

## Does a secured creditor need a Court order to take possession of livestock under s 138C of the PPSA by unlawful means?

Author: Chris Kintis & Judith Milazzo

Section 138C of the *Personal Properties Securities Act 2009* (Cth) (**PPSA**) provides for the seizure and disposal or retention of livestock by a secured party. It is in addition to the general power of seizure the subject of section 123 of the PPSA.

The Federal Court recently considered this section, and how far it extends, including if a Court order is required and if the repossession can be by any means – including unlawful means. The Court was asked, amongst other things, to make a declaration that the secured party is entitled to take possession of livestock over which it had a security interest by any means, including unlawful means if necessary, in accordance with section 138C of the PPSA.

We discuss the case, conducted by Chris Kintis and Judith Milazzo of ClarkeKann's litigation and dispute resolution team, together with Nicholas Mirzai, Counsel of 3 St James Hall Chambers, below.

### Key facts

- **The parties** - StockCo (the plaintiff) is a livestock financier, providing short term funding to cattle and sheep farmers. Tucki Hills (the defendant) carries on a business farming livestock.
- **The agreements** - The parties entered into agreements by which Tucki Hills would purchase livestock and once that livestock was sold (by and agreed date), the sale proceeds would be paid to StockCo and Tucki Hills would receive the surplus, if any.
- **Security interest** - Until the sale of the livestock, the title to the livestock remained with StockCo and Tucki Hills agreed to grant StockCo a security interest registerable under the PPSA over the livestock. There was no dispute as to the security interest.
- **Default** – Tucki Hills subsequently defaulted on the agreements, and despite demands and extensions of time, failed to deliver the livestock for sale, or otherwise repay StockCo. StockCo sought to repossess the livestock, however was prevented with difficulties as the livestock was held in locked premises and it was concerned of trespass and damage to the property which may occur as a result of the repossession.

### The proceeding

StockCo commenced proceedings in the Federal Court, seeking:

1. Interim injunctive relief, preventing Tucki Hills from compromising or dealing with the livestock; and
2. final relief, entitling StockCo to take possession of the livestock in Tucki Hills' possession, by any means necessary including unlawful means, and for Tucki Hills to provide StockCo with unimpeded access to do so.

### The outcome

On the hearing of the interim application, StockCo obtained an injunction restraining Tucki Hills from disposing of, transferring, realising, appropriating or otherwise dealing with any of the livestock, subject to the security interest, pending the hearing of the application for final relief.

At the final hearing, the Court declared that StockCo was entitled to take possession of the livestock in accordance with s 138C of the PPSA, and ordered that Tucki Hills do all things reasonably necessary to provide StockCo with unimpeded access to the livestock. An order extending the injunction was also made until those steps of enforcement occurred.

StockCo contended that the enforcement of a security interest over livestock under the PPSA can include by way of "unlawful trespass", if necessary, on the land where the livestock is located. As such, and unlike when seeking to obtain the benefit of section 123 in the absence of section 138C, a secured party looking to enforce under section 138C does not need a Court order permitting access to the premises upon which the livestock is located.

Although the Court did not find that it was necessary to decide the issue, in circumstances where Tucki Hills consented to the relief being sought, it made some comments which are useful for secured parties seeking to rely on s 138C of the PPSA to take possession of livestock, including that:

- Part 4.3 of the PPSA deals with seizure and disposal or retention of collateral. Relevantly, section 123 provides that a secured party may seize collateral, and section 138C deals with the seizure and disposal or retention of livestock. It seems that section 123 permits secured parties to enforce their interest by seizure of collateral "by any method permitted by law". In contrast under section 138C there is no limitation in respect of livestock, and the power of seizure is said to be without limiting section 123.
- The question for the Court was whether enforcement under section 138C requires enforcement in accordance with section 123, i.e. by any method permitted by law, or something else, i.e. potentially including unlawful means.
- However, because StockCo had already come to the Court for orders and declarations, including by way of consent on the part of Tucki Hills, the Court's view was that it was not necessary to decide whether section 138C gives a secured party the legal right to enter land and repossess the livestock without a court order.
- The Court concluded that the plain wording of s 138C justified a declaration that StockCo is entitled to take possession of the livestock, and an injunction that Tucki Hills do all things reasonably necessary to provide it with unimpeded access to the livestock. On that basis, the Court was of the view that it is inappropriate to include a declaration that StockCo is entitled to take possession of the livestock "by any means, including unlawful means if necessary".
- In any event, Justice Stewart's reasons for judgment states, "*s 138C(3) provides that it can do so by entering the land on which the livestock is located. The inevitable implication of that provision is that the plaintiff, having obtained the declaration ..., can enter the land to take possession of the livestock even if entry upon the land would otherwise have constituted trespass.*"

## The takeaway

Whilst a good outcome for StockCo, the effect of the case is that the question of whether a secured party looking to utilise section 138C of the PPSA is to approach the Court in future where a grantor simply does not respond to a demand for delivery up or access to repossess remains unresolved.

If you would like any further information on this case or would like to discuss your legal rights, please contact [Chris Kintis](#), Litigation and Dispute Resolution Partner, or your usual ClarkeKann contact.

*StockCo Agricapital Pty Ltd v Tucki Hills Pty Ltd [2022] FCA 929*