**LETTER OF COMFORT**

Generally, given by holding company in favour of subsidiary regarding the policy it will adopt to guarantee debts of subsidiary.

**Legal Structure**

Whether a letter of comfort constitutes a moral or legal obligation depends on whether the wording and intention creates a contractual obligation or not. **Kleinwort Benson Ltd v Malaysia Mining Corporation (UK Case):** MMC got loan from Kleinwort for subsidiary with clause saying it was their policy to ensure that the business of the subsidiary was in all times in a position to meet its liability under loan agreement. Held: moral obligation, sufficient uncertainty of word ‘policy’ – could mean many things.

**Gate Gourmet Australia [2004]:** If you wish to create a moral responsibility only, needs to be explicitly stated in contract.

**NEGATIVE PLEDGE**

Promise by borrower that it will not create any further rights in respect of its assets in favour of another creditor, which would enable latter to rank ahead of number one. Contractual undertaking restricting right of borrower to create, or permit give notice of intention to do so. **Held:** reasonably intelligent bystander test – observing the negotiations between the parties would they conclude it was a moral or legal responsibility? Promise held to be binding in this case.

**Application to appoint receiver**

Will appoint receiver where risk that assets available to satisfy debt may be dissipated

**Factors Act 1892 (Qld) s 2 & 3**

- S 2 definition of mercantile agent:
  - Any person who, in the ordinary course of their duties buys, sells, consigns, trades or raises money against their principal's goods to a third party
- S 3 – powers of mercantile agent
  - If owner consigns to mercantile agent with intention they should sell for them – then provisions of section 3 override nemo dat rule

**Promises to obtain security**

Contractual undertaking – mere promise to give security when called upon unlikely to be specifically enforced. Will most likely have to pursue an action for damages.

**Transferring title – nemo dat rule**

General rule: nemo dat quod non habet – no-one gives what they do not have.

Rule restated in s 24 of the SGA – no-one can transfer better title than they have, fact that the purchaser gives good consideration and acts in good faith without notice of seller’s want of title is irrelevant.

**Exceptions to Nemo Dat**

1. **Estoppel by words or conduct or negligence s 24(1)**
   - (a) estoppel by words or conduct:
     - Seller pretends or gives impression they are entitled to sell goods and true owner does not correct them, buyer who buys in good faith can estop owner from exercising title rights

   **Eastern Distributors v Golding:** owner of MV wished to purchase another vehicles from motor dealer, dealer made plan to get him finance – owner signed forms transferring title to dealer to get finance, dealer sold car, owner esposed fromes from covering from purchaser.

   **Thomas Australia Wholesale Vehicle Trading Co v Marac Finance Australia:** owner may be precluded from denying seller’s authority by reason of conduct which, expressly or impliedly, constitutes an unambiguous representation that seller has authority to make sale. In some situation – failure to take steps to prevent sale may estop from asserting title. Inaction, silence or even gross carelessness in protection of property not enough by itself.

   (b) estoppel by negligence
     - Negligence by true owner results in buyer being misled

   **Mercantile Credit v Hamblin:** old lady wanted loan against MV, dealer got her to fraudulently fill out forms, didn’t know they were transfer of title forms. Held: in order to establish negligence BUYER has to establish owner owed duty of care to be careful, owner didn’t exercise reasonable care and this failure was proximate cause of damage. Elderly lady unschooled in business matters.

2. **Sale by mercantile agent s 24(2)**

   **S 3:** where a mercantile agent, with consent of owner, is in possession of goods or documents of title, any sale, pledge or other disposition of goods in the ordinary course of business as a mercantile agent shall be valid as if expressly authorised to make sale.
   - **Factors Act 1892 (Qld) s 2 & 3**
   - **S 2 definition of mercantile agent:**
     - Anyone who, in the ordinary course of their duties buys, sells, consigns, trades or raises money against their principal’s goods to a third party
   - **S 3 – powers of mercantile agent**
     - If owner consigns to mercantile agent with intention they should sell for them – then provisions of section 3 override nemo dat rule

**Ordinary course of business**

**Stiffs Motor Guarantee v British Wagon Co:** mercantile agent came into possession of goods under HP agreement outside normal course of his business – didn’t have possession of goods in his capacity as a mercantile agent.

**Pearson v Rose & Young:** dealer who was only authorised to have possession of car to solicit offers for owner acting outside ordinary course of business in selling car after obtaining registration book by a trick.

**Stadium Finance v Robbins:** car dealer sold outside ordinary course of business who sold car without access to registration book and key.

**Seller in possession after sale s 27(1)**

**Seller sold goods, not delivered – retains possession after sale and sells to an innocent third party.**

**Bible Gateway**

**Isaiah 49:16**

1. I have not hid thy name, O Lord: thou art my salvation.
2. Therefore with a glad heart will I sing unto the Lord, and be joyful in the God of my salvation.

**Nations**

**Canada**

**March 14, 2023**

**International Organization for Standardization (ISO)**

**ISO 9001:2015**

1. **Quality Management Systems**
2. **Requirements**

1. The organization shall establish, implement, maintain and continually improve a quality management system to enhance customer satisfaction.
2. The organization shall ensure that the quality management system is integrated into the organization's processes and is aligned with its strategy and objectives.

**Terms of Service**

**Privacy Policy**

**Accessibility Statement**

**Copyright © 2023 Bible Gateway, a division of Bible Society. All rights reserved.**
Distinguish from combination

**Requirements**
- Right arises by operation of law.
- Owed to bank by use of funds held by the customer (in that capacity) in an account with the bank.

**Distinguish from combination**
- Must be two independent debts
- Any balance left after set off is then the balance to be paid

**RIGHT OF SET OFF/COMBINATION OF ACCOUNTS**

**Excluded from PPSA under s 8(1)(d).**

**Definition:**
- Common law right of debtor (normally bank) to set-off amounts owed to bank by use of funds held by the customer (in that capacity) in an account with the bank.
- Right arises by operation of law.

**Requirements**
- Must be two independent debts
- Any balance left after set off is then the balance to be paid

**Combining of client’s accounts in order to arrive at overall debt owed**
- Right of combination operates where parties are dealing with each other on the basis of a running account governed by one contract
- Law regards multiple accounts of clients as part of the same contract between banker and customer
- The combined balance can then be set off against another independent account giving rise to a separate debt
- Bank normally contracts for right of combination

**Set off under Statute: bankruptcy and liquidation**
- S 86 Bankruptcy Act
- S 553C Corporations Act – liquidation of companies

**Set off in equity**
- In England – view is that set-off claims will be allowed where the cross-claims are so closely connected with the plaintiff’s demands that it would be manifestly unjust to allow them to enforce payment without taking into account the cross-claim
- Not clear whether Australian courts would take this view

**Examples:**
- Landlord and tenant
  - Beasley v Darcy: Tenant owed rent but entitled to set off damage incurred by landlord’s excursions onto property to cut down timber (debt for damage v debt for rent)
- Lawyers
  - Pigott v Williams: client being sued for failure to pay solicitors account allowed to set off claim against action for negligence against solicitor

**Set off under contract**
- Usually designed to extend rights of set off acquired by statute and equity – can include third parties in agreement
- Set off created by agreement only effective where customer not subject to bankruptcy or liquidation proceedings (National Westminster Bank v Halesowen Presswork)

**Banks attempting to create a charge**
- Banks tried to get customers to give charge over their bank accounts (credit balance) as they believed this would give them security a right to set off would not in event of insolvency
- Bank is bailee of money in account, client has a chose in action to claim for negligence against bank

**S 86 Bankruptcy Act**
- Bank normally contracts for right of combination

**Example of an SI under s 12(2).**
- Morris v Agrichemicals: conceptually impossible for bank to be both bailie and chargeree at same time

**Flawed asset arrangements s 12(2)(l)**
- Definition: conditions imposed on an asset (typically an account) which trigger before other interests arise.
- Commonly used for accounts where bank will not authorise instruction to pay at request of account holder until rights owing to bank are duly met
- In a commercial sense the flawed asset is simply the mechanism by which the rights of set off and combination are effectuated
- No relevant case law from US, NZ or Canada on this point

**ROMALPA CLAUSES – RETENTION OF TITLE CLAUSES**

**Benefit:**
- Two remedies, retention of title gives remedy of repossession and equitable remedy of tracing gives right to follow proceeds.
- Need fiduciary relationship for tracing
  - Obligation to place proceeds in separate and distinct bank account
  - Stipulate that seller must sell goods at accepted market value - establishing an agency relationship
- Problems with co-mingled goods – using goods that were subject to retention of title to make other goods.

**Key points**
- Wording of clause is crucial – any ambiguity or lack of clarity may well be held to merely create a charge
- One goods become inseparable from finished product title passes to buyer
- Clauses seeking to reserve title in finished product will be reinterpreted as intending to create charge
- Clauses which clearly establish a fiduciary relationship between supplier and buyer for proceeds can be effective but need to require monies to be kept separate and apart
- Granting of period of credit to buyer could destroy claim of fiduciary relationship

**Aluminium Industry Vassen BV v Romalpa Aluminium:**
- A clause in a contract reserving title in goods until goods are paid for is called a ‘Romalpa Clause’, clause may also be extended to entitle owner to trace proceeds of sale due to romalpa clause where proceeds held on trust for supplier.
- Facts: sale of aluminium foil – company went broke, tried to recover remaining foil and money from proceeds, allowed to repossess foil – but needed a fiduciary relationship between parties for remedy of tracing. Here normally no fiduciary relationship, but clause 13 in contract gave implied power of sale to on-sell to purchasers, was an agent selling the principal’s goods so in a fiduciary relationship to principal and remains accountable for goods and proceeds.

**Manufactured goods and charges**
**LIENS**

**Definition:**

- **Re Peachdart**, leather used to make handbags, seller tried to include right to have ownership of manufactured goods. **Held:** inequitable to grant seller retention of title for manufactured goods (re-interpreted contractual term on basis of equity), must have intended it to be a charge – but if charge not registered then not binding on receiver.
- **Co-mingled goods**
  - **Borden v Scottish Timber Products**: resin used to make chipboard, supplier lost title in resin when resin ceased to exists – could not be separately identified from chipboard as finished product.
  - **Hendy Lennox v Grahame Puttick Ltd**: diesel engines supplied to be incorporated into generators were able to be repossessed since could undo bolts and separate from engines to get back to original form.
- **Proceeds of co-mingled goods**
  - **Associated Alloys v CAN Ltd**: sale of steel used to manufacture boilers, wrote term into K requiring right to recover certain amount of proceeds as owed. Held: bank account has proceeds from sale of manufactured goods which were a value added product, claim tried to include claim for all steel sold and unpaid for – great deal of that sitting in unsold boilers so can't claim proceeds for that, need to submit claim on basis of amount of steel in each boiler sold – should have worked out how much steel in each boiler and get sale report for each month.
  - **Re Andrabell**: ability of original supplier to trace proceeds of leather used in handbags denied since no express requirement of buyer to hold proceeds on trust, or in fiduciary capacity for seller. Unlike in Romalpa case:
    - This can be evidenced by implied power of sale in contract
- **Tracing – fiduciary relationship**
  - Need a fiduciary relationship (Re Hallets)
  - This can be evidenced by implied power of sale in contract
- **Re Andrabell**: ability of original supplier to trace proceeds of leather used in handbags denied since no express requirement of buyer to hold proceeds on trust, or in fiduciary capacity for seller. Unlike in Romalpa case:
  - **No express acknowledgement of fiduciary relationship**
  - **No provision obliging buyer to store goods in a way that manifested ownership of seller**
  - **No provision that seller should obtain benefit of any claim against sub-buyer**
  - **No obligation under contract to keep proceeds of re-sale separate from its own monies**
  - **Could not be contended buyer was selling as an agent**
  - **No concession that buyer was a bailee**
  - **Period of credit difficult to reconcile with obligation to account – credit period implies buyer is free to use money for their own purposes**

**All Monies’ Romalpa Clauses**

- Where seller reserves ownership of all goods supplied until all money due under the contract(s) has been paid.
- **Armour v Thysen**: all monies clause effective in reserving title until whole amount is paid.
- **Puma Australia v Sportman’s Australia Ltd**: confirmed Australian position mirrors UK – all monies clause effective in reserving title until whole amount paid.

**A lien is a right given to the person in possession of goods to retain them until payment of a debt arising under a K for provision of services to those chattels.**

**Barrat v Gough-Thomas**: definition of lien – lien arises by operation of law and entitles holder to retain possession until payment of obligation

- **Nature of remedy**
  - A remedy in rem (raised against the good) distinguished from a remedy in res (against the person), remedy against the chattel.
  - Owner of goods has strongest rights: ownership rights and remedy of repossess/indication
  - Lien gives a remedy against owners right to recover or vindicate goods – can legitimately retain possession in face of owners rights but can only retain goods for a reasonable period of time
  - What is a reasonable period of time depends on the circumstances
  - Use possession as leverage to persuade owner to pay

- **Characteristics**
  - Arises out of operation of law
  - Relies on possession – if lien holder loses possession he loses his right to security
  - Redelivery of the goods to the owner destroys the lien
  - Lien is cancelled once payment is tendered in full
  - Can only sell goods upon obtaining judgment

**Lien arising by operation of law**

- Common law recognised categories of people entitled to liens
  - **Artifices** (e.g. mechanics, people with particular skill sets)
    - **Tappenden v Artus**: artificer’s lien for repairs
  - **Innkeepers** – providing a public service, can exercise lien over premises, lien extends to debts incurred for accommodation and any good served during stay but DOES NOT extend to incorporate liquor provided.
  - **Transporters** (shippers, ship owners, railways etc.)
  - **Lawyers** – right to lien over files and contents of client files

**Arisng out of local custom**

- **Majeu Carrying Co v Coastal Rutile**: applicant tried to claim a new category of lien – warehouser’s lien of general possession. Warehouse storing bags of rutile that were reading for shipping, C hadn’t paid bill for storage – M claimed lien on goods claiming that warehouser also had a lien as this was a ‘trade custom’. **Held:** Claim denied, rigorous proof required to establish a custom of this nature, applicant to prove:
  - Certainty and lack of ambiguity as far as right of warehouser to this claim
  - Reasonableness and
  - Longstanding practice

**Possession: bailee cases**

- **Abermarle Supply v Hinde (UK TAXI CASE)**: garage sold London taxis to taxi owner on hire purchase, hire purchase agreement included a right to maintain the goods/take taxis to a servicer for repairs. Parked taxis at a particular garage, agreement was service + overnight storage. Seller aware of arrangement – had continued over 3 years and had never enforced right to stop buyer from creating lien. Garage was aware taxis bought under HP but not aware of contractual terms prohibiting creation of liens. Defaulted on finance payments – finance company tried to repossess cars. Defaulted on bill – garage owner exercised lien over taxis. Seller brought action against garage.
  - **Held:** owner had knowledge of arrangement with garage – was estopped from claiming rights since he had allowed it – by not exercising his rights every time he had waived rights and was estopped from claiming these rights. Bailee (HP buyer) could provide a lawful possession over which a provider of skills could exercise a lien.
  - **Fisher v Automobile Finance Co of Australia (Aus post)**: F garage owner, A was HP seller and M R was HP buyer of truck. Clause in K – not entitled to create liens over goods without consent. Brought truck to F for repair, F exercised lien after default. A acted to recover truck as soon as they found out.
  - **Held:** didn’t adopt reasonable use approach, and facts did not allow a plea for estoppel in this case. Not prepared to infer authority based on reasonable use to buyer to create lien. No one but the owner can create a lien for repairs on the owner’s property.

**Statutory Exceptions**

- **Disposal of Uncollected Goods Act 1967 (Qld)** – goods sold in circumstances where seller has reasonable doubt that they will be reclaimed. **Held:** goods sold and lien not recorded. **Held:** lien not recorded. **Held:** goods sold and lien not recorded.

**Survivors’ Rights**

- **Retain possession of property pending payment**
  - Exercise additional right to recover debt by court action – obtain judgment before selling
  - MAY NOT
    - **MAY NOT**
      - Sell or deal with property at own will
      - Sell interest as a lienee
      - Can’t charge for storage of goods exercising a lien over
  - **Statutory Exceptions**
    - **Disposal of Uncollected Goods Act 1967 (Qld)** – allows right of sale over goods that have been effectively abandoned with notice