

# Topic 5: (A) Priority Regimes and (B) Commercial Dealings as Security Interests Over Property

## Lecture 13

### Topic 5A Priority Regimes

#### 1. Priority under SOGA

- Scenario:
  - Looks like there are two legal owners.
  - Cannot have two legal interests. Not a priority issue. Identification issue - who is the legal owner?
- General rule
  - **Nemo dat quod habet - no one can give better interest than he possess**
    - If you are not the owner, you cannot make someone else the owner
    - Bona fide purchaser clears the title, but it is the owner of legal title giving you the title that gets you legal title.
  - In context of sale of goods
    - **SOGA s26**
      - (1) **Subject to the provisions of this Act**, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, **the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell**
      - (2) Nothing in this Act shall affect:
        - (a) **the provisions of the Factors (Mercantile Agents) Act 1923**

#### • Exceptions

##### A. Estoppel SOGA s26 (1)

###### ★ Summary

- Someone (normally a bailee) without legal title sells goods without owner's authority, based on Nemo dat quod habet, title cannot pass.
- But, if owner has made representation that would make buyer think bailee has authority, title can pass
- Representation:
  - ◆ More than mere giving possession to bailee [Thomas v Marac]
  - ◆ Signed transfer form and giving possession is enough [Eastern Distributors v Goldring]
  - ◆ Silence can be representation if owner has duty not to remain silent [Great Eastern Railway]
- **SOGA s26 (1)**
  - **...unless the owner of the goods is by the owner's conduct precluded from denying the seller's authority to sell**
- Question to ask:
  - Did the owner make representation to the buyer that the bailee has authority to sell?
    - ◆ E.g. I own a shop and its contents, I ask my mate to look after the shop for me. What do I have to do to represent to someone that comes into the shop to think my mate has authority to sell?
  - [Eastern Distributors v Goldring] - signed transfer form can be representation
    - ◆ Facts
      - ◇ M is a mobile greengrocer. M own a van, wants to buy a car. No money.
      - ◇ M engage car dealer C to arrange a deal to sell the van to hire-purchase company (ED), hire it back, use extra to pay for car.
      - ◇ C signed blank hire-purchase form and left it with Coker.
      - ◇ Deal fail.
      - ◇ C used the form M signed to sell van.
      - ◇ M thinks he still own the van, later sold it to G.
    - ◆ Issue:
      - ◇ Who is the owner of van? Eastern Distributor or G?
    - ◆ Held:
      - ◇ ED
        - ▶ After deal fail, C should stop. No actual authority to sell van.
        - ▶ **But, there is representation of authority to sell**
          - **Voluntarily giving possession is not enough, need signed transfer form.**
          - Coker was armed by Murphy with documents which enabled him to **represent to ED** that he was the owner of the van and **had the right to sell it**. The result is that M is, in the words of s 26, **precluded from denying Coker's authority to sell**, and consequently ED acquired the title to the goods which M himself had and **M had no title left to pass to G**
  - [Thomas v Marac] - just giving possession to bailee is not enough for representation
    - ◆ Facts
      - ◇ Owner of a car lease car to K, K sold it pretending to be the owner.
      - ◇ Buyer argue that he acquire good title from K since while K does not have legal title, the owner did not put sticker on the car when leasing to K, and this conduct preclude the owner from denying K's authority to sell?
    - ◆ Held:
      - ◇ No representation.

- ◇ Giving possession is not enough.
    - **[Great Eastern Railway] - silence can amount to representation, where the person has a duty not to remain silent.**
      - ◆ Facts
        - ◇ 2 delivery orders of same goods. Receiver sold goods.
      - ◆ Held:
        - ◇ Seller estopped from denying receiver's authority to sell.
        - ◇ Documents have mercantile meaning
        - ◇ Seller under a duty to say something, not to remain silence
        - ◇ When is there a duty not to remain silent?
          - ▶ e.g. when see ad of selling your goods that you did not authorise, then duty.
- B. **Sale by a mercantile agent SOGA s26(2)(a)**
  - ★ Summary
    - Someone without legal title sell goods without owner's authority to sell it, based on Nemo dat quod habet, title cannot pass.
    - However, if
      - ◆ This is a dealer, and **Factors (Mercantile Agents) Act 1923 (NSW), s3**
      - ◆ Have possession of goods with consent of owner, and **Factors (Mercantile Agents) Act 1923 (NSW), s 5**
      - ◆ In possession as a mercantile agent (not as fixer etc.), and
      - ◆ Sold goods (as disposition), and
      - ◆ In the ordinary course of business of a mercantile agent, and
      - ◆ Buyer buy in good faith without notice for value
    - Then title can pass
  - **SOGA s26(2)(a)**

(2) Nothing in this Act shall affect:

**(a) the provisions of the Factors (Mercantile Agents) Act 1923**
  - **Factors (Mercantile Agents) Act 1923 (NSW), s 5**

(1) Where a **mercantile agent is entrusted as such** with the possession of any goods or the documents of title to goods, any sale pledge or other **disposition** of the goods made by the agent **in the ordinary course of business of a mercantile agent** shall, subject to the provisions of this Act, be as valid as if the agent 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.**

    - Requirements:
      - ◆ **Mercantile agent** - Must be a mercantile agent
      - ◆ **Entrusted** - with the consent with the owner
      - ◆ **As such** - in possession as a mercantile agent.
        - ◇ Put car into car dealer for sale v put car into car dealer for service
      - ◆ **With possession of goods**
      - ◆ **Disposition of goods** - e.g. sale
      - ◆ **In the ordinary course of business**
      - ◆ **Buyer buying in good faith without notice for value**
- Section 3** 'Mercantile agent' means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.
  - i.e. Dealers.
  - Someone who pretend to be a mercantile agent?
- C. **Sale under voidable title (obtained from voidable K) SOGA s27**
  - ★ Summary
    - Someone has voidable title under a K. If he sell it to buyer who buy in good faith without notice for value before K rescinded, title can pass to buyer.
    - Not about void title (obtained by theft)
    - K normally rescinded by retake goods or communicate with other party intention to rescind.
      - ◆ But, if both not possible, other ways (e.g. telling police) can rescind K as well **[Car and Universal Finance v Caldwell]**
  - **SOGA s27**

Where the seller of goods has a voidable title thereto but the seller's title has not been avoided at the time of the sale, **the buyer acquires a good title to the goods, provided the buyer buys them in good faith and without notice of the seller's defect of title.**

    - **[Lewis v Averay]**
      - ◆ Facts
        - ◇ L induced by G to sell car to G. Let G take car away but cheque bounced. K voidable, title voidable but not avoided yet.
        - ◇ G sold to A
      - ◆ Held:
        - ◇ Although K voidable and G's title voidable, since title not avoided at them of sale, A good title under s27.
  - How do you rescind a K?