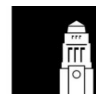

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Registration, Re-Characterisation of Quasi-Security and the Nemo Dat Rules

Duncan Sheehan*

1. INTRODUCTION

There has been recent practitioner and academic interest in reforming the English law of personal property security; both the City of London Law Society project headed by Richard Calnan and the Secured Transactions Law Reform Project for instance have academic and practitioner participants. Parliament recently enacted amendments[1] to part 25 of the Companies Act 2006; however, the question remains whether further reform is needed, which could be along the lines of the Personal Property Security (or Securities) Acts (PPSAs)[2] found in the Commonwealth. It seems though there is little political will for further reform. BEIS have for instance indicated an unwillingness to set up or oversee any new register. That required a rethink of the Law Commission's proposals for reform in bills of sale; the latest proposals from the Government in implementing the Law Commission's recommendations therefore involve a reformed electronic register remaining at the High Court.[3] This unwillingness to countenance a new register suggests that comprehensive secured transactions law reform is a long way off, but the process of understanding our options still

* Professor of Business Law, University of Leeds; this paper was presented at the SLS conference in Oxford in September 2016, and a conference, part-funded by the Society of Legal Scholars, on Secured Transactions Law Reform at the University of Leeds in January 2017. I am grateful to Louise Gullifer, Gerard McCormack, Magda Raczynska and Sean Thomas for their comments and to Jan Bornheim and Lionel Smith for pointing me to some of Quebecois material.

[1] Introduced by the Companies Act (Amendment of Part 25) Regulations 2013

[2] PPSAs exist in New Zealand, Australia and all Canadian provinces except for Quebec; reform has also been enacted in Jersey and along different non-PPSA lines in the Republic of Ireland

[3] Law Commission, Bills of Sale (Law Comm no 369, 2016), Law Commission, Goods Mortgages Bill: A Response to the Consultation and Update on the Current Draft Bill (2017); the department's unwillingness to set up or designate a registry was a point made by the BEIS representative at the January 2017 conference on Secured Transactions Law Reform. For final proposals see HM Treasury, Goods Mortgages Bill: A Consultation (2017) https://www.gov.uk/government/consultations/goods-mortgages-bill/goods-mortgages-bill-consultation#approach-to-registration (visited 25 September 2017); Goods Mortgages Bill 2017, cl 9.

remains important. This paper explores the interaction of any reform of secured transactions law and the nemo dat rule, the rule that title cannot be passed to a third party by a non-owner and its exceptions. On one level, they are separate issues and it is clearly possible to reform nemo dat without touching secured transactions law. It is less obvious that the reverse is true.

Despite the lack of political appetite, much of the discussion about reform has concentrated on whether an extension of registration to quasi-security interests, devices which perform a security function but are not strictly security interests, is required. There are two possible models of registration. The first model is the Commonwealth Personal Property Security Act model. That involves the re-characterisation and registration of quasi-security interests, such as retention of title clauses, where the creditor retains ownership of goods pending payment, as security interests. Under the PPSA model, also known as the unitary model, the retention of title debtor is therefore treated as the owner of the asset, granting a registered security interest to the creditor. The PPSA model is derived from the Uniform Commercial Code Article 9. The American position, prior to Article 9, was, however, different to English law. For one, Benedict v Ratner[4] held that a floating charge was impossible. The Commonwealth jurisdictions began, prior to legislative reform, from a position closer to our own, and so much of our discussion is drawn from the Commonwealth legislation. The second model, used for example in Quebec, would be registration without re-characterisation. This can be referred to as the registration-only model. Different terminology is used by Whittaker for this latter model;[5] his term of "possession-based model" is, however, inapt. Whatever name is given to the model, however, the retention of title creditor is treated as the owner, maintaining the general law position. There are dangers in a comparison with Quebec.

[4] Benedict v Ratner 268 US 353 (1925)

[5] B Whittaker, The Personal Property Securities Act 2009: A Review (2015) 117 (sometimes "possessory model")

Quebec is a civilian jurisdiction, its law based on French roots. Nonetheless Quebec is the most prominent example of a jurisdiction with a registration-only model and it can help us see what shape the model might take in England. Let us finally note that the unitary model is said to be more functionalist, looking at the economic function of the financing device, and the registration-only model more formalist, maintaining formal distinctions between security interests and others that do the same job, but are not security.[6]

Both of these models are attracting attention. The second model attracts less attention, but while Calnan has rejected re-characterisation, he concedes that registration of retention of title clauses would be possible without re-characterisation.[7] In the context of asset finance devices, the Secured Transactions Law Reform Project put out a discussion paper in January 2017 about the possibility of registration without re-characterisation.[8] The conclusion here, however, that the logic of registration trumps the logic of characterisation. In order to make the registration scheme workable a registration-only model must provide outcomes essentially the same as a PPSA model. Although I have described the registration-only model as more formalist, that is only on the surface; its operation inevitably leads to effective functional re-characterisation.

It would be possible to do nothing; however, even in the absence of reform of security law, retention of title clauses are causing difficulty and so some changes will be needed even if their registration is rejected. Sales law is distorted by creditors' attempts to reach through on-

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[6] See generally M Bridge et al, 'Formalism and Functionalism in the Law of Secured Transactions' (1999) 44 McGill LJ 568

[7] R Calnan, 'What Makes a Good Law of Security?' in F Dahan (ed), Research Handbook on Secured Finance in Commercial Transactions (Edward Elgar, 2015) 451, 471

[8] See https://securedtransactionslawreformproject.org/discussion-papers/ (visited 1 September 2017)

sales to secure priority over proceeds of sale.[9] Recently a sale of bunker oil on retention of title terms has been re-characterised as not a sale of goods at all;[10] rather the question is analysed through the lens of agency. Gullifer is quite correct to note that there is a significant lack of fit between the Sale of Goods Act and retention of title clauses; indeed she questions to what extent "sales" on such terms will ever be characterised as sales.[11] She suggests three possible responses: re-analysing the passage of property, redrafting the Sale of Goods Act and registering and re-characterising retention of title clauses, favouring the third. It is beyond our scope in this essay to re-examine in detail the merits or demerits of an agency analysis; largely, as will be seen, Gullifer's analysis as to the problems with the current law is accepted.

On the assumption therefore that reform is appropriate, the logic of registration over characterisation can be demonstrated by examining the operation of the nemo dat principle. There are two main substantive sections to the article. Part 2 examines the tensions in the law between the need to protect an owner's title and the interest in the third party in buying what he thought he was getting – good title. The article examines how this tension might be resolved by reference to the UCC, which provides a model in article 2 for reform of nemo dat, one not found in the Commonwealth jurisdictions. The same tension exists between the need to protect the security holder's interest and to protect the third party buyer of the goods. Part 2 therefore provides a ground-clearing exercise for Part 3, where the purpose of registration schemes and the effect of the two models for registration are assessed. In order to do this, it is necessary to understand registration and re-characterisation in general terms; the

[9] Caterpillar (NI) Ltd v Holt [2013] EWCA Civ 1232; PST Energy 7 v OW Bunkers (Malta) Ltd [2016] UKSC 23, [2016] 2 WLR 1193

[10] PST Energy 7 v OW Bunkers (Malta) Ltd [2016] UKSC 23, [2016] 2 WLR 1193

[11] L Gullifer, '"Sales" on Retention of Title Terms: Is the English Law Analysis Broken?' (2017) 133 LQR 244

models are outlined in part 3(a). How the Personal Property Security Act system deals with nemo dat issues is explained in part 3(b). Finally part 3(c) examines how the two different models of registration deal with two specific cases. One conclusion is that the notoriously tortuous reasoning regarding the Factors Act in Re Highway Foods[12] can be avoided by a PPSA. Another is that some nemo dat questions, particularly where the seller is in possession, are answered in exactly the opposite way with the party losing title under the current law gaining it under a PPSA. At the same time PPSA-style reform can lead to more and more interests being pulled into the scheme to avoid difficult dividing lines and one criticism raised at the approach of the PPSAs is indeed the tendency to over-inclusivity.[13] Dividing lines are, however, inevitable; they are not avoided by a registration-only scheme. Quite the contrary there will always be questions of what interest should be subject to the registration scheme, and which not. There will always be questions of what interests are subject to the standard exceptions to nemo dat and which ones subject to the different regime consequential on registration, and it is clear from part 3(c) precisely why the regime applying to registered interests will need to be different to that applying to non-registrable ones, and why the regime applying to registered interests must approximate to the re-characterisation regime. It is for this reason that registration trumps characterisation, but it does also need to be noted that it produces easier, simpler and superior outcomes to the recent agency approach.

2. REFORM OF NEMO DAT AND POLICY OBJECTIVES

This section of the paper primarily examines the tension between the nemo dat rule and its exceptions as outlined in the Sale of Goods Act 1979 and the Factors Act 1889. Three

[12] [1995] 1 BCLC 209
[13] Bridge et al, above n 6, at 575

exceptions are dealt with here, but there are others. First, an owner who has held someone else out as entitled to deal with the asset may sometimes be estopped from denying that the latter was entitled to deal with the asset;[14] secondly a person in possession either in his capacity as a buyer of the goods, or sometimes in his capacity as the seller, may be able to pass better title than he has.[15] A third is where a mercantile agent is in possession of the goods in that specific capacity for the purposes of sale, but for no other purpose.[16] Their detailed operation is not important but all of these rely on the notion that a bona fide transferee should be protected against defects in the transferor's title – and ability to transfer title - of which he had no notice.[17] Two things are important. First, they are restrictive exceptions. Secondly, the policies English law pursues – to protect the owner's title, but also to protect the marketability of the asset - pull in different directions and because the proper approach to resolving the tension has not been coherently thought through gaps exist between the different exceptions.

One recent case – Fadallah v Pollak[18] - illustrates how a party might fall into the cracks between the exceptions. In that case Eagle agreed to sell two generating sets to Pollak, but since Pollak had nowhere to store them also agreed to have them shipped up and kept in his own warehouse. In the meantime Fadallah agreed with Eagle to buy the same generators. He paid the purchase price in advance. Pollak in turn agreed to sell them back to Eagle, at Eagle's request, on retention of title terms. Pollak was never paid by Eagle, and argued the

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[14] There is a type of estoppel principle in Sale of Goods Act 1979, s 21

[15] It is not therefore any buyer or any seller without title who can pass good title; it is a buyer in possession or seller in possession. Sale of Goods Act 1979, ss 24-25

[16] Personal Property 1889, s 2; see D Sheehan The Principles of Personal Property Law 2nd edn (Hart: Oxford, 2017) ch 3

[17] M Bridge, L Gullifer, G McMeel and S Worthington (eds), The Law of Personal Property (Sweet and Maxwell: London, 2013) para 13.011; see also Feuer Leather Corpn v Frank Johnstone & Sons [1981] Com LR 251

[18] [2013] EWHC 3159

generators still belonged to him under those terms. Fadallah relied firstly on the Factors Act 1889, s. 2, which provides for a mercantile agent in possession of the goods in that capacity for the purposes of sale and with the consent of the owner to pass good title. He failed. Eagle was not a mercantile agent.[19] He relied secondly on the Sale of Goods Act 1979, s. 24 on the basis that Eagle had originally sold the sets to Pollak and was therefore a seller in possession. He failed. Eagle had not, at the time of the sale to Pollak been in possession of the goods;[20] they were in Bournemouth and had to be brought up later under the agreement whereby Eagle stored them for Pollak; Eagle was not therefore in possession as seller, but bailee. Fadallah finally attempted to rely on the buyer in possession exception in section 25. He failed because Eagle came into possession of the goods prior to the agreement to buy them back from Pollak.[21] Yet Fadallah has no knowledge of any of this, just that Eagle was in lawful possession and was selling the goods. The broad policy of marketability seems in his favour.

Official reform efforts to address these gaps and lack of co-ordination between the exceptions have been patchy. The Department of Trade and Industry for instance issued an 8-page consultation paper, but this was largely met with derision because of its brevity and its lack of any serious engagement with the policy issues at stake.[22] The Law Commission indicated an intention in 2005 to look at the question as project number 11 in their Ninth Programme of Law Reform;[23] it then unfortunately decided to defer the question in their Tenth Programme,[24] and despite consultation (now closed) on the thirteenth programme[25] reform currently seems off the agenda.

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[19] Ibid [35]
[20] Ibid [53]
[21] Ibid [55]
[22] Sheehan, above n 16, 76; E McKendrick (ed), Goode on Commercial Law 5th edn (Penguin: London, 2017) para 16.101 (hereafter McKendrick)
[23] Law Commission, Ninth Programme of Law Reform (Law Comm no 293, 2005) para 1.16
[24] Law Commission, Tenth Programme of Law Reform (Law Comm no 311, 2008) paras 4.2-4.4

Nonetheless if reform is to take place the type of real thought, not found in the DTI paper, on the way forward needs to take place. Who for instance is the best placed loss-avoider? Louise Gullifer's[26] solution, like that of the UCC, is to prefer the position of the purchaser over the original owner; the effect is to improve the marketability of goods. The owner is usually the most efficient loss bearer in that he has the ability to take out insurance to protect against loss.[27] Article 2-403 UCC provides

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser, or
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be a "cash sale", or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
>
> (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "**Entrusting**" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

The first point is that the most efficient loss bearer is critical to the operation of article 2-403 UCC.[28] When I "entrust" assets to another person voluntarily I put it out of my hands to decide which third party, if any, receives them. Goode on Commercial Law puts it like this: if my judgment as to the trustworthiness of the party in possession is defective I should not be able to put the consequences of that on the third party.[29] This is particularly important where

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[25] http://www.lawcom.gov.uk/project/13th-programme-of-law-reform-call-for-ideas/ (visited 14 October 2016)

[26] L Gullifer, 'Exceptions to the Nemo Dat Rule in Relation to Goods' in J de Lacy (ed), The Reform of UK Personal Property Security Law (Routledge: London, 2010) 188, 221-222.

[27] S Thomas, 'The Role of Authorisation in Title Conflicts Involving Retention of Title Clauses: Some American Lessons' (2014) 33 CLWR 29, 38-40

[28] EM Swartz, 'The Bona Fide Purchaser Rule Revisited: A Comparative Inquiry' (1962) 42 Boston UL Rev 403

[29] McKendrick, above n 22, at para 16.07.

the third party is a merchant, acting in the ordinary course of business. I ought to be able to assure myself of the trustworthiness and honesty of the person I entrust the goods to. I ought to be able to make checks as to his identity and so on. By contrast as a buyer you see a person who deals in that type of goods, apparently in the ordinary course of business and should be able to rely on that,[30] or you might be tempted to make separate checks.[31] In essence there is a broad estoppel doctrine at work.[32] If the property is stolen I cannot make such identity checks; probably you are not buying the asset from a merchant who habitually deals in this type of goods and you have a greater reason to be suspicious. Good faith purchasers from thieves are not common.[33] If the entruster is a thief the merchant can therefore only transfer the thief's title and the buyer remains vulnerable to the original owner.[34]

The second point is that a boundary question with article 9 arises where the creditor has a security interest in an asset entrusted by the chargor to the seller. Adams v City National Bank & Trust Co of Oklahoma[35] was this fact pattern; Adams bought from the car dealer to whom the vehicle had been transferred by Clanton, who had previously granted the bank a security. Although article 2-403 did not on the facts help Adams, the court did not rule out a security interest being cut off by article 2-403.[36] The policy question, however, is familiar and this – not the details of Adams itself – is what is important for the paper. It is whether the marketability of the asset to the third party buyer is more important than the creditor's interest in maintaining his security.

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[30] Article 9-317, 9-320 UCC. See also Personal Property Securities Act 2009 (Cth) s 46; Personal Property Securities Act 1999 (NZ) s 53

[31] All three of these policies are set out in Heinrich v Titus-Will Sales Inc 868 P 2d 169, 173 (1994)

[32] Atlas Auto Rental Corpn v Weisberg 281 NYS 2d 400, 403 (1967); Simson v Moon 222 SE 2d 873 (1975)

[33] R Duesenberg, 'Title, Risk of Loss and Third Parties' (1965) 30 Missouri L Rev 191, but see Farqharson Bros. v King [1902] AC 325 (HL) 335-336 where Lord MacNaughten suggested that if carelessness in losing an item did not matter to the owner, why should carelessness in conducting his own business?

[34] KF Jillson, 'Article 2-403 UCC: A Reform in Need of Reform' (1979) 20 William & Mary L Rev 513, 552

[35] 565 P 2d 26 (1977)

[36] Ibid 29. The general issues are discussed by J Cargill, 'Entrustment under UCC article 2-403 and its Implications for Article 9' (1987) 9 Campbell L Rev 407

3. NEMO DAT UNDER A REFORMED SECURED TRANSACTIONS LAW

Retention of title clauses are inserted into a contract of sale by a seller providing goods to buyer so as to retain ownership of the goods pending payment.[37] Formally they are not security interests. However, they do have the same function: to provide surety to the creditor that he will be paid. The first part of this section looks generally at the difference between the PPSA and registration-only scheme. The second examines the consequences of re-characterising these clauses as security interests on the nemo dat rules, and the third asks what results are demanded by registration without re-characterisation.

(a) Re-Characterisation and/or Registration of Quasi-Security Interests

In the introduction two possible registration models – the unitary model and the registration-only model – were introduced. Under the Commonwealth Personal Property Security Acts retention of title clauses are re-characterised, but only for the purposes of the Act, as a security interest if it in substance secures an obligation.[38] The justification for including title based financing devices, such as retention of title clauses, is precisely their functional equivalence to security interests, and the consequent ability to enhance publicity and the transparency of information provided to potential creditors as to the debtor's true position. While not costless to the party registering, the potential buyer of the asset subject to the security is now the cheapest loss-avoider. All he has to do is search. Registries are therefore at their most useful where third parties have greater difficulty in verifying title information

[37] Sheehan, above n 16, at 284
[38] Eg Personal Property Securities Act 2009 (Cth) s 12(1)

than the state,[39] and where the third party who loses out is otherwise least able to protect himself.

One question is whether that requires re-characterisation. The City of London Law Society do not believe re-characterisation should occur. Their stated reason is that retention of title clauses are not security interests and that they should not be re-characterised by reference to economic function.[40] Richard Calnan, who leads their Secured Transactions Code project, has suggested that to do so ignores the intention of the parties which was precisely that a security interest not be granted.[41] In other words to treat them as security interests and to treat the retention of title debtor as the owner when he was never intended to be the owner is to ignore an important foundational principle of English commercial law – party autonomy. It simply is not true, however, that English law does not re-characterise against the expressed intentions of the parties. Even without registration, English law has engaged in the re-characterisation of retention of title clauses as floating charges to the extent that they purport to cover proceeds and products.[42] Calnan's argument could equally be said to apply there, requiring the retention of title clause to extend through into proceeds; yet English law historically did not do so, because the effects on third parties were deemed unacceptable.[43] In short allowing the retention of title creditor first claim on debts due from customers would decimate the invoice factoring industry where those very debts are sold at a discount to the factor to provide cash for the debtor.

[39] A Bell and G Parchomovsky, 'Of Property and Information' (2016) 116 Columbia L Rev 237, 284
[40] City of London Law Society, Discussion Paper: Secured Transactions Reform (2012) para 1.13
[41] Calnan, above n 7, 471
[42] Re Bond Worth [1980] Ch 228
[43] Sheehan, above n 16, at 382

A registration-only scheme remains an option, however,[44] despite this rather poor argument against re-characterisation. Calnan himself has recognised that lack of re-characterisation need not preclude registration.[45] Registration, even without re-characterisation, would still have the advantage of providing publicity for a retention of title clause, which would allow other creditors to engage in a monitoring process, reduce the costs of due diligence, and render the searcher the cheapest loss-avoider. A voluntary system of registration, like that the CLLS recommend for assignment of receivables[46] where the sanction for non-registration is not nullity, but the deferral of priority to prior registered interests, might be introduced. Indeed the fact that nullity is not a sanction for non-registration might have helped the New Zealand legislation pass.[47]

Quebec has a solution where non-registration does not lead to nullity but deferral of priority and does not (unlike New Zealand) re-characterise. In Re Ouellet it was decided that failure to register the retention of title device does not convey ownership to the buyer[48] and in a reversal of the position in common law Canada set out in Re Giffen[49] the retention of title creditor's interest binds the trustee. However, registration must take place within 15 days under article 1749 of the Quebec Civil Code (QCC)[50] and late or non-registration means that the retention of title clause is postponed to prior-registered security interests.[51] The thinking is outlined in Maschinenfabrik Rieter AG v Canadian Fidelity Mills.[52] Nuss JA explained in that case that the idea was to avoid "apparent ownership", where a creditor believes the

[44] Whittaker, above n 5, at 117
[45] Calnan, above n 7, at 477-478
[46] CLLS Secured Transactions Code (2016) article 38
[47] M Gedye, 'The New Zealand Perspective' in L Gullifer and O Akseli (eds), Secured Transactions Law Reform (Hart, 2016) 115
[48] 2004 SCC 64, [2004] SCR 355, 368
[49] [1998] 1 SCR 91
[50] This was not originally the case, criticised by R Cuming, 'The Harmonisation of the Secured Financing Laws of the NAFTA Partners' (1995) 39 St Louis ULJ 809, 817-818
[51] RCC Cuming, CJ Walsh and RJ Wood, Personal Property Security Law 2nd edn (Irwin: Toronto, 2012) 108
[52] 2005 QCCA 1033

debtor has greater assets than in fact he has.[53] The retention of title by the creditor is necessarily compromised to some degree by the deferral of priority needed to give an incentive to register. Likewise registration is necessary if a lease, where the lessor agrees to provide moveable assets for rent for a period over a year,[54] is granted, or a credit-bail is created,[55] where the lessor acquires moveable assets from a third party at the request of the lessee and the nominal lessor is merely a financing conduit. Even if the lessor's ownership is not registered, however, it remains effective against the lessee's trustee in bankruptcy.[56] This result, and the corresponding result in Re Ouellet has been criticised by Cuming, Walsh and Wood as ignoring the different rules for hypothecs, the Quebecois equivalent of a charge, where the trustee in bankruptcy is a third party against whom the hypothec is ineffective. They cannot see the distinction.[57] If the trustee in bankruptcy is a third person for the purposes of the Civil Code in one context, why not in the other?

(b) PPSA Provisions on "Taking Free" Explained

It is a central element of the Personal Property Security Act system that security remains in both the original collateral and the proceeds.[58] A secured party therefore normally prevails over a transferee of the asset, unless consent is given. In Australia for example the Personal Property Securities Act 2009 (Cth), s. 32 provides for the chargee to authorise the transfer free of the security.

[53] Ibid, [27]
[54] QCC art 1852
[55] QCC arts 1842, 1847; Cuming et al, above n 51, at 110-111
[56] Lefebvre (Trustee of) v Tremblay (Trustee of) 2004 SCC 63
[57] Cuming et al, above n 51, at 113
[58] Personal Property Securities Act 2009 (Cth) s 32

The exceptions are commonly referred to as the “taking free” rules. They tell us when the third party “takes free” of (is not subject to) the security interest. Under the Personal Property Securities Act 2009 (Cth), s. 46 the secured party loses out to the buyer or lessee of goods if they are sold or leased in the ordinary course of business. Other exceptions are that the security interest was unperfected;[59] the purchase is of low value goods for personal use;[60] the purchase is of a motor vehicle by a consumer from a dealer;[61] the asset’s serial number – if required to be registered – is incorrectly registered, or the asset is a motor vehicle and a search by serial number would not disclose the security.[62] Bills of exchange and investment securities and ADI accounts have separate “taking free rules” in the Australian legislation.[63] Under a PPSA the buyer or lessee is disentitled from relying on these rules if he has a specified degree of knowledge.[64] This might be participation in the creation of the interest, actual or constructive knowledge of the interest, or actual or constructive knowledge of breach of the security agreement.[65]

This current section is divided into two subsections. The first considers the general policies in play. Essentially they are the same as in nemo dat. The second section outlines the relationship between authorised transactions by the chargor and those in the ordinary course of business. There are difficulties in nailing down what is meant by the “ordinary course of business” but the important point is that it is much clearer under a PPSA when a purchaser can be treated as having good title than under the nemo dat provisions in the Sale of Goods Act 1979 and the Factors Act 1889. Section 3(c) of this paper makes that abundantly clear.

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[59] Ibid, s 43
[60] Ibid, s 47
[61] Ibid, s 45(3)
[62] Ibid, ss 44-45
[63] Ibid, ss 48-51, 70-72
[64] D McGill, ‘Transfer of Title by a Non-Owner: The Exceptions to Nemo Dat under the Personal Property Securities Act 2009’ (2011) 39 ABLR 208, 224-225
[65] Whittaker, above n 5, at 280-282

(I) POLICY CONSIDERATIONS

The question that needs to be asked in deciding these requirements is what the balance between the rival claimants is. The policy issues are therefore the same as under the standard nemo dat situations. How important is the marketability of the asset versus the protection of the secured creditor? Some assets are more liquid than others; financial collateral for example is treated differently in part because of the need to maintain liquidity.[66] Is the transaction in the ordinary course of business? Who is the cheapest cost avoider? If I entrust my property to you, I can presumably be expected to check whether you are trustworthy. If I am a consumer I cannot (usually at least) be expected to search a register. A final issue is whether the security is unregistered and unperfected or not; if it is unregistered a search will result in no hits. Essentially if unregistered security interests are allowed to willy-nilly bind third parties it defeats the point of registration. Registration is supposed to inform potential creditors of incumbrances over the collateral, and so the more devices with security effects that are registered the better.[67] Discoverability and transparency are key and concentrating information in one place reduces search costs.

Yet although the policy issues are the same, the rules are different in form, and the differences are explored in more detail in part 3(c). The taking free rules under a PPSA are expressed in terms of value and notice, but the Sale of Goods Act provisions are also expressed in terms of good faith. By itself this might change the results even if just at the margins. In fact, however, as a result of re-characterisation the results can be completely

[66] L Gullifer, 'What Should we do about Financial Collateral?' [2012] CLP 377

[67] See generally UNCITRAL, Security Rights Registry Guide (2013); H Beale, M Bridge, L Gullifer, E Lomnicka (eds), The Law of Security and Title-Based Financing 2nd edn (OUP: Oxford, 2012) para 23.74 criticising the law for preferring form over function

different. Yet there is a wider issue, which arises whichever registration model is adopted. Imagine A sells assets to B under retention of title terms. B puts them in his warehouse, but A has also separately bailed goods to B; that bailment will not be discoverable by a register search. B purports to sell to C; C will take good title to the goods free of the RoT clause under the PPSA provisions in cases where the sale appears to be in the ordinary course of business. It is not inconceivable that B will attempt to sell some of the bailed goods as well, and whether he can give C good title will depend on whether he can fit within (say) the mercantile agency exception to nemo dat, estoppel by representation of ownership or of authority to sell.[68] C simply wants good title and yet different regimes with potentially different outcomes apply where the sale appears to be in the ordinary course of business, but B is not a mercantile agent who has received the goods in that capacity and for the purposes of sale, nor has A made any representations as to either B's ownership or authority to sell. This could be difficult for a third party purchaser to insure against, may militate in favour of wider reform of nemo dat, and puts pressure on the boundary between registrable and non-registrable interests. That said, dividing lines are inevitable in a title conflict scenario; all that changes is which dividing lines come to the fore.

(II) AUTHORISATION AND ORDINARY COURSE OF BUSINESS UNDER A PPSA

In Australia the Personal Property Securities Act 2009 (Cth), s. 46[69] allows for a buyer or lessee of an asset to take free of a perfected security interest created by the buyer's seller,[70] where the property was sold or leased in the ordinary course of the seller's or lessor's

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[68] On which see Sheehan, above n 14, at 56-59
[69] Mirrored (or mirroring) by Personal Property Securities Act 1999 (NZ) s 56
[70] The rule is different in Quebec where no limitation to the buyer's seller exists. See Cuming et al, above n 51, at 97

business. Section 46(2) provides that this is not the case if the buyer or lessee has actual knowledge that it is in breach of the terms of the security interest. In order to see the scope of this section it is necessary to understand its relationship to cases where the transaction is authorised. Clearly where the secured party authorises the debtor to deal with the asset free of the security the security does not continue in the collateral.[71] That is designed to respect the parties' choice.[72] There is an overlap between the provisions in that often a sale in the ordinary course of business will be authorised. Section 46 also allows, however, for the validation in the hands of the buyer where the transfer is unauthorised. In Motorworld Ltd v Turners Auctions Ltd,[73] dealing with the corresponding New Zealand provisions, Motorworld purchased second hand cars from Nichibo, subject to a retention of title clause, reselling them at auction. Lang J held that Nichibo knew Motorworld was selling the cars on,[74] from which he concluded the sales were impliedly authorised. He denied that the ordinary course of business provision assisted, as it was designed to provide protection to the purchaser not the seller;[75] its operation would not, in the absence of authority to sell, preclude the seller converting the cars. Note also that a very wide licence to deal might render the ordinary course of business section otiose.[76]

The main question, however, is when the transaction is in the ordinary course of business? The question has been examined in English law by Ashborder BV v Green Gas Power Ltd[77] in the context of the floating charge where a transaction not in the normal course of business

[71] Personal Property Securities Act 2009 (Cth) s 32; this must be prior authority to deal. Lanson v Saskatchewan Valley Credit Union (1999) 14 PPSAC (2d) 71
[72] Sheehan, above n 14, at 357-359
[73] [2010] NZHC 113; the relevant provisions are section 45 (authority) & section 53 (ordinary course of business) Personal Property Securities Act 1999 (NZ)
[74] Ibid, [42-45]
[75] [2010] NZHC 113, [39]
[76] M Gedye, 'The Development of New Zealand Secured Transactions Jurisprudence' (2011) 34 UNSWLJ 696, 726-727; L Gullifer and V Barns-Graham, 'The Australian PPS Reforms: What will the new Regime Look Like? (2010) 4 Law and Financial Markets Review 394
[77] [2004] EWHC 1517

will lead to the crystallisation of the charge. Etherton J suggested that the first step is to decide the scope of the ordinary course of that particular company's business and then whether an objective observer would view the transaction as being in the ordinary course of business.[78] Another context in which ordinary course of business is examined in English law is in the context of mercantile agency where Oppenheimer v Attenborough[79] merely talks about operating from normal business premises in a normal way.

A clutch of New Zealand cases may provide some guidance in the context of a PPSA and their general approach is similar to Ashborder and Oppenheimer in that it is highly fact-sensitive. In StockCo v Gibson[80] the banks provided secured finance to four companies (the Security Group) linked to the Crafar farms, but then decided to advance no further funds. A company called StockCo also provided some secured finance. Plateau (one of the Security Group companies) sold 4000 heifers to StockCo, which were then leased to another company, Nugen. The sellers' receivers claimed that the animals were subject to the bank's security interest against Plateau. The question whether the transaction was authorised disappeared on appeal and argument centred on the ordinary course of business provision. Its objective is to allow commerce to proceed expeditiously without the need to check sellers' titles.[81] A two-step process was appropriate. First, the court must decide what the seller's business is. Secondly, it decides whether the sale was in the course of that business, and looks to different indicia to decide this. These include the place the agreement was made (was it the normal place of business of the company), the quantity of goods sold (was the quantity usual or too high?), the price, and whether the person undertaking the transaction needed to ask for special

[78] Ibid [227]; see on the effect of abnormal transactions Fire Nymph Products Ltd v The Heating Centre Pty Ltd (1992) 7 ACSR 365
[79] [1908] 1 KB 221; Sheehan, above n 14, at p. 63
[80] [2012] NZCA 330
[81] Ibid [45]

authorisation to make the transaction.[82] The Court decided that the transaction was in the ordinary course of business and had been explicitly authorised.

In Carey v Smith[83] NZ Peat was in the business of removing and selling peat; they sold a large quantity of peat (referred to as the pile) to the Careys and their company Brumac, which the Careys left on land leased by NZ Peat and which they intended at some point to sell back. NZ Peat had separately granted a general security agreement to ANZ Bank. The question was whether the sale to the Careys was in the ordinary course of business. Duffy J approved a list of factors. Those factors include where the agreement was made; sales made at the seller's premises are more likely to be in the ordinary course of business. A sale to a consumer buyer may be more likely to be in the ordinary course of business than a sale to a dealer or financial institution; a sale at or near market price is more likely to be in the ordinary course of business than a sale well below market price; if the manager making the sale had to refer back to another person or committee it is less likely to be in the ordinary course of business.[84] It seems as well that – and this may be problematic because it is difficult to prove or see – the motive of the seller is relevant.[85] If the seller is insolvent and in effect simply selling to keep afloat, that is not in the ordinary course of business. Given these different factors, it has been suggested that it is not possible to accurately pin down the definition of "ordinary course of business".[86] On the facts Duffy J decided that the sale was not in the ordinary course of business and the Carey's interest in the peat pile was subject to the bank's security.[87]

[82] Ibid [77], approving the list in Fairline Boasts Ltd v Leger 1980) 1 PPSAC 218, 222-223
[83] [2013] NZHC 2291
[84] Ibid, [76-78]; M Gedye, 'A Hoary Chestnut Resurrected: The Meaning of "Ordinary Course of Business" in Secured Transactions Law' (2013) 37 Melbourne UL Rev 1, 24-27
[85] Estevan Credit Union v Dyer (1997) 146 DLR (4th) 490
[86] 369413 Alberta Ltd v Pocklington [2001] 4 WWR 423, [21-29]; see also Royal Bank v Ag-Com (2001) 2 PPSAC (3d) 1, [85-87]
[87] Ibid [85]

In Tubbs v Ruby,[88] by contrast, the transaction was in the ordinary course of business. The worry here, for Gedye, is that price seems to be trumping all else as an indicator of whether the transaction is in the ordinary course of business. He argues the transaction was simply a financing tool for Waimate, and Ruby should have been treated as taking a security interest.[89] Waimate was in the timber business and had given a general security agreement to the bank. However, it was in financial difficulty and its directors set up Ruby to buy timber, usually for cash, from Waimate in order to allow it improved cash flow. Pending on-sale by Ruby, the timber remained in Waimate's possession. Waimate was allowed (but not obliged) to sell the timber on and account for the sale price to Ruby. Ruby had no staff who did not also work for Waimate. For Gedye, this indicates that Ruby did not purchase the goods as an arm's length sale in the way anticipated and the transaction should not therefore have been thought of as in the ordinary course of business,[90] allowing Ruby to take free of the bank's security interest.

Tubbs v Ruby is clearly very similar to Carey v Smith. The sale and buy-back in the latter case had, however, been a genuine attempt to provide NZ Peat with funds to harvest peat and should have been registered according to Duffy J. Had it been registered, the judge might have given the Careys purchase money security super-priority.[91] He was therefore forced to distinguish Tubbs. That distinction was the lack of put option in Tubbs requiring Waimate to buy the timber back at predetermined price.[92] Whether the distinction is thought sufficient or not, and it does seem a dubious one, the facts of the case must be scrutinised carefully; it is hard to see how a less fact-sensitive regime might be designed.

[88] [2010] NZCA 353
[89] Gedye, above n 76, at 728
[90] Ibid 729
[91] [2013] NZHC 2291, [93]
[92] Ibid [82]

(c). Effect of Reform on Current Statutory Exceptions to Nemo Dat in Goods

Many of the statutory exceptions to nemo dat in the context of goods will become redundant where a PPSA applies. It is important to the integrity of a PPSA system that it take priority over other provisions; under New Zealand law, for example, the Sale of Goods Act 1908 has been amended so as to make clear the priority given to the Personal Property Securities Act 1999 (NZ) in deciding these questions.[93] The seller-in-possession and buyer-in-possession provisions of that Act now expressly provide in sections 27(1A) and 27(2A) that where the transaction is covered by the PPSA, the rules in that latter Act apply. This section examines the effect of both models on the buyer and seller-in-possession provisions.

(I) BUYERS-IN-POSSESSION: THE EFFECT OF THE UNITARY MODEL

In Re Highway Foods Ltd[94] meat was sold by Harris to Highway Foods subject to a retention of title clause and then sub-sold to Kingfry, again subject to a retention of title clause. Highway Foods failed to pay the price under their agreement with Harris. Harris and Kingfry concluded a new contract of sale after Harris purportedly repossessed the goods under their retention of title clause. The question turned on who owned the meat at the time of this new contract. If Harris, they were entitled to the price against Kingfry, but if Kingfry the price was payable to Highway Foods under the original arrangement. Highway Foods' receivers attempted to rely on the Factors Act 1889, s. 9, arguing that, although there had been no sale, there had been an agreement to sell between the buyer (Highway) and sub-buyer (Kingfry). Section 9 provides,

[93] Sale of Goods Act 1908 (NZ) s 23(2); Mercantile Law Act 1908 (NZ) s 3

[94] [1995] 1 BCLC 209.

> Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, **or under any agreement for sale, pledge, or other disposition thereof,** to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The section in bold is additional to the provisions in the Sale of Goods Act 1979, s. 25. Highway argued that Harris were unable to repossess the meat because title had passed to Kingfry under the agreement for sale; Harris therefore had only a personal claim in debt. The court rejected this; Harris retained title to the goods. Highway had not passed title to Kingfry and could not expect to be paid by Kingfry. Consequently Harris could resell to Kingfry.[95] Tettenborn supports this and is right to do so; it is hard to see how a transaction which, if entered into by an owner would not pass title, should do so if entered into by a non-owner.[96] The effect of Highway, however, is that a sub-purchaser cannot be entirely secure in his title. As it happens Kingfry was in the end better off than they would otherwise have been, because Harris sold to them at the price Highway would have paid, which was lower than the price Highway charged. Yet plainly this will not always be the case. Fortunately the sub-purchaser is not wholly without protection. He cannot be sued for conversion by the original seller.[97]

Thomas stresses the importance in Edward Nugee's reasoning as judge in Highway Foods of the references to mercantile agency, bringing us back to section 2.[98] Section 2 provides

> (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting **in the ordinary course of business of a mercantile agent**, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

[95] Sheehan, above n 16, at 73
[96] A Tettenborn, 'Reservation of Title: Nemo Dat and Double Sale' [1996] CLJ 26
[97] P4 Ltd v Unite Integrated Solutions [2006] BLR 180
[98] Thomas, above n 27, at 32-34

Where the seller passes the goods to the first (section 9) buyer under an agreement for sale, that buyer is to be treated as a mercantile agent in possession of the goods with the consent of the seller when transferring to the third party. *Atiyah and Adams'* Sale of Goods[99] argues that the reference to section 2 is problematic; section 2 only provides any sale is valid as if authorised; it makes no mention of agreements to sell so, as Thomas also points out, at the point of transfer to the section 9 buyer there is no sale to validate.[100] Yet if so, section 9 does little other than prevent a conversion action (albeit not just in the Highway Foods context).

In Fairfax Gerrard Holdings Ltd v Capital Bank plc[101] Dimond sought to purchase die cutting machines from China. It arranged finance through Fairfax. A third company, Assetline, was to purchase the machines and sell to Dimond. The finance agreement provided for sale of the machines with reservation of title until payment was received in full. Dimond were able to sell goods on in the ordinary course of business subject to the proceeds being held on trust for the claimants. There was a sub-sale to Carrprint which also received finance on retention of title terms with the bank (Capital) purchasing the goods and leasing them to Carrprint. Fairfax is essentially identical to Highway Foods in that there is a double retention of title clause. The Court of Appeal held that the finance agreement recognised that title would be passed prior to payment,[102] and that on a sale any debt due from the ultimate customer should be assigned to Assetline.[103]

On this basis Dimond was held to have implied actual authority to pass title. The claimants had argued that the defendants had converted the machine by leasing it to Carrprint when it

[99] C Twigg-Flesner, R Canavan and H McQueen (eds), *Atiyah and Adams'* Sale of Goods 13th edn (Pearson: London, 2016) 329
[100] Thomas, above n 27, at 38
[101] [2007] EWCA Civ 1226
[102] Ibid, [27]
[103] Ibid, [30]

belonged to the claimants. At first instance the judge held that Capital had notice of the retention of title clause and so of Dimond's lack of express authority to sell the machines on.[104] Section 25 of the Sale of Goods Act (just like section 9 of the Factors Act) provides that the sub-buyer must receive in good faith and without notice of any rights of the seller. Yet the point of such a retention of title clause is not to preclude sub-sales; notice of the clause should imply nothing about notice of its terms. Kelry Loi has criticised the result in Fairfax on other grounds as well, arguing that the implied term contradicts express terms agreed by the parties.[105] In particular the Court of Appeal argued that the finance agreement substituted a right to the proceeds for the right in the collateral. Loi argues that the intention was to maintain an interest in both.[106] If Loi is correct, Fairfax was attempting to have its cake, by retaining the ability to claim the original collateral, and eat it by having a trust or assignment of the proceeds of sale.

The financier, or the original RoT seller, will seek to maintain an interest in either the original asset or in the proceeds of sale. If attempts to trace into proceeds fail, financiers will want to be able to exercise greater control of the original asset and be able to recover that collateral from third parties. Fairfax has been seen as providing protection from that result by allowing ready implication of authority to sell.[107] If, however, greater protection is given to the third party sub-purchasers, pressure builds to allow the financier to trace into proceeds.

It seems to have been assumed that the assignment (or trust) of the proceeds of any sale by Dimond was valid. The first point to note is that the trust receipt nominated approved sub-

[104] [2006] EWHC 3439, [17-20]
[105] K Loi 'Retention of Title and Implied Authority to Pass Title to Sub-buyers' [2008] LMCLQ 427, 430
[106] Ibid, 431
[107] Atiyah, above n 99, at 407

buyers. The fact that there were approved and nominated sub-buyers might tend to militate in favour of a conclusion that Dimond was not selling on its own account. In Re Bond Worth[108] the sellers of the acrilan fibre attempted to retain "beneficial ownership" of property into which the fibre was mixed – in that case carpets. Slade J said that the implicit authority to deal with the fibre on Bond Worth's own account meant that Monsanto could not have the benefit of a trust;[109] at best the sellers had a void unregistered floating charge. The type of control exercised in Fairfax might negative this conclusion. It may be that, just as in Romalpa Aluminium v Aluminium Vaassen,[110] as between Dimond and Capital Dimond sold as principal, but as between Dimond and Fairfax/Assetline Dimond was accountable for the proceeds. In Romalpa and in Caterpillar (NI) Ltd v John Holt & Co[111] the intermediate buyer was described in similar terms: to act as "fiduciary owner" in the former or "fiduciary agent" in the latter case. After Caterpillar, however, this makes the intermediate buyer the seller's agent, holding the proceeds of sale on trust, and property passes directly to the sub-buyer. Romalpa might therefore be reasoned differently today. Yet, as Gullifer points out, this construction gives the seller probable priority over receivables financiers, which has unpalatable commercial consequences.[112]

Another complication raises its head. Caterpillar also held that the Sale of Goods Act s. 49 was a complete code of when a party could sue for the price. The section provides, "Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods." If the intermediate buyer is seen as

[108] [1980] Ch 228
[109] Ibid 249
[110] [1976] 1 WLR 676
[111] [2013] EWCA Civ 1232
[112] L Gullifer, 'The Interpretation of Retention of Title Clauses: Some Difficulties' [2014] LMCLQ 564; Gullifer, above n 11, at 251-252

an agent, the seller will be unable to ever sue him for the price as property passes not to the buyer, but to the sub-buyer. PST Energy 7 Shipping v OW Bunkers Malta Ltd suggested – albeit obiter – that this was wrong.[113] The contract in Bunkers was held not to be a sale, but had it been a sale the price would therefore have been recoverable under the contract and section 49 would only apply to sales, not on credit terms, where title passes before delivery.[114] However, while the sellers in Bunkers supplied bunker oil under reservation of title terms, the buyers were allowed to burn the fuel in their ships' engines and Lord Mance described this not as a sale contract but as a contract to permit consumption prior to payment and passage of property after payment if unconsumed.[115] The logic is that no contract where the "buyer" is expected to do something – like consumption or on-sale of the goods - rendering it impossible to transfer title to the buyer on payment counts as sale. After Caterpillar the retention of title contract between seller and a buyer, expected to sell on, is likely to be one of agency. Precisely where that combination of cases leaves matters is not immediately clear.[116]

By contrast, while there is a difficult factual question whether a transaction is in the ordinary course of business under a PPSA, it is no harder than deciding the same matter for the purposes of a floating charge. Many of these complications therefore disappear. Under a Personal Property Security Act, Harris would have a security interest registered against Highway; if Highway sells on again under retention of title terms, an A-B-C-D problem arises. In Duggan's example Mary (A) has a lamb and provides a security interest to Bo-Peep (B) who registers it against Mary's name. Mary sells the lamb to her teacher (C), and C and D

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[113] [2016] UKSC 23, [2016] AC 1034, [58]
[114] Gullifer, above n 11, at 256
[115] [2016] UKSC 23, [2016] AC 1034, [28]
[116] Gullifer, above n 11, at 259-260

enter into negotiations for a further transaction.[117] Duggan raises the question of who D searches against. Presumably D knows nothing about Mary and so misses Bo-Peep's security when he searches.

While Duggan is making a point about the limits of a debtor's name based registration scheme, an A-B-C-D problem can be derived from the facts of Re Highway Foods and illustrate the nemo dat implications. Highway, the owner of the meat is A, and has given a security interest (the re-characterised retention of title clause) in favour of B (Harris). Harris registers that interest against Highway. Highway then sells the meat to Kingfry (C) subject to a retention of title clause, which is also re-characterised as a security interest. Highway perfects that security by registration against Kingfry. If Kingfry sells on to D, D always takes free of Harris' interest, although D does take subject to Highway's perfected interest unless a taking free rule applies. Harris, however, retains security in the proceeds of sale against Highway. Another scenario is that Highway sells to Kingfry in the ordinary course of business with no retention of title and no security interest. Kingfry takes free of Harris' security interest, but Harris again obtains a security right as against Highway in the proceeds of sale.[118] Where there is a double retention of title clause we have seen the contortions in Re Highway Foods. Under a PPSA matters are easier; the question does not come up in the same way. Nemo dat cannot prevent the retention of title debtor selling the goods because he is deemed to be the owner. Provided registration takes place the retention of title creditor has priority against later creditors seeking security in proceeds[119] and the deleterious interpretations of both Re Highway Foods and Bunkers can be abandoned to history.

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[117] A Duggan 'A PPSA Registration Primer' (2011) 35 Melbourne U L Rev 867, 878

[118] Whittaker, above n 5, at 489

[119] Ibid 483; nb Harris would lose priority as against an invoice factor. Personal Property Securities Act 2009 (Cth) s 62. Under the agency construction in Caterpillar priority against an invoice factor would probably be maintained.

(II) SELLERS IN POSSESSION: THE EFFECT OF THE UNITARY MODEL

Michael Gerson (Leasing) Ltd v Wilkinson[120] illustrates a rather different case. Emshelf Ltd sold goods to the claimant finance company (Gerson) in 1995 on a sale and leaseback basis. The goods never left their premises. However, their acknowledgment that they held the goods on account of the buyer finance company and that the buyer was owner counted as a constructive delivery of the goods with an immediate bailment of the goods back to themselves.[121] Emshelf therefore continued in possession for the purposes of the Sale of Goods Act 1979, s. 24. The section provides

> Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Two things need to be noted. The first is that Re Highway Foods concerned inventory. Michael Gerson does not, and the seller in possession problem should not occur as frequently in inventory scenarios; the seller will not usually retain possession of goods once sold for long, although clearly a second sale between property passing and delivery is possible. The goods in question in Gerson were heavy plant and machinery; as such it might be expected that the scope of Emshelf's authority to sell on would be limited. The second is that section 24 does not, unlike the Sale of Goods Act 1979, s. 25 or the Factors Act 1889, s. 9, refer to mercantile agency. There is no implied cross-reference back to section 2.

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[120] [2001] QB 514 (CA); Sheehan, above n 16, at 69

[121] [2001] QB 514 (CA) 526.

Emshelf sold some of the goods (the schedule 3 goods) again in 1996 to the second defendants, State Ltd, on a sale and leaseback basis. Both agreements were terminated on Emshelf's failure to keep up payments after which Gerson purportedly agreed to sell the assets to Sagebush, although Gerson in fact contested this. In the alternative Gerson claimed that property only passed under the sale to Sagebush on payment and never having been paid, they (Gerson) remained owners. State also agreed to sell the schedule 3 goods to Sagebush which ultimately sold the goods on to Wilkinson. The case turned on whether Emshelf was a seller in possession; if so, section 24 bit to allow State to obtain good title of the schedule 3 goods and to withstand Gerson's allegation that by selling the goods they had converted them. The court held that because the second sale to State Ltd involved delivery of constructive possession to State there was sufficient delivery to allow section 24 to bite,[122] despite the goods never physically moving from Emshelf's premises. Title passed to State Ltd and neither defendant was a converter as against the claimant regarding the schedule 3 goods.

Under a PPSA, a sale and leaseback is a security interest. Gerson's interest would be re-characterised as a security interest over Emshelf's goods, but State's interest would also be re-characterised as a security interest over Emshelf's goods. Gerson would therefore register the sale and leaseback. That security interest ranks as first in time against the sale and leaseback to State. Gerson therefore takes priority over State, a different result to the current law. This is defensible on the basis that State Ltd can search the register; State is the lowest cost avoider, not Gerson. However, were it a sale (without leaseback) to State no search would be needed so long as Emshelf sold the goods to State in the ordinary course of business. This makes the characterisation of the second transaction (and whether it is in the normal course of business) vital.

[122] Ibid, 527-528.

The next question is whether Gerson would take priority over Wilkinson under a PPSA. Working this out is slightly more fraught as there are three distinct possibilities. Firstly, if there were a sale (without leaseback) by Emshelf to State in the ordinary course of business, Wilkinson ought not to be bound. If the buyer (State) has taken free of a security interest created by his seller (Emshelf) so should State's transferees. This is called the shelter principle in American law.[123] The second possibility is that Gerson's interest is binding on State because the sale to State was a sale and leaseback transaction (as in fact it actually was) and Gerson's security is registered first. Under the Australian provisions the answer is that State Ltd cannot sell the goods in the ordinary course of business under the Personal Property Securities Act 2009 (Cth), s. 46; for the purposes of the statute Emshelf is the owner of the goods. State Ltd has a security interest. State would have to be enforcing that security interest in selling the asset. The third possibility is that the sale to State (without leaseback) is not in the ordinary course of business. Gerson's interest continues in the asset and is binding on State for two years to enable Gerson to re-register against State. However, because third parties cannot check the register against State and find the security in the meantime, they take free of the interest unless they have knowledge of it.[124]

(III) NO RE-CHARACTERISATION: THE REGISTRATION-ONLY MODEL

On this model retention of title clauses would be registered for priority purposes, but the retention of title creditor is treated as the owner. The question being asked is therefore rather different to that being asked under the unitary model. Under that model the question is whether the third party (C) takes legal title from the chargor (B), who is deemed for the

[123] Eg RH Skilton, 'Buyer in Ordinary Course of Business under Article 9 of the Uniform Commercial Code (and Related Matters)' [1974] Wisconsin L Rev 1, 76

[124] Personal Property Securities Act 2009 (Cth) s 52

purposes of the statute to own legal title, subject to the charge in favour of A. Under the registration-only model the question is prima facie blunter; does C take legal title?

The Sales of Goods Act 1979 s. 25(1) and the Factors Act 1889, s. 9 provide for a requirement that any person receiving the goods from the buyer-in-possession must be in good faith and "without notice of any lien or other right of the original seller in respect of the goods". Registration counts as notice, but does it count as notice to everyone? As Goode on Legal Problems of Credit and Security points out, some buyers, such as consumers or those buying from sellers in the ordinary course of business cannot reasonably be expected to search, so should not be attached with notice.[125] It may be therefore that different standards of notice are appropriate in different cases. Notice would be imputed if the transaction were not in the ordinary course of business, assuming no other exception applied, and so the third party would be bound by the security; however, if transaction were in the ordinary course, notice would not be imputed and the third party purchaser would not be bound. These considerations cannot really be accommodated by the Sale of Goods Act. Indeed the same difficulty applies with respect to section 24, which in the same vein requires a person receiving the goods from the seller-in-possession to be in good faith and have no notice of the prior sale.

The upshot is that, just as they are in the Quebecois system, questions of nemo dat need accommodating in the reformed scheme and the difficulties of Highway Foods and the agency analysis in Bunkers are again eliminated. Article 2961.1 QCC provides that a reservation of title in a "universality" or rights under a lease of more than a year over a

[125] L Gullifer (ed), Goode on Legal Problems of Credit and Security 5th edn (Sweet and Maxwell: London, 2013) paras 2.30, 5.32

"universality", or class of assets, cannot be set up against a third person who acquires any such property in the ordinary course of business of the seller's enterprise. The rule corresponds to the rule as it relates to hypothecs (or charges) over universalities of property,[126] although, as Cuming points out, that latter rule is expressed somewhat elliptically.[127] Cuming, Walsh and Wood, however, suggest that the combination of QCC provisions mean that a buyer acquiring assets under a sale in the ordinary course of business takes free of hypothecs whether registered or not and whether the buyer knows of it or not.[128] This raises another difficulty and one raised earlier in part 3(b)(I). Different rules will apply depending on whether there is a registrable interest or not – irrespective of whether or not there is formal re-characterisation. Results may be different and third parties will find it hard to know which regime applies. This in turn leads to a boundary line problem. Pressure would grow as litigants try to argue that the title financing device in question was (or was not) registrable. The wider the list of registrable interests the greater this problem becomes and the greater the incentive to expand the list further; the inclusion of credit-bail and some leases over a year-long in Quebec is instructive therefore. The Civil Code fails to draw a distinction between leases for finance and other purposes, merely requiring registration if they are for a period over a year, albeit only in business cases, over moveables required for the service of an enterprise, or a road vehicle or other moveables determined by regulation. Two points need to be made. Firstly, this issue of dividing lines is, as has been stressed repeatedly, unavoidable, as is vigilance about where they are placed. Secondly, floating charge and Factors Act jurisprudence, and the New Zealand cases discussed earlier provide guidance helping to define ordinary course of business.

[126] QCC art 2700
[127] Cuming, above n 50, at 830-831
[128] Cuming et al, above n 51, at 97

A final difficulty is the way in which a reservation of title clause creditor may seek an interest in proceeds. Capitant argued almost 100 years ago that real subrogation to the price might apply in Quebec where the goods are sold on.[129] Real subrogation is in effect an analogue to tracing from the original collateral to the proceeds. After Poulin v Serge Morency et Associés Inc,[130] however, real subrogation cannot transfer the reservation of title clause beneficiary's interest to sale proceeds in Quebec.[131] Post Bunkers/Caterpillar this seems not to be English law; with the right drafting the "seller" can trace through to proceeds and modern Quebec law therefore provides no steer as to how to balance the interests of these different parties under a registration-only model. It would therefore still be necessary either to redraft the Sale of Goods Act or re-characterise the passage of property rules (these being Gullifer's other options apart from re-characterisation as a security) to avoid the difficulties those two cases cause. An alternative would be to draw reservation of title clauses into the rules respecting proceeds of assets subject to formal security interests. This becomes another compromise in respecting the retained title of the creditor and a registration-only regime becomes an uncomfortable half-way house at best, or even functionally equivalent to re-characterisation.[132] If so, we may as well be honest and re-characterise openly.

4. CONCLUSION

This article has considered the impact of registration of title based financing devices, particularly but not exclusively retention of title clauses. Registration allows parties to engage

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[129] H Capitant 'Essai sur la subrogation reelle' [1919] RCD 321; see LD Smith 'Unauthorised Dispositions of Trust Property: Tracing in Quebec Law' (2013) 58 McGill LJ 795, 805-806

[130] [1999] 3 SCR 351; see also Grondin v Lefaivre (Trustee) [1931] 2 DLR 114

[131] Smith, above n 129, at 806, although Smith does have some doubts as to whether the cases are good authority for this position.

[132] The non-unitary approach to retention of title clauses of UNCITRAL is precisely that – requiring functionally equivalent outcomes to those under the security rights regime – UNCITRAL Legislative Guide on Secured Transactions (2007) Recommendation 188

in cheaper monitoring of the debtor's activities, but also entails third parties often becoming the cheapest loss avoider. Essentially the registration process can be used to off-load risk to third parties who can be expected to check the register. The question becomes when is it unreasonable to expect third parties to do so; those third parties can, and should, benefit from the taking free rules. However, there are two registration regimes. In one the retention of title clause is formally re-characterised as a security interest (the PPSA or unitary scheme). In the other the creditor retains formal ownership of the goods (the registration-only scheme). That latter scheme inevitably leads to compromises; even if, as in Quebec, the clause is not void if unregistered, the creditor's ownership cannot be fully respected. To render a registration-only scheme workable results approximating those under re-characterisation are needed. The logic of registration is dominant over everything else including characterisation. That said, once retention of title clauses are registered, the problems inherent in an agency explanation of Bunkers disappear. There would be boundary lines for example to be drawn between registrable and non-registrable interests but this should not dissuade us from reform.

Registration is politically unfeasible at the moment. Nonetheless the paper has done two things. Firstly, it has that clarified the choice reformers have is between registration and some other way of reforming Bunkers, rather than between re-characterisation and not. Equally importantly, and even acknowledging the inevitable dividing lines to be drawn between cases within and outside the registration regime, it seems secondly that registration avoids the problems of Bunkers and nemo dat rules in the retention of title context. There is more work, however, to be done on the theoretical impact of registration on property rights. Bell and

Parchomovsky wrote a paper primarily examining title registries,[133] but their work does not touch registries of security or quasi-security interests, and this remains a gap needing filling.

[133] Bell and Parchomovsky, above n 39