

CHATTEL SECURITIES ACT 1981, SS 8-10

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(1) Categories of Chattel securities transactions under Chattel Securities Act

Despite its title, the key term in the Chattel Securities Act is not "chattel", but "goods". "Goods" is defined in s 2(1) as including:

"all chattels personal and fixtures severable from the realty other than things in action and money."

The Act divides the various forms of chattel security transaction into three mutually exclusive categories, namely, goods mortgages, hire-purchase agreements and leases. These expressions are also defined in s 2(1).

"'Goods mortgage' means -

an instrument or transaction by or under which a security interest in or over an interest in goods is reserved or created or otherwise arises."

"Security interest" means, in effect, an interest reserved or created in goods by way of security for payment of a debt, but does not include an interest arising under a goods lease or a hire-purchase agreement. The expressions "mortgagor" and "mortgagee" are used to describe the parties to a goods mortgage.

"Hire-purchase agreement" has the same meaning as in the Hire-Purchase Act 1959. The expressions "hirer" and "owner" are used to describe the parties to a hire-purchase agreement.

"'Lease' means -

a contract for the hiring of goods or for the grant of a licence to use goods and any other contract for the bailment of goods but does not include a hire-purchase agreement."

The expressions "lease" and "lessor" are used to describe the parties to a lease.

(2) The function of ss 8-10

The function of s 8 of the Act is to alter the rules which govern a competition between the mortgagee of goods under a goods mortgage and a subsequent purchaser of an interest in the goods for value, in good faith and without notice of the mortgagee's security interest. Section 9 deals with the competition between the lessor of goods under a lease and a subsequent purchaser, and section 10 with that between the owner of goods under a hire-purchase agreement and a subsequent purchaser.

Apart from ss 8-10, the position governing such a competition depends principally on whether the interest in the goods of the mortgagee, lessor or owner (the "secured party") was legal or equitable. If it was a legal interest (as in the case of a legal mortgage, a hire-purchase agreement or a goods lease), it would as a general rule prevail over the interest of a subsequent purchaser (subject to the provisions in the sale of goods legislation relating to transfer of title). If it was an equitable interest (as in the case of an equitable mortgage or charge), it would as a general rule prevail over the subsequent purchaser of an equitable interest in the goods, but it would not prevail over the purchaser of the legal estate for value in good faith and without notice of the earlier interest.

Before turning to the new rules laid down by ss 8-10, reference should also be made to Part III of the Act, which complements these provisions. Part III provides for the registration of holders of certain interests in motor cars, trailers and some other vehicles (see s 13(1)). The interests in respect of which registration may be applied for are listed in s 16(1) as follows:

- (a) a security interest of a mortgagee under a goods mortgage;
- (b) an interest of a lessor under a lease; and
- (c) an interest of an owner under a hire-purchase agreement.

Subject to s 23 of the Act, registration protects the interest of the secured party from the operation of s 8, 9 or 10.

(3) The operation of ss 8-10(a) The general rule

The general rule laid down by ss 8(1), 9(1) and 10(1) is to the effect that a bona fide purchaser for value and without notice will defeat a secured party.

(b) Exceptions

This rule is subject to a number of exceptions:

- (i) it does not apply where the secured party is in possession of the goods (ss 8(1), 9(1) and 10(1));
- (ii) it does not apply where the sale to the purchaser is in pursuance of a process of execution issued by or on

behalf of a judgment creditor (sections 8(1), 9(1) and 10(1));

(iii) it does not apply where the purchaser is a person who carries on a trade or business in which he deals in goods of that kind unless the goods are goods to which Part III applies (ss 8(3), 9(3) and 10(3)) (where such a dealer resupplies the goods, his customer may be a purchaser and, if he is, s 8, 9 or 10 may operate in his favour);

(iv) it does not apply where the purchase price (that is, the conversion price) exceeds \$15,000, unless the goods are:

- a commercial vehicle (see s 2(1));
- farm machinery (see s 2(1)); or
- goods to which Part III applies (see s 13(1))

(see ss 8(5), 9(5) and 10(5));

(v) in addition, there is a partial exception to the general rule contained in s 11. Sub-section (2) of ss 8, 9 and 10 provides in each case that the onus of providing that the purchaser has acquired an interest in the goods free from the interest of the secured party is on the purchaser. Normally, the required standard of proof would be on the balance of probabilities, but s 11 provides that in certain circumstances, the purchaser must prove beyond reasonable doubt that the purchase is for value in good faith and without notice of the secured party's interest. Those circumstances are as follows:

- where the purchaser is a member of the same household as the seller;
- where the purchaser and the seller are related bodies corporate;
- where the seller is a body corporate of which the purchaser is a director or officer; or
- where the purchaser is a body corporate of which the seller is a director or officer.

(c) The concept of notice

The concept of notice, as employed in ss 8-10, is governed by s 2(3) of the Act, which lists three circumstances in which a person will have notice of the interests of a secured party:

- (i) where he has actual notice of the interest;
- (ii) where the interest is in goods to which Part III applies, if the secured party is registered as its holder; and
- (iii) where he has been put upon inquiry as to the existence of the interest and has deliberately abstained from inquiry when he might reasonably have expected the inquiry to reveal the interest.

(d) The effect of registration under Part III

The relationship between ss 8-10 and Part III of the Act will now be evident. By force of s 2(3), but subject to s 23, registration of a secured party puts a purchaser on notice of the secured party's interest in the goods and so prevents the operation of s 8, 9 or 10 in the purchaser's favour.

However, that is the only effect of registration. In particular, registration does not give the secured party priority over a subsequently created or registered security interest in the goods. Nor, in contrast to the position under the bills of sale legislation (repealed by s 27 of the Act), does failure to register result in avoidance of the security.

(e) Purchase for re-supply by way of lease or hire-purchase

What is the effect of ss 8-10 where the person who purchases the goods is a financier who is acquiring them for the purpose of resupply by way of lease or hire-purchase?

(i) Where the goods are not goods to which Part III applies

The financier would normally be a person who carries on a trade or business in which he deals in goods of that kind. Therefore, s 8(3), 9(3) or 10(3) would apply to prevent his being treated as a purchaser and his purported acquisition of the goods would not extinguish the secured party's interest pursuant to s 8, 9 or 10. On the other hand, the latter outcome should follow subsequently, as a consequence of the acquisition of the goods from the financier by the lessee or hirer but a lessee or hirer is not a purchaser unless or until any option to purchase is exercised.

(ii) Where the goods are goods to which Part III applies

Where the goods are goods to which Part III applies, ss 8(3), 9(3) and 10(3) will not prevent the financier from being treated as a purchaser, so that his acquisition of the goods may extinguish the secured party's interest, provided it is not registered and provided the other requirements of s 8, 9 or 10 are satisfied.

This outcome may be a defensible one in most cases, but not in the following one:

- A mortgages his motor car to B to secure an advance;
- B fails to register under Part III;
- A subsequently, and without B's consent, sells the motor car to C who lets it back to A on hire-purchase;
- C has no notice of the mortgage in favour of B and has not been put on inquiry.

In these circumstances, s 8 will operate to extinguish B's interest when C acquires the goods, and C will acquire the goods free from B's interest. This result is wrong because functionally the transaction between A and C is a security transaction, not a purchase, so that the competition between

A and C is one not between a secured party and a purchaser, but between two secured parties. Accordingly, the issue should be, not whether C takes his interest in the goods free from, or subject to, B's interest, but rather which of B and C has first claim on the goods by way of realization of his security. However, the effect of s 98 is to deny B any claim on the goods at all, even in the event of there being a surplus after C's claim is satisfied.