, for detinue. In the County Court of Victoria, Judge Holt dismissed Southbank's claim, on the ground that Southbank had an unregistered "security interest" in the vehicles and that such interest had been extinguished, upon the purchase or purported purchase of the vehicles by GMAC, by the operation of s 7(1) of the Act. That decision was reversed by the Court of Appeal of the Supreme Court of Victoria². The Court of Appeal (Maxwell P, Eames and Ashley JJA) held that Southbank did not have a "security interest", that s 7(1) did not apply to extinguish its interest, and that it was entitled to succeed in the action.

2 *Southbank Traders Pty Ltd v General Motors Acceptance Corporation Australia* [2006] VSCA 102.

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The legislation

5 The purpose of the Act was to re-enact with amendments the *Chattel Securities Act* 1981 (Vic) ("the 1981 Act")³. It will be necessary to make further reference to the 1981 Act below.

6 Part 3 of the Act contains a scheme for the registration of security interests in registrable goods, which include motor vehicles. The register is kept by the Roads Corporation of Victoria, and is available to be consulted by purchasers of vehicles. Part 2 of the Act includes provisions aimed at protecting purchasers against unregistered security interests. It also deals with questions of priority between competing security interests.

7 Section 7, which is in Pt 2, provided:

"7(1) Subject to section 8, if a secured party has –

(a) an unregistered security interest (whether or not over registrable goods or interstate registrable goods); or

(b) a registered inventory security interest –

in goods but is not in possession of the goods and a purchaser purchases or purports to purchase an interest in the goods (otherwise than at a sale in pursuance of a process of execution issued by or on behalf of a judgment creditor) for value in good faith and without notice when the purchase price is paid (or, if the price is not paid at one time, when the first part of the purchase price is paid) of the security interest from a supplier being –

(c) the debtor; or

(d) another person who is in possession of the goods in circumstances where the debtor has lost the right to possession of the goods or is estopped from asserting an interest in the goods against the purchaser –

the security interest of the secured party is extinguished."

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8 The expression "security interest" was defined in s 3:

"'security interest' means an interest in or a power over goods (whether arising by or pursuant to an instrument or transaction or arising on the execution of a warrant issued under the Magistrates' Court Act 1989) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation and includes any interest in or power over goods of a lessor, owner or other supplier of goods."

9 Also relevant are the definitions of "debtor" and "inventory security interest", which provided:

"'debtor' in relation to a security interest means the person who created the security interest or against whom the penalty enforcement warrant giving rise to the security interest is issued under the Magistrates' Court Act 1989 and includes the lessee in relation to a lease of goods and the hirer in relation to a hire-purchase agreement.

...

'inventory security interest' means a security interest –

- (a) given by a dealer in or over goods of a kind in which the dealer deals in the course of the dealer's business; or
- (b) reserved in or over goods in the possession or control of a dealer, being goods of a kind in which the dealer deals in the course of the dealer's business."

10 It will be necessary to return to the significance, for the application of s 7(1), of the terms "created", "given" and "reserved" in those definitions.

11 Sub-section (3) of s 3 provided:

"(3) For the purposes of this Act, a hirer or lessee of goods or a buyer of goods under a conditional sale is deemed to have an interest in the goods notwithstanding that title or general property in the goods has not passed to the hirer, lessee or buyer."

12 The Act operates in a legal context which includes the provisions of the *Goods Act* 1958 (Vic); in particular ss 23, 24, 27 and 31. It is not necessary to consider the operation of those provisions in any detail. However, it is important to notice three matters. First, the general rule, provided by s 27 of the *Goods Act*,

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is that "where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had" is qualified in several important respects. Secondly, and in particular, the general rule is subject to s 31 of the *Goods Act*. This provides that in certain circumstances a disposition by a buyer in possession after a sale by the original seller may confer good title in favour of a third party who takes in good faith and without notice of any rights of the original seller. However, s 31 of the *Goods Act* has no effect in relation to transfers of registrable goods to which the Act applies (s 7(6)).

13 Thirdly, the provisions of the *Goods Act* that have been mentioned have often had to be considered and applied in deciding the competing claims of an owner of the goods and the claims of a purchaser who bought the goods in good faith and for value. As the decided cases show⁴, the competition has often involved the claims of financiers arising under any of a wide variety of different forms of transactions.

14 GMAC argues that it purchased, or at the least purported to purchase, the nine vehicles in question from Kingstrate, that Southbank prior to that time had a security interest in the vehicles, and that the security interest of Southbank was extinguished by the operation of s 7(1). That there was at least a purported purchase by GMAC of an interest in the vehicles is not in dispute. However, Southbank denies that its interest in the vehicles was a "security interest". Furthermore, Southbank disputes that GMAC's purchase, or purported purchase, was for value in good faith and without notice.

15 As to whether Southbank's interest was a security interest, the question is that posed in the opening paragraph of these reasons. That question was answered in the negative by the Court of Appeal. If this Court decides that it should be answered in the affirmative (as it was by the primary judge) then, subject to an argument based on s 10 of the Act, the appellant accepts that it will be necessary for the matter to be remitted for the resolution of outstanding issues.

4 For example, *Motor Credits (Hire Finance) Ltd v Pacific Motor Auctions Pty Ltd* (1963) 109 CLR 87 and, on appeal, *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* (1965) 112 CLR 192; [1965] AC 867.

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The meaning of "security interest" in the Act

16 The question which arises is one of statutory construction. The meaning of the word "security" may vary according to context⁵, but the outcome of this case turns upon the meaning with which the Victorian Parliament used the expression "security interest" in the Act.

17 In *Clough Mill Ltd v Martin*⁶, the English Court of Appeal was concerned with the application of a provision of the *Companies Act* 1948 (UK) relating to registration of charges, and had to decide whether a retention of title clause in a contract for the sale of goods created a charge over the goods in favour of the vendor. For that purpose the Court of Appeal accepted an earlier judicial definition of "charge"⁷ as embracing "any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt". It was held that the contract of sale did not answer that description because it did not *confer* an interest in property on the vendor; rather, ownership of the goods never left the vendor because it was *reserved* by the contract of sale. Oliver LJ⁸ said that there was no doubt that an important part of the purpose of the clause was to give the vendor security for the payment of the purchase price, but the protection given in the event of the insolvency of the buyer went beyond that. His Lordship also said that the operative word in the judicial definition of charge was "confers", and that was not apt to cover a reservation of title. The buyer conferred no interest in property on the vendor; rather, the vendor retained its interest. The House of Lords reached a similar conclusion in *Armour v Thyssen Edelstahlwerke AG*⁹.

18 The issue that arose for determination by this Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*¹⁰, although it also concerned the

5 *Handevel Pty Ltd v Comptroller of Stamps (Vict)* (1985) 157 CLR 177 at 196-197.

6 [1985] 1 WLR 111; [1984] 3 All ER 982.

7 *In re Bond Worth Ltd* [1980] Ch 228 at 248 per Slade J.

8 [1985] 1 WLR 111 at 122-123; [1984] 3 All ER 982 at 992.

9 [1991] 2 AC 339.

10 (2000) 202 CLR 588.

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alleged effect, as a charge, of part of a retention of title clause, was somewhat different, and it turned particularly on the distinction between two "building blocks of the law of property": the institutions of the trust and the charge¹¹. Nothing in that decision cast doubt on what had earlier been said by the English courts. The statutory definition in issue in *Associated Alloys* (with its use of the technical expression "charge") may be contrasted with the definition in issue in the present case.

19 The definition of "security interest" in the Act, which includes "any interest in or power over goods of a lessor, owner or other supplier of goods", plainly extends beyond cases of a charge over goods in the form of a contract which confers an interest in goods by way of security for a debt. Leaving aside the disputed matter of a conditional sale where property in the goods has not passed to the buyer, contracts of hire-purchase and lease are treated as giving rise to security interests, even though in such cases ownership of the goods remains in the owner or lessor and the hire-purchase agreement, or lease agreement, does not "confer" an interest in the goods in the owner or lessor in the sense considered in *Clough Mills Ltd v Martin*. Whether the definition extends to a conditional sale with a retention of title clause is the matter for decision, but there is no doubt that, in covering hire-purchase and lease agreements, "security interest" extends beyond mortgages and charges. The Victorian Court of Appeal, in this case, said that "it is a defining characteristic of a right of security at common law that rights over property owned by the debtor be conferred on the creditor." However, what was referred to is not a defining characteristic of a "security interest" under the Act, bearing in mind the inclusion of the interests of owners and lessors under hire-purchase and lease agreements.

20 In certain contexts, the word "secures", which appears in the definition of "security interest", has a technical meaning which corresponds with the meaning of "right of security" referred to by the Court of Appeal, but it is sometimes used in a broader sense of something that gives a right to look to some source of payment over and above the personal liability of the debtor. Thus, for example, a guarantee from a third party may be said to secure payment of a debt. In *Singer v Williams*¹², Viscount Cave said, concerning "securities":

11 (2000) 202 CLR 588 at 595 [5].

12 [1921] 1 AC 41 at 49.

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"The word denotes a debt or claim the payment of which is in some way secured. The security would generally consist of a right to resort to some fund or property for payment; but I am not prepared to say that other forms of security (such as personal guarantee) are excluded."

In the same case, Lord Shaw of Dunfermline said¹³:

"The word 'securities' has no legal signification which necessarily attaches to it on all occasions ... and it is to be interpreted without the embarrassment of a legal definition and simply according to the best conclusion one can make as to the real meanings of the term as it is employed in, say, a testament, an agreement, or a taxing or other statute as the case may be."

21 The potential width of the term "security" is reflected in the meaning given in *Stroud's Judicial Dictionary*¹⁴ as "anything that makes the money more assured in its payment or more readily recoverable." In *Butterworths Australian Legal Dictionary*¹⁵, with reference to *Batchelor & Co Pty Ltd v Websdale*¹⁶, the word "security" is primarily defined as "something that secures or makes safe."

22 The Act clearly recognises the possibility of a conditional sale of goods under which title has not passed to the buyer. It does so in terms in s 3(3), and the definition of "inventory security interest", which applies to s 7(1)(b), refers to a "security interest" (as defined) that has been "reserved in or over goods in the possession or control of a dealer". The Court of Appeal pointed out that the present is not a case of possible extinguishment of a registered inventory security interest under s 7(1)(b). It is a case of possible extinguishment of an unregistered security interest under s 7(1)(a). Nevertheless, it is significant, as a matter of construction, that the definition of "inventory security interest" envisages that a security interest may be an interest that is reserved in or over goods, as well as one that is given by the owner of the goods.

13 [1921] 1 AC 41 at 57.

14 6th ed (2000) at 2390.

15 *Butterworths Australian Legal Dictionary* (1997) at 1058-1059.

16 (1962) 63 SR (NSW) 49. See at 51-54 per Sugerman J.

23 In the reasons of the Court of Appeal, the legislative history of the relevant provisions was set out in some detail. In 1972, the Molomby Committee made a report to the Victorian Attorney-General entitled "Fair Consumer Credit Laws". The Committee recommended legislative reforms designed to deal with the substance, rather than the form, of chattel security transactions. It referred to the use of conditional sale agreements as a means of avoiding the registration requirements of bills of sale legislation and remarked that "functionally the retention of title by the vendor or owner under a non-registrable agreement is a security."¹⁷ It recommended that transactions with the same commercial substance should be regulated in like manner, and that there should be no difference between the regulation of conditional sale agreements and of bills of sale and chattel mortgage securities¹⁸.

24 In 1978, legislation substantially based on the Molomby Report was introduced in the Victorian Parliament. It included the Chattel Securities Bill. That Bill did not involve a registration system. The proposed legislation was stood over for public discussion. In 1981, legislation, involving redrafts of the 1978 proposals, was enacted. It included the 1981 Act, which provided for a system of registration of certain interests. It included, in s 2(1), a definition of "security interest" as:

"an interest or a power –

- (a) reserved in or over an interest in goods; or
- (b) created or otherwise arising in or over an interest in goods under a mortgage, charge, lien, pledge, trust or power –

by way of security for the payment of a debt or other pecuniary obligation or the performance of any other obligation but does not include an interest or a power reserved, created or otherwise arising under a lease of goods or under a hire-purchase agreement within the meaning of the *Hire-Purchase Act* 1959."

17 Victoria, Molomby Committee, *Fair Consumer Credit Laws*, January 1972 at 5.9.3.

18 Victoria, Molomby Committee, *Fair Consumer Credit Laws*, January 1972 at 5.9.5.

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25 The Court of Appeal pointed out that the definition covered two different methods by which a security interest might arise: reservation and creation. It also pointed out that, if the object was to cover conditional sale agreements, it was at least arguable that the 1981 Act failed to achieve that result because the definition referred, not to an interest reserved in goods, but to an interest reserved in or over an interest in goods – an inapt description of what is effected by a conditional sale.

26 In 1984, the Viney Committee was established to review the 1981 Act. That Committee reported in 1985. It recommended, among other things, the removal of the distinction between mortgages and charges, on the one hand, and the interests of lessors and of owners under hire-purchase agreements on the other. The Viney Committee's report resulted in the Act with which we are concerned. The Court of Appeal drew attention to the differences between the definition of "security interest" in the 1981 Act and the definition in the 1987 Act. There are two main differences. First, the 1981 definition excluded leases and hire-purchase agreements, whereas the 1987 definition included them. Secondly, the 1981 definition referred to interests reserved or created, the concept of reservation being apt to describe the interests of a vendor under a conditional sale agreement. The 1987 definition refers to an interest in or power over goods, whether arising by or pursuant to an instrument or transaction or arising on the execution of a warrant, which secures payment of a debt. While there is no reference in the 1987 definition to the concept of creation of an interest, the 1987 definition of "debtor" refers to the person who created the security interest, but does not refer to reservation.

27 The Court of Appeal said:

"Given that 'reservation' and 'creation' are distinct concepts, and given that reservation is the hallmark of a conditional sale, it would have been reasonable to expect that chattel securities legislation which was intended to embrace conditional sales would include the concept of 'reservation' explicitly. As we have seen, the 1981 Act did include that concept though, as already suggested, it seems doubtful whether even the use of that word achieved the objective of bringing conditional sales within the framework of the 1981 Act.

How, then, to explain the disappearance of the concept of 'reservation' altogether when the 1987 Act replaced the 1981 Act? There is nothing in the Viney Report to suggest that that Committee was aware – let alone intended – that its proposed new definition of 'security interest' would repeal, and not replace, paragraph (a) of the 1981 Act's definition

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of 'security interest', which used the word 'reserved'. As we have said, the Committee's sole objective in this regard appears to have been to combine within the single term 'security interest' the three classes of interest which had been dealt with separately in the 1981 Act [ie mortgages and charges; leases; hire-purchase agreements]. The Committee did not see itself as altering the substantive scope of the legislation at all.

The inescapable fact is, however, that the definition of 'security interest' in the 1987 Act contains no reference to the reservation of an interest in goods. The Act defines 'security interest' by reference solely to the concept of 'creation'. The 1987 Act thus omitted the very concept – reservation – which was a key requirement if conditional sales were to be captured."

28 The statement that the 1987 Act defines "security interest" by reference to creation is somewhat elliptical. It defines "security interest" by reference to debt or other pecuniary obligation. The definition of "debtor" says it means the person who created the security interest, and includes lessees and hirers. The lessee under a lease of goods and the hirer under a hire-purchase agreement do not in any strict legal sense create the interest of the owner, yet that interest is a security interest, and the lessee or hirer, in the definition of "debtor", is included in a class generally described as persons who created the security interest. This suggests that, in the definition of "debtor", the reference to the creation of a security interest is not intended to reflect a dichotomy between creation and reservation, for it is reservation which is more apt to describe what occurs in relation to the interest of a lessor or an owner under a hire-purchase agreement.

29 The Court of Appeal then turned to what it described as the "mystery" of s 3(3) of the 1987 Act. That provision deals with hirers or lessees of goods or buyers of goods under a conditional sale, and, for the purposes of the Act, deems them to have an interest in the goods notwithstanding that title or general property in the goods has not passed to the hirer, lessee or buyer. The Court of Appeal could find no purpose of the Act that was served by this deeming provision. It therefore concluded that the provision was of no assistance in construing the definition of "security interest". This reasoning was challenged by the appellant.

30 Sub-section (3) of s 3 makes it plain that conditional sales, under which title had not passed to the buyer, were intended at least in some respects to be affected by the Act. Furthermore, it deals compendiously with leases, hire-purchase agreements and conditional sales. Those matters cannot be ignored when considering the critical words of the definition of "security interest", which

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is said to include "any interest in or power over goods of a lessor, owner or other supplier of goods". "Owner" is defined by reference to hire-purchase agreements. Where there is reference, in one provision of s 3, to "a lessor, owner or other supplier of goods", and a question arises as to what kind of person was in contemplation as a supplier of goods, it is significant that in another provision of s 3 there is a reference to leases, hire-purchase agreements and conditional sales.

31 It was suggested in argument in the Court of Appeal that one purpose of s 3(3) was to enable s 7(1) to operate in the case of a sale of the relevant goods to a third party by a lessee, hirer, or buyer under a conditional sale agreement. Section 7(1) requires, for its application, a purchase or purported purchase of an interest in the goods. It is that which causes the extinguishment of the unregistered security interest. If the person (say, a motor trader) who effects the sale is a lessee or hirer of the goods or a purchaser under a conditional sale agreement, that person is deemed to have an interest in the goods in order to support the conclusion that there had been a purchase or purported purchase of an interest in the goods. Further, s 3(3) may be engaged in the case of successive, or back-to-back, financing arrangements. In such a case, a lessee, hirer, or buyer is deemed to have an interest in the goods. Section 3(3) cannot be ignored.

32 In the present case, the critical words are those of the definition of "security interest", which includes "any interest in or power over goods of a lessor, owner [of goods subject to a hire-purchase agreement] or other supplier of goods". The words "other supplier of goods" are wide enough to cover a vendor of goods under a conditional sale in which title or general property in the goods has not passed to the buyer. The provisions of s 3(3) suggest that the Act treated leases, hire-purchase agreements, and conditional sales in the same way. To do so would be consistent with the recommendations of the Molomby Committee as modified by the recommendations of the Viney Committee.

33 To be a "security interest" the interest, relevantly, must be one that "secures" payment of a debt or other pecuniary obligation. Reference has been made above to the potential width of that term. The express inclusion of the interests of lessors, and owners of goods subject to hire-purchase agreements, demonstrates that the concept of security is not used in any narrow sense. In a strict sense, those interests are not conferred or created by the lessee or hirer. The right of ownership never passes from the owner. Such interests are, however, security in a broader sense, and it is in that sense that the Act speaks of an interest which secures payment. If it were otherwise there would be an internal inconsistency in the definition.

34 The words in parentheses in the definition of "security interest" speak of an interest "arising by or pursuant to an instrument or transaction". Again, since the definition includes the interests of a lessor or owner (in the case of a hire-purchase agreement), and since the rights of ownership of such a person exist before and apart from the lease or hire-purchase agreement, then the words "arising by or pursuant to an instrument or transaction" cannot be used in a technical sense and, in particular, cannot be intended to distinguish between an interest which owes its existence entirely to the instrument or transaction in question and an interest reserved by such instrument or transaction. The same may be said of the word "created" in the definition of "debtor", which also includes leases and hire-purchase agreements.

35 A conclusion that the definition of "security interest" includes conditional sales is consistent with the purpose of the legislation, the statutory context, and the text, understood in the light of the potential width of the language used. It is to be preferred to the conclusion reached by the Court of Appeal. On this issue, the appellant succeeds.

Other issues

36 Both the primary judge and the Court of Appeal addressed the further question, raised by s 7(1) of the Act (if it applied) as to whether GMAC's purchase from Kingstrate was for value in good faith and without notice. The primary judge answered that question favourably to GMAC. The Court of Appeal, after examining the detail of the evidence, and without expressing any concluded view of its own, decided that there was error in the way the primary judge reasoned on the point and said that, if GMAC had succeeded on the first issue, it would have been necessary to remit the matter for retrial. That conclusion has not been challenged in this Court. Nevertheless, GMAC raised in this Court, and in the Court of Appeal an argument which, if accepted, would outflank Southbank's reliance on the matters referred to.

37 The argument was based on s 10 of the Act, which deals with priorities. In brief, the argument was that GMAC had a security interest, and, since GMAC registered its security interest before Southbank, then, GMAC's security interest took priority. To this argument, Southbank replied, without much elaboration, that there were deficiencies in GMAC's registration which defeated its reliance on s 10. There was said to be at least a triable issue as to what, if anything, GMAC achieved by its registration. The Court of Appeal did not express a view upon this point.

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38 In this Court, there were three grounds of appeal. Ground 1 related to what was earlier described as the principal question in this appeal, that is, the meaning of "security interest". Ground 2 was that the Court of Appeal erred in not dealing with s 10 of the Act. Ground 3 was that the Court of Appeal erred in not dealing with an argument based on s 67 of the *Goods Act* 1958 (Vic). Ground 1 should be resolved in favour of the appellant. As to the remaining grounds, and as to the issues outstanding under s 7(1) of the Act, the matter should be remitted to the Court of Appeal to be dealt with in accordance with the reasons of this Court. That may or may not involve remitting the matter to a trial court, as the Court of Appeal considers necessary.

Orders

39 The appeal should be allowed with costs. The orders of the Court of Appeal of 31 May 2006 should be set aside. The matter should be remitted to the Court of Appeal for further consideration in accordance with the reasons of this Court. The question of costs at trial and in the Court of Appeal will be for the Court of Appeal in the light of its further disposition of the case.