Nemo Dat and Secured Transactions Law Reform

Duncan Sheehan
Professor of Business Law

d.k.sheehan@leeds.ac.uk
1. Context to Reform

English law is uncodified and based on equitable and common law principles

4 consensual security interests

- Equitable charge (fixed or floating)
- Mortgage (legal or equitable)
- Contractual lien
- Pledge

Other title based financing devices are not security interests
2. Proposals

Two basic models and a compromise

1. Article 9 UCC/ Personal Property Security Act
   • Re-characterisation of retention of title clauses as “in substance” security interests (unitary model)
   • Other interests also included in the scheme as “deemed security” interests, including factoring arrangements

2. City of London Law Society
   • Retains the formal distinction between security and quasi-security
   • No registration of retention of title clauses
   • Includes “voluntary” registration of assignments of receivables
2. Proposals

3) Compromise?
• Registration of reservation of title clauses without re-characterisation (Quebec; possession model)
3. What Difference does it Make?

1. Under a PPSA, unregistered RoT clause normally void

- Nb New Zealand: priority is deferred
  
  *Dunphy v Sleepyhead Manufacturing Co. Ltd*[2007] 3 NZLR 602

- Quebec: reservation of title clause is deferred in priority if unregistered or registered late (after 15 day period up art 1749 QCC).

5. What Difference does it Make?

2. Some *nemo dat* questions become priority questions under a PPSA

- Imagine a seller-in-possession scenario *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514 (CA)

- Two sales and leaseback currently section 24 Sale of Goods Act 1979; under a PPSA a priority issue

- Pressure on boundary line...

- Under possession model, the question is *prima facie* different – does the third party take good title? Section 24 not obviously appropriate...

- What about inclusion of taking free rules in possession model?

- Consistency between those rules and SoGA 1979
3. What Difference does it Make?

3. CLLS leave it be...
- Distortions by attempts to reach through to proceeds

*Caterpillar (NI) Ltd v John Holt & Co (Liverpool) Ltd.* [2013] EWCA Civ 1232, [2014] 1 All ER (Comm) 393

*PST Energy 7 Shipping v OW Bunker Malta Ltd* [2016] UKSC 23, [2016] 2 WLR 1193

4. Whatever choices we make compromises are essential.