

Commercial Law – PART B

Ownership

- Include rights of possession and use
- Interest: represents quantum of rights over the asset which he enjoys against all other
- Title represents the strength of the interest he enjoys over all others

Possessory Title

- Legal: right of person to possess, the proprietary title of the owner is paramount
- Physical: having control of the chattel
- Must have actual and intention to control. Usually deemed to continue unless passed or abandoned (intentional relinquishment of title inferred from conduct)
- Non owners in lawful possession of goods are entitled to sue in conversion, as long as they have sufficient property or interest in the goods subject to the claim deriving from their possession or right to possess. (Wilbraham v Snow)
- Sutton V Buck: even if it was in a invalid Sale and Purchase Agreement, once possession is taken but the buyer with consent of the owner who had intention to transfer, it is said that the buyer had derived right to possession from the true owner and that was enough to defeat any right claimed (e.g. from bailiff).

a) Finders Possessory interest

- Armory v Delamirie- innocent finders have a right of possession against all but the rightful owner, and may claim possessory title to the found goods derived from the mere fact of possession and not obtained by dishonest means.
- Parker v British Airways- innocent finders only acquire right over the chattel if it was abandoned and he takes into his care and control
- Finders must: 1) take reasonable measures to find the true owner (Parker) and 2) must have permission from the occupier to be on the land in which the chattel is found on (Waverly v Fletcher).
- In the case Flack v National Crime Authority a substantial sum of money was found in Mrs Flack's house which was confiscated and held by the police. Mrs Flack was allowed to keep the money as the court ruled she manifested an intention to exercise control over any chattels in her house, whether or not she was aware of them as her house was not public and entrance was fairly restricted.

b) Occupier's rights

- Have superior right over the found chattel attached to the building over the finder (Parker) and those chattels unattached to the land only if he has the intention to exercise control over the land as their interest in the goods is thought to have existed before the finder's interest (Waverley)
- An occupier who allows anyone to be on the property at all times has no element of control over the property and thus will have acquire proprietary interest in the goods. (Tamworth v AG (NZ case))
- Parker quoting Elwes v Brigg Gas Company- No doubt those chattels become affixed to the realty, ownership of the chattel will follow ownership of the realty. Therefore ownership of chattels embedded in the land so as to form part of the land, owner of

land has superior right over the finder notwithstanding that the owner is unaware of the existence.

c) Theft

- If possession is taken, a wrongdoer may acquire a possessory title to the goods which he has unlawfully taken into his possession but of course the owner's title will always prevail.
- In order to avoid a free for all, absent of owner renders wrong downer's possessory title the better one: Bird v Fort Frances(Ontario case)
- Tinsley v Milligan: even if initial acquisition of property was illegal, no illegal agreement was being enforced and the applicants were not required to rely on their own illegality to establish their case.
- Costello:
- 1) establish fact of possession gives possessory title which defeats illegal methods of obtaining,
- 2) Where titles are relative party with stronger title succeeds, suspect of theft's of car, police ultra vires their authority in detaining the car has a weaker title.
- Possessory title of thieves could be defeated by a bona fide purchaser if the goods were subsequently detained by the police and lawfully (not ultra vires) sold to a third party, the bona fide purchaser had prima facie acquired the goods . Buckley v Gross

Title to Sue in Conversion: Parker v BA:

- 1) Occupier of land has rights superior to those of a finder in or attached to the land and an occupier of a building have that similar right regardless of whether or not aware of the property's presence.
- 2) As long as he has manifested an intention to exercise control over the building and the things which may be upon it.

BAILMENT- where bailee is in possession of goods which belong to another.

- **Elements**

- Possession of tangible goods
 - Must have come into or take possession of the goods without intention to assert control or physical control means no bailment (Ashby v Tolhurst)
 - Such as car owners and management of car parks by an in and out permit system(Always Win Ltd) otherwise if a ticket and you park yourself is issued it is a mere licence (Ho Sui Kam v On Park Parking)
- Bailee must have consent to the possession
 - Anyone voluntarily assumes possession of goods belong to another will be held to owe at least the principal duties of the bailee- Palmer
 - Bailee needs to voluntarily take possession of the bailor's chattel, regardless of whether the bailor consented to or not (The Pioneer Container)

- Bailee can then invoke terms of a sub bailment under which he received the goods if owner has consented to it.
- Sub-bailee can only be said to have voluntarily taken into possession if he has sufficient notice that a person other than the bailee is interested in the goods. And will assume towards that other person the responsibility for the goods
- Bailor must have superior interest in the goods
 - Bailee interest is limited possessory interest.
 - Will be required to return the goods to the bailor or deal consistent to the bailor's instructions. If no intention of the goods to be returned, no bailment (Foley v Hill)
 - Mercer v Craven Grail Storage: bailee is authorised to substitute other goods for those which have been substituted. If expressly made or implied as long as parties intended that the depositor should have proprietary rights.
 - Even if contemplated changes are made to the chattel
 - Goods sold subject to reservation of title clause, buyer is a bailee even though they are given power to sell goods to sub buyer or use them (Clough Mill)
- **Bailee's Duty**
 - Exercise reasonable care for safety of the article entrusted to him as demanded by the circumstances of the case. Take responsibility for damage done or theft and take reasonable steps to secure recovery of goods in the circumstances(Houghland v RR Low)
 - Burden of proof lies on the bailee to show that it had exercised due care or that even if due care was taken damage/ loss would have taken place (Always Win Limited)
 - If bailee entrusts his agent or servant (must do so with permission), he is still answerable for the manner in which the servant or agent arise it out. Unless that act of his servant is outside the scope of their employment, the bailee will then not be liable for damages (Always Win)
 - Standard of care for bailee for reward and an involuntary bailee is the same (China national silk case)
- **Bailee and Third Parties**
 - Bailee may sue third parties in trespass, conversion, detinue and negligence since against the wrongdoer, having possession renders title (the Winkfield)
 - Whereas bailor cannot sue unless he has the right to immediate possession (bailment at will) of the chattel at the time of the wrong doing. OR
 - Bailee commits a wrongful act that repudiated the bailment (North General)
 - Once the bailee has recovered full damages from wrong doer, the wrongdoer has a full answer to any action by the bailor. (the Winkfield)
 - Bailor may recover full market value of the goods and damages from wrongdoer unless they are too remote. But must account surplus to the bailor.

- Defence:
 - Wrongdoer defends action on behalf of and with authority of true owner
 - Wrongdoer committed with authority of true owner
 - Wrongdoer has become owner of the goods.

FOUR KINDS OF CONSENSUAL SECURITY (Lien, Pledge, Mortgage, Bills of Exchange)

- Security refers to the provision of rights against a person's assets which are intended to enhance the probability of recovering a debt claim against them

GIVING POSSESSION

1) Lien-retains possession

- S41 Sales of Goods Ordinance: seller has lien on unpaid goods for the price while he is in possession of them.
- COMMON LAW: A right to retain possession of goods under which the debt arises in lieu of payment confers no title to the lien holder: HK Exhaust Emission Laboratory v CRIC Motor Work.
- may be general or particular
- **Common Law** lien a.k.a. Particular Lien (HK EXHAUST EMISSION)
 - Lien over a specific good related to the debt)
 - Allows creditor to retain possession of goods as security for payment of debts which relate to the property retained
 - Creditor show his labour that is expended on the chattel when it came into his lawful possession
 - Labour improved the condition of the chattel
- **Statutory Lien** a.k.a. General Lien(HK EXHAUST EMISSION)
 - Of all properties of the debtor currently in possession of the creditor
 - Allows creditor to retain possession of any property of the debtor until any debt due from the debtor is paid-stockbrokers
 - As long as they have possession of other goods belonging to the debtor, the lien still exists
 - Existence is that the usage in a particular trade in a particular locality must be certain and reasonable that everyone in the trade knew of it or on inquiry could have ascertained its existence
- Debt must be of a definite amount Singh v Thaper
- LIENEE under Bankruptcy Ordinance is a secured creditor
- **Loss of right** when
 - I) possession is lost unless loss of possession is induced by fraud or otherwise wrongfully obtained, the lien is recovered. (Yuen)
 - II) Even if lienee later recovers possession, the lien is terminated. (Pennington v Reliance Motor Works)
 - III) Lien is mere right of possession, using goods in a manner other than mere possession renders the lien extinct. (Jumbo Key Holdings v Hong Kong Equestrian Centre)

- **EQUITABLE: Cheung Kwan Kei v Cheung Kwan Fai**: vendor has equitable lien over property when SAP is executed and upon completion the consideration is not transferred.
- Non possessory, arising due to specific performance.
- **Yuen v Kings Way car Services**:
- First identify what kind of lien it is, has the lien been lost by extinction.
- Dispossession renders the lien extinct, but subsequent regaining possession of the property by the creditor does not necessarily render the lien extinct. It is determined by the matter of fraud.

2) **Pledge-delivers possession**

- A form of bailment for security. Title remains with the pledgor whilst the possession is held by the creditor.
- Pledgor in possession is treated as a mercantile agent and is capable of passing good title to a bona fide purchaser for value without notice of the continuing pledge.
- Can only be created if asset is capable of either constructive or actual delivery of it to the creditor (**Official Assignee of Madras v Mercantile Bank of India**)
- Delivery may be actual (physically handing the actual goods over), symbolic (handing keys to building over) or constructive by telling the pledge where they are (**Dublin City Distillery v Doherty**).
- Once possession is returned to the pledgor the pledge is no longer effective
- Goods held by a third party may be deemed constructively held for the pledge; the third party must have notification from the pledgor of the transfer of possession.
- **Non negotiable transport documents**- Pledge of documents referring to goods other than a bill of lading, a document intangibles that embodies title to goods, is not in general to be deemed a pledge of goods and is merely a pledge over the documents (**William Mc Ewan v Smith**)
- Non negotiable instruments- bill of exchange marked with not negotiable is incapable of transfer therefore cannot be pledged. Cheques crossed not negotiable remains transferable and only effect of the crossing is that a transferee acquires no better title than his transferor and thus takes subject to equities.
- A cheque crossed account payee or crossed as not transferable, is not capable of being pledged.
- Share and debenture certificates are not recognised under English law to be pledged as the delivery of share certificate and a completed transfer of shares agreement only renders them an equitable charge and not a pledge. At best it confers rights to registration and not rights stemming from the registration.

Giving Rights over assets

3) **Mortgage**

- Statutory definition in CPO- any charge or lien on any property for securing money or money's worth
- Goode: a mortgage is a right of appropriation (such as a charge) plus a transfer of ownership.
- Transfer of ownership (legal or equitable title) of an asset to the mortgagee.

- Mortgagee becomes the legal owner who has a right to sell on default and an obligation to transfer title back to the mortgagor on satisfaction of the debt
- Allows banks' ability to realise the security if necessary and prevents borrower from selling the secured assets.
- No need to take possession for the mortgagee to be perfected only when in default, as commercially it is not practical to do so.
- But Mortgagor obtains a right in equity as beneficial owner from a equity of redemption granted to them (Duchess of Hamilton v Countess of Dirlton),
- Mortgagor either retain possession by licence or formal lease (Typhoon 8 Research v Seapower Resources)
- May be registered under the s80 Companies Ordinance
- Equitable mortgage does not transfer legal title exists as a less formal form of security that can be ignored by a bona fide purchaser for value of the legal title to an asset without notice, plus there is no power of sale.

4) Bills of Sale – Fixed and Floating Charge

a) Fixed Charge

- Confers rights not possession, should be perfected by also taking a pledge over the asset
- Debt is secured against a fixed asset
- Depending on the agreement, the charger will require the chargee's permission before dealing with the asset fixed against the debt.
- When an enforcement event occurs as specified in the charge document, the bank or charger may require the charge to sell the asset or appoint a receiver to do so
- S80 Companies Ordinance, charges may be registered

b) Floating Charge

- Debt secured against an equitable entity, over a group of assets present or futures like shares or stock which may fluctuate in price and are identified generically
- Charger is free to deal with the assets under ordinary course of business until an event of default under the agreement that triggers crystallisation.
- EQUITY Floating charge operates in equity over existing and future property initially as a matter of contract and then conveyance by way of with a constructive trust which fixes upon the property in the hands of the chargor (Re Lind)
- **Crystallisation**- freezes the chargor's freedom to deal with the assets over which it floats, effectively becoming a fixed charge with respect to any of the assets over which it previously floated (Re Permanent Houses)
 - Occurs when the mechanism under the loan agreement is triggered and will restrict the borrowers' freedom to deal with the assets over which it floats can be frozen
 - Such as on events of borrower's liquidation, administrative receivership, borrower ceases to carry on business, intervention by the bank
 - Re Manurewa Transport, crystallisation does not itself renders a new charge to be registered, but it is good commercial sense to do so as it gives notice to

prospective creditors notice that the borrower has lost its authority to deal with the secured assets.

- Floating charges are vulnerable to later fixed charges as it ranks behind them in priority
- May appoint a receiver to enforce the charge but receiver will act as agent of the borrower.

Charge over Bank Account

- S15A Law Amendment and Reform (Consolidated) Ordinance
 - A person can charge his chose in action (non-tangible goods) for the benefit of another to secure a debt.
 - Reconciled with Re Charge Card Service
 - Millett J indicated that a charge in favour of a debtor of his own indebtedness to the chargor is conceptually impossible, therefore cannot charge against bank account.
 - Since it would be impossible for a bank to realise its security in the normal way because it could not claim payment of the debt from itself.
 - A charge or mortgage is a valid security over a choses in action such as a bank account
 - However there is a question of whether it is necessary to register as it is not clear whether or not such account represents a book debt or not.
 - But as Hoffman in BCCI stated, that these charges are common and the fact that equivalent security could be created in other ways was no reason for preventing banks and their customers to charge over deposits.
 - However Independent Automatic Sales would give a usual outlook that fund at bank would not be regarded as a book debt.

Charge over future assets

- Equitable doctrine: treats as done that which ought to be done, hence there is some sort of trust in favour of the lender would be created as soon as the charge comes into existence.
- Equity can enforce a promise given for value to transfer property yet to come into existence as soon as it came into existence
- EQUITY Floating charge operates in equity over existing and future property initially as a matter of contract and then conveyance by way of with a constructive trust which fixes upon the property in the hands of the chargor (Re Lind)

Registration-s83 (2) certificate of registration is evidence that charge is registered

- S80 Companies Ordinance states that registration of fixed and floating charges is required
- S80 (1) CO, sent to the Companies Registry. But it is a registration of particulars of the charge and not that of the documents creating the charge. But if unregistered, it is void against other secured creditors.
- S80(2) must register charges over book debts and floating charges over all undertakings

- Registration only gives constructive notice of existence of the charge and not the contents of the charge.
- S86C) - if registration within 5 weeks of creation of the charge, date of registration is the date of the creation of the charge.
- Court may grant extension for registration.

Priority

- ABN Amro Bank v Chiyu Banking Corporation: In normal circumstances registration will render the priority of the charges, and fixed charges regardless of time of registration is superior to any earlier floating charges, unless an existence of a negative pledge of the company not to create any further charges that rank above or pari passu to the existing floating charge, and the 2nd fixed chargee has notice of the negative pledge then 1st floating charge will have priority. Or if 1st floating charge has crystallised before the creation of the 2nd fixed charge.
- Dearle Hall- Registration of security with the Companies Registry will usually defeat the rule. In order to priorities between assignments over choses in action, notice of assignment must be given to the third party which owes the obligation, such notice will render the first assignment superior to any subsequent assignments. Without notice the 2nd assignment will take priority if they gave notice to the debtor. The rule will not apply if a subsequent assignee knows of an earlier assignment when taking the assignment.
- Constructive notice- it could reasonably be expected that a creditor would search the charges register.
- Insolvency s265 (3B) CO: if there are insufficient funds to pay of the debts, the fixed charges have priority over the claims of holders of debentures under any charge created as a floating charge by the company.
- S266B CO- any dealings of property 6 months prior to winding up will be unfair preference and voidable, if the buyer is an associate to the company the preference period is 2 years.
- S267 CO- Floating charge created within 12 months of winding up proceedings will be invalid unless company was solvent immediately after the creation of the charge. However the charge will be valid to the extent of the cash paid to the company at the time of the creation in consideration of it and interest or at 12% per annum, whichever is lower. (Mace Building v Lunn)
- S268 CO- fraudulent disposition made with a view to defraud creditors will be voidable at the instance of any person prejudiced by it.

Romalpa Clause

(Not a security interest because it depends upon no title at all passing prior to the price of the goods being paid)

- Retention of title clause within a contract of sale.
- Reserve title to the seller until all monies owed to the seller by the buyer have been paid
- Arniyr v Thyssen: all monies Romalpa clause is where seller retains the title until the buyer has paid the price of the good sand all other sums owing to the seller, does not usually create a charge

- Statutory retention s21 SOGO, allows title to remain vested with the seller.
- Permits the seller to enter onto the buyer's premises to reclaim the goods.
- Should be a provision seeking to trace the proceeds of onward sale of the goods through the buyer's bank account.
- Exception: where goods have been sold on to an innocent third party then the third party gets good title.
- Should be an requirement to keep the seller's goods identifiable. S
- Such as separate storage, only if it is detachable then the goods are capable under the clause- Henry Lennox v Graham Outtick. Otherwise the seller's title in the goods extinguishes as they cannot trace the goods into the new product.
- Generally not registerable as they are preventing the property in the goods from passing to the buyer in the first place- Clough Mill v Martin.

Bill of Exchange-

- DEFINE - S3(1) Bill of Exchange Ordinance (e.g s73 Cheque)
 - Unconditional order in writing
 - addressed by one person to another
 - signed by the person giving it
 - requiring the person to whom it is addressed to 1) pay on demand or at a 2)fixed or determinable future time
 - as sum certain in money.
 - To or to the order of a specific person or to bearer
- May be assigned, evidence of the obligation to pay, receiver does not have to give consideration, s30(1)BEO presumption of signature party appears on the bill is prima facie deemed to have become a party thereto, the negotiability of the paper enables anyone holding it to sue the person who created the paper
- Trade bills of exchange: a instrument recognising a trade debt that rather than demanding immediate payment of goods, this document timelines the buyer of the goods to promise to pay for the goods after a specific period.
- May be sold at a discount in the capital markets
- Some will have payment of the amount due under them guaranteed by a bank
- Parties: party who takes in good faith for value is a holder in due course and is unconcerned with any prior equities which affect the bill. That he took the bill in good faith and for value (s30(2) BEO , London Joint Stock Bank v Simmons)
- S29 BEO a holder who derives his holding from a holder in due course who himself is not a party to any fraud or illegality has all the rights of that holder in due course as regards the acceptor and all the parties to the bill prior to that holder.
- The drawer of the bill requires the acceptor to accept the bill in favour of the payee. The acceptor is only liable once he or she signs the bill.
- No liability arises from a forged signature.
- A bill may be payable to the bearer.
- Zanda Investment v Bank of America: unauthorised signature
 - Where it appears that the signatory had no actual or apparent authority to indorse cheques for the party, by s24 BEO, the endorsement does not entitle banks to retain the proceeds.
 - S86 BEO- there being no suggestion of bad faith, each bank is required to show that it had not been negligent.

- If a cheque is crossed 'not negotiable a/c payee only, a bank collecting for an indorser owes a duty of care to the true owner to take reasonable steps to satisfy themselves that the payee has authorised the bank to collect for the customer
- Banks have a duty of practical commercial approach that allows them to presume his customer is in all probability honest unless and until there are indications to the contrary (Marfani v Midland Bank)
- A cheque may be made payable to the bearer
- A cheque may be crossed and if so must be collected by a bank
- Not negotiable mark renders the cheque transferable but any party taking it is put on notice that it is no longer a negotiable instrument
- A Cheque may be crossed Ac Payee only in which case the bank must collect it only for the benefit of the named account and no other.

Assignments- simple transfer of rights of the lender without the borrower's consent

- LEGAL: S9 Law Amendment and Reform Consolidation Ordinance - Assignment of Receivables or debt may be done so by an instrument
 - in writing and signed by the assignor
 - absolute
 - Notified in writing to any person against whom the assignor could enforce the assigned right (on receiving notice of assignment, the borrower is obliged to pay any monies due under the assigned loan to the new assignee.
 - if not the assignment will be an equitable one
- Assignment can only transfer rights and not obligations
- However rights under a contract can be assigned without consent only in cases where it can make no difference to the person whom the obligation lies to which the two persons he is to discharge it (Tolhurst v Associated Portland Cement Manufacturers)
- Equitable Assignment- assignments given effect by the courts of equity and will thus only pass an equitable right to the chose in action, only intention to assign were plain an equitable assignment is valid, regardless of notice to the debtor. (Bluebottle UK v Deputy Commissioner of Taxation)
 - Intention to assign (Brandt Sons v Dunlop Rubber)
 - Assignee must consent to the assignment (Standing v Bowring)
 - No consideration is required (Holt v Heatherfield Trust)
- Assignee must join the assignor in any action on the debt (Three Rivers DC v Bank of England)
- Useful for banks who wants to assign part of an outstanding loan without disclosure
- Obvious disadvantage is that borrower does not have notice of the assignment and is entitled to continue making payments through the existing lender, which will render a good discharge of the debt and assignor is subject to equities (Commercial Factors v Maxwell Printing).
- Clear way to get around this is for the assignee to take conditions and warranties as well and representations and undertakings from the assignor that the money will be paid to them.

- Also rely on s9LARCO to send notice to the debtor upon certain events.
- Assignment of part of a debt (RE steel Wing) cannot be legally assigned as it is clearly not absolute and it would be ineffective under any statutory method for transferring part of a debt.
- Fixed Charge over book debts (National Westminster Bank v Spectrum Plus Limited): theoretically possible but creditor has to ensure that the charge is properly fixed and not floating, if the charger has to use the funds on a daily basis as working capital, the less likely the charge can be regarded as fixed.
- Security over a bank account (S15A LARCO, Re Charge Card Services): it is possible under the statute to do so but it may not be capable of being registered, (RE Brightlife) since it is unclear whether the money in the account represents a book debt.

SET OFF- a right to set a debt owed by a creditor to a debtor against the debtor's debt and so reduce or extinguish that debt

- Not strict security interest and not registerable
- Equitable right of Set Off
 - A bank may set off a liquidated debt owed to it by a borrower against a liquidated debt owed by it to that borrower
 - If the available if it would support the grant of an injunction in equity to restrain the plaintiff from proceeding at law (Murphy v Zamonex)
 - Geldof Metaalconstructie v Simon Carves- there must be
 - Clear cross claims for debts or damages, which
 - Were so closely related as to the subject matter that the claim sought to be set off impeached the other in the sense that it made it positively unjust that there should be recovery without deduction.
- Contractual set off
 - Most security documents supporting a loan will enhance the equitable right of set off by allowing the bank to set off unliquidated (contingent) claims. Where cross demands between agreeing parties are mutually extinguished
- Set off on liquidation
 - On commencement of winding up, mutual dealings exist which involve rights and obligations, where absolute or contingent, s35 Bankruptcy Ordinance.