THE DEVELOPMENT OF NEW ZEALAND'S SECURED TRANSACTIONS JURISPRUDENCE

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I INTRODUCTION

In many jurisdictions, including Australia and New Zealand, the law of secured transactions has traditionally been a complex and often uncertain branch of the law that lacks transparency and conceptual coherence.[1] But on 1 May 2002, with the commencement of the *Personal Property Securities Act 1999* (NZ) ('*NZPPSA*'), New Zealand implemented a new regime for regulating the use of personal property as security for the repayment of loans and the performance of other obligations. Australia is now following suit with the coming into force in early 2012 of Australia's version of the *NZPPSA*, the *Personal Property Securities Act 2009* (Cth) ('*Australian PPSA*').

In New Zealand, the new regime has been regarded as one of the most significant commercial law reforms ever to take place.[2] Its significance derives not only from the impact on, and importance of, the subject matter to business practice but also from the fact that the reforms proceeded on a wholly different conceptual basis to the prior law. This latter point distinguishes secured transactions law reform from other important commercial law reform initiatives, such as company law reforms, which, while often substantial and significant, have rarely proceeded on such an entirely new theoretical basis. It might be expected that the novelty of the concepts, at least to Australasia,[3] would influence the judicial treatment of the new regimes. Nearly a decade (and around fifty decisions) later, it is now possible to assess how the New Zealand courts have responded to the new concepts. This article reviews the prior law, looks at the

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1 See generally New Zealand Law Commission, *Reform of Personal Property Security Law*, Preliminary Paper No 6 (1988) 50.

2 *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528, 530, citing Michael Gedye, *Fundamentals of the Personal Property Securities Act*, Legal Research Foundation Seminar (8–9 February 2000).

3 In fact, aspects of the concepts underpinning the new regime had been introduced into New Zealand law prior to the enactment of the *NZPPSA*. For example, the *Chattels Transfer Act 1924* (NZ) s 18A – introduced from 1 January 1975 by the *Chattels Transfer Amendment Act 1974* (NZ) s 2 – anticipated the *NZPPSA* definition of a security interest a quarter of a century before the *NZPPSA* was enacted. See also the definition of 'security interest' in the *Motor Vehicle Securities Act 1989* (NZ). What was novel in the *NZPPSA* was the application of these concepts to a comprehensive secured transactions regime.

history and rationale of the reforms and analyses the subsequent development of the relevant New Zealand jurisprudence. Some passing comments will also be made on how the similar reform initiatives currently being implemented in Australia may play out.

The author deals just with the use of personal property as collateral; interests in land are not considered. The personal property securities legislation of both New Zealand and Australia only peripherally affect the use of real property as security. Where land is used as collateral, Torrens legislation in both countries continues to govern so that a mortgage registered under that legislation remains the best form of security over land. Inevitably, transactions will arise, such as assignments and/or security over rental payments due under a lease of land, that have aspects of both real and personal property law and that require a choice as to which regime should apply.[4] Occasionally, the *NZPPSA* may impact more directly on the law and practice relating to certain interests in land. For example, mortgages of land on which crops are growing may potentially be affected by a perfected security interest in the crops as personal property.[5] Also, since the implementation of the *NZPPSA* regime, and as a consequence of the abolition of the registration of company charges under the *Companies Act 1993* (NZ) ('*Companies Act*'), mortgages or charges over land owned by companies are no longer separately publicised in New Zealand through registration under the *Companies Act*. This latter point may have precipitated some changes in practice, such as encouraging the use of separate *Land Transfer Act 1952* (NZ) mortgages rather than simply relying on a general charging provision in a company debenture document, but this was always the prudent practice and the *NZPPSA* did not introduce any conceptual changes to the law relating to mortgages over real property.

II THE NEW ZEALAND LAW BEFORE 1 MAY 2002

Before the *NZPPSA* was enacted, the law of transactions secured over personal property was an admixture of statute, common law and equity that drew substantive legal distinctions (with significant economic consequences) based on:

- the legal form that transactions took;
- whether or not the debtor was incorporated; and
- the types of personal property involved.

New Zealand had always recognised the traditional English common law and equitable security devices of the pledge, mortgage, fixed charge and floating charge but, even though the law was based on the same common law and

4 See, eg, *Marac Finance Ltd v Greer* (Unreported, High Court of New Zealand, Hansen J, 11 January 2011) where the Court had to determine the respective priorities of an all assets security interest perfected under the *NZPPSA* and a mortgage over land, which included an assignment of rentals, that was registered under the *Land Transfer Act 1952* (NZ).

5 See *NZPPSA* s 101.

equitable principles, the New Zealand statutory overlay could produce different outcomes to those in England. Legislatively, the law had developed in a desultory way, with a number of home grown amendments to the English precedents on which the New Zealand legislation was based.[6] By the time the *NZPPSA* came about, the prior regime involved three principal registration statutes[7] that were neither mutually exclusive[8] nor comprehensive in aggregate.[9] Financiers seeking to avoid registration requirements could employ retention of title arrangements such as *Romalpa* clauses or leases that were generally effective without registration.[10] The efficacy conferred on retention of title clauses by sections 19, 21 and 23 of the *Sale of Goods Act 1908* (NZ) (which are still in force but now subservient to the *NZPPSA*) meant such clauses became ubiquitous.

Shortcomings in the prior law, which had been identified as long ago as the 1950s,[11] included non-uniform registration requirements and non-uniform consequences of non-registration under the various registration statutes and technically obsolete registers. Such anomalies created significant gaps in the pre-*NZPPSA* registration regimes. Eventually, it was decided that a substantially new approach needed to be adopted and the *NZPPSA* was enacted. The three principal registration regimes of the *Chattels Transfer Act 1924* (NZ), the *Companies Act* and the *Motor Vehicle Securities Act 1989* (NZ), which required registration of security agreement documents, or particulars of them, were abolished and replaced with a single electronic registration regime that requires registration of a description of the property given as security rather than registration of the security agreements themselves. The new approach (known as notice registration) allows registration to take place prior to completion of a security agreement and also allows a single registration to cover more than one discrete secured transaction.

A change of greater doctrinal significance was that under prior law, much of consequence turned on the precise legal form that transactions took, particularly provisions relating to the retention or transfer of title, whereas within the

6 For example, periodic amendments to the *Chattels Transfer Act 1924* (NZ) – such as the customary hire purchase regime found in s 57 and the inventory financing provision in s 26(1)(d) introduced by the *Chattels Transfer Amendment Act 1974* (NZ) – over time resulted in a regime quite different to the English Bills of Sale legislation on which it had been modelled.

7 The *Chattels Transfer Act 1924* (NZ), the *Companies Act 1955* (NZ) (the registration of charges provisions of this Act were temporarily carried forward under the *Companies Act 1993* (NZ)) and the *Motor Vehicle Securities Act 1989* (NZ). These registration regimes were repealed by the *NZPPSA* but other specialist registration regimes, for example under the *Ship Registration Act 1992* (NZ), have been carried forward.

8 Some single transactions could necessitate registration under more than one statute.

9 Some transactions might escape registration under any of the statutes.

10 Subject to s 27(2) of the *Sale of Goods Act 1908* (NZ), which could give a buyer priority over an unregistered retention of title arrangement.

11 G Cain, 'The Chattels Transfer Act: Oddities and Oddments' (1959) 35 *New Zealand Law Journal* 87. See also Stefan A Riesenfeld, *The Quagmire of Chattels Security in New Zealand* (Legal Research Foundation, University of Auckland, 1970).

confines of the *NZPPSA*, such distinctions no longer matter.[12] On the other hand, it is important to appreciate that the *NZPPSA* does not abolish the old forms of pledge, mortgage, fixed charge and floating charge; rather, for the purposes of secured transactions law, the *NZPPSA* abolishes the legal significance of any distinctions between them. The old forms of security device may still be employed, though alternatively the more generic concept of a 'security interest' can be utilised. In effect, the old forms are subsumed within the unitary concept of a security interest for the purposes of the *NZPPSA* but may retain relevance outside the *NZPPSA*; even in other legislation dealing with secured transactions such as the mortgage enforcement provisions of the *Property Law Act 2007* (NZ)[13] and various provisions of the *Companies Act*.[14]

III THE PEDIGREE OF THE *NZPPSA*

Until the latter half of the 20th century, disparate and inconsistent secured transaction laws were a near universal problem. But in the United States, a number of factors not present in New Zealand (or Australia) contributed to the need for reform. United States courts had rejected the concept of the floating charge,[15] so this equitable device that had facilitated secured financing in the Commonwealth never took root there. This inevitably led lawyers to try to work around the problem and gave rise to a multiplicity of artificial security devices that, because of the American federal legal system, inconveniently came to be regulated differently in different states. The desire to rationalise the artificial security devices that had developed, and the quest for commercial laws that were common across states, eventually gave birth to Article 9 of the United States' *Uniform Commercial Code* ('Article 9'). Article 9 was first enacted in Pennsylvania in 1953 and has subsequently been adopted in all states. It has been substantially rewritten on a number of occasions but remains true to its conceptual roots. The philosophy underpinning the original design of Art 9 in the 1940s and 1950s was that all transactions, the function of which is to secure performance of an obligation by creating or reserving an interest in personal property, should be regulated in like manner.[16] As Gilmore writes: 'The idea

12 See, eg, *NZPPSA* s 17(1)(a) (a security interest is defined 'without regard to … the identity of the person who has title'); *NZPPSA* s 24 ('The fact that title to collateral may be in the secured party … does not affect the application of any provision of this Act relating to rights, obligations, and remedies').

13 Pt 3 sub-pts 5, 6.

14 See, eg, the related definitions of 'charge' and 'secured creditor' in s 2 of the *Companies Act,* which are relevant to such provisions as s 221(4)(a) (notice of amalgamation proposal must be given to secured creditors) and s 305 (rights and duties of secured creditors on liquidation). The analysis in *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602, [36]–[37] ('*Sleepyhead*') to the effect that the definition of charge under the *Companies Act* must be interpreted consistently with the definition of security interest under the *NZPPSA* is discussed below.

15 *Benedict v Ratner*, 268 US 353, 360 (1924) established, 'a transfer of property which reserves to the transferor the right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to creditors, fraudulent in law and void … whether the instrument of transfer be recorded or not'.

16 See Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Company, 1965) ch 9.

which the draftsmen started with was that the system of independent security devices had served its time; that the formal differences which separated one device from another should be scrapped and replaced with the simple concept of a security interest in personal property.'[17]

Despite the slightly different impetus for reform, this philosophy also underpins the *NZPPSA* (and the *Australian PPSA*) and accounts for a core feature of the legislation: namely, what is variously described as the 'unitary', 'functional' or 'in substance' security interest. By this is meant a single, comprehensive statutory definition of a security interest that is based on the commercial function or economic substance of a transaction and that does not turn on the particular legal form adopted. This definition encompasses all prior security devices, and more,[18] unifying them so that they may still be utilised but in a way that ensures substantive outcomes will no longer depend on formalistic distinctions. A transaction will create a security interest if its commercial function, or economic substance, is to secure performance of an obligation, regardless of the description and wording utilised by the parties.[19] This feature of the definition, which is common to most security interests,[20] has long been recognised and should not be regarded as controversial, yet it is a source of enduring resistance. Early evidence of the recognition of the functional security interest is seen in the recommendation that conditional sales should be declared by statute to be chattel mortgages, noted by Burdick in 1918,[21] and some American state law to that effect.[22] Early resistance to the concept is also identified by Burdick, who pointed out:

> It was the opinion of the great majority of [Commissioners on Uniform State laws], that a conditional sale differs, *in substance as well as in form,* from a chattel mortgage, and that sound business policy is subserved by continuing this distinction. The primary purpose of a chattel mortgage is to secure a debt due the mortgagee by giving him a defeasible title to certain goods of the mortgagor. The primary purpose of a conditional sale is to prevent ownership of certain goods passing to the purchaser, until a stipulated event – usually the payment of the purchase price.[23]

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17 Ibid 290 [9.2].

18 Retention of title transactions are the principal group of transactions that are now swept up by the functional definition of security interest but that were not *consistently* regulated as security interests under the prior law. Of course, some prior laws, such as s 18A of the *Chattels Transfer Act 1924* (NZ), did regulate title retention arrangements as secured transactions.

19 See, eg, *NZPPSA* ss 17(1)(a), 17(3). Most significantly, it makes no difference which of the parties holds traditional legal title.

20 Most, but not all, security interests. For pragmatic reasons, the definition of security interest is extended to include certain transactions that do not secure performance of an obligation: see *NZPPSA* s 17(1)(b); Michael Gedye, Ronald C C Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 82–5 [17.3].

21 Francis M Burdick, 'Codifying the Law of Conditional Sales' (1918) 18 *Columbia Law Review* 103, 107.

22 Burdick notes that 4 Vernon's Sayles' Texas Civil Statutes 1914, art 5654 provided that '[a]ll reservation of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages': ibid.

23 Ibid (emphasis added).

The distinction referred to is, of course, now recognised as little more than a legal fiction – the fallacy in the reasoning being to confuse the purpose of the transaction with the outcome dictated by the legal form. Few would now doubt that the primary purpose of both the chattel mortgage and the conditional sale is to utilise a proprietary right in personal property to secure a debt due from the debtor.

Although the New Zealand legislation owes its conceptual pedigree to the Uniform Commercial Code of the United States, the version of Article 9 ultimately enacted as the *NZPPSA* came via Canada. In 1967, Ontario enacted a personal property securities legislation modelled on Article 9. Modified versions were subsequently adopted by the other Canadian provinces and when the New Zealand Law Commission recommended the adoption of a similar model for New Zealand, it modelled its draft Act on the legislation then proposed for British Columbia.[24] Subsequently, the Ministry of Economic Development took responsibility for enacting legislation and prepared a draft Bill[25] that departed from the Law Commission's draft Act, and the North American precedents on which it was based, in some fundamental respects. The drafters had attempted to improve upon the North American model but in doing so had introduced a number of serious flaws. As a consequence of submissions from concerned parties, a second version of the Bill was prepared that largely reverted to the Canadian model enacted in Saskatchewan, so that the fundamental flaws were remedied whilst retaining some incremental changes and New Zealand drafting conventions. The differences between the New Zealand and Saskatchewan Acts essentially devolve into two categories:

1. variations resulting from deliberate policy choices to depart from the substantive Canadian law; and
2. the adoption of New Zealand drafting styles and conventions that resulted in the New Zealand provisions being worded differently to their Canadian counterpart where there was no intention to alter the substantive law.

There are also structural differences between the New Zealand and Canadian Acts that, together with the differences in wording (whether as a result of the policy or stylistic choices) produce two consequences. First, there is the risk with any novel and untested drafting that errors will be introduced and second, there is the prospect, when the wording of imported legislation is varied, that foreign precedents will be less applicable (for better or worse). Indeed, a number of errors or anomalies were introduced into the *NZPPSA*. Since the *NZPPSA* came into force on 1 May 2002, some of these have been rectified by amending

24 See New Zealand Law Commission, *A Personal Property Securities Act for New Zealand*, Report No 8 (1989).

25 Copies of this draft Bill were distributed to interested parties, including the author, who has a copy on file.

legislation.[26] Nevertheless, rectification appears to be an ad hoc process. Other proposed remedial provisions have not proceeded and there appears to be no clear strategy for reviewing the legislation, whether for the purpose of rectifying known errors, evaluating the success of the regime or with a view to making improvements to keep abreast of changing circumstances. Section 343 of the *Australian PPSA* requires a mandatory review of the Act within three years. Although had the *NZPPSA* contained a similar provision it is likely that outstanding issues would already have been addressed, a similar outcome may yet be achieved by executive fiat. An expert committee should be established by the Minister of Economic Development to conduct a review along the lines proposed by the *Australian PPSA* to evaluate the New Zealand regime and determine what amendments are desirable.

The new Australian *Australian PPSA* obviously has a pedigree similar to that of the New Zealand legislation, but being the more recent has also had the opportunity to draw on both the *NZPPSA* and recent developments in North America. It also includes many local innovations, both stylistic and substantive. One downside of such innovations, apparent also in New Zealand, is the increased difficulty of determining the relevance of foreign precedents decided on equivalent, but differently worded, legislation.

IV OTHER FACTORS SHAPING THE NEW ZEALAND JURISPRUDENCE

In addition to the drafting differences between the Canadian and New Zealand legislation, environmental and cultural differences in business practice between Canada and New Zealand have contributed to some divergence in the way in which Canadian and New Zealand secured transactions jurisprudence has developed. Even if the *NZPPSA* had been identical to the Canadian legislation, it is unlikely that New Zealand courts would have uncritically adopted the analysis and reasoning of Canadian courts.

Distinctive features of New Zealand secured transactions practice that may influence the interpretation of the legislation include the following statutory and environmental factors:

- In New Zealand, but not in Canada, unperfected security interests are enforceable against a liquidator or the Official Assignee. As a consequence, New Zealand has seen none of the multitude of Canadian cases where a trustee in bankruptcy (ie, a liquidator or the Official Assignee) has challenged technically deficient registrations in the

26 See generally Mike Gedye, *Personal Property Securities: Consolidated Legislation and Analysis* (Thomson Brookers, 2001) ch 14. Remedial legislation is via various Personal Property Securities Amendment Acts: *Personal Property Securities Amendment Act 2001* (NZ); *Personal Property Securities Amendment Act 2004* (NZ); *Personal Property Securities Amendment Act 2005* (NZ); *Personal Property Securities Amendment Act 2007* (NZ). Other amendments to the legislation, some remedial, include those consequent on the enactment of the new *Property Law Act 2007* (NZ).

Personal Property Securities Register ('PPSR'). This is because in New Zealand a security interest will be enforceable against a liquidator or the Official Assignee even where an ineffective financing statement has been registered.[27] It is difficult to estimate the full influence this has had on the way in which the New Zealand jurisprudence has developed but one consequence is that in New Zealand there has been little consideration of the crucial issue of when a registration is seriously misleading and therefore invalid.[28] Australia has adopted a middle road on whether unperfected security interests remain valid in insolvency, though one that is more closely aligned to Saskatchewan than to New Zealand. Under section 267 of the *Australian PPSA*, upon a debtor's insolvency, unperfected security interests generally vest in the debtor (the 'grantor' in Australian terminology). This is equivalent to invalidating unperfected security interests against the official administering the debtor's insolvency.[29] However, in contrast to the Saskatchewan Act, section 268 of the *Australian PPSA* provides that not all unperfected security interests suffer this fate. For example, under section 268(1)(a) of the *Australian PPSA* unperfected transfers of accounts receivable (in Australian terminology 'accounts'), and unperfected commercial consignments, are only set aside where they secure payment or performance of an obligation.[30] As a consequence, under the *Australian PPSA*, the difficult classification issue of whether a transfer of an account receivable (or a commercial consignment) secures performance of an obligation will become far more significant and there is accordingly likely to be far more litigation on this question than under either the Saskatchewan or New Zealand approaches.[31]

- New Zealand is one of the few remaining countries (along with Australia) where bank security agreements are commonly enforced by the private appointment of a receiver. When the *NZPPSA* first came into force, receivers demonstrated a marked reluctance to litigate. Disputes frequently arose but were commonly settled out of court. This can probably be put down to a desire not to incur unnecessary legal costs and an unwillingness to test the drafting idiosyncrasies in the *NZPPSA*.

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27 Likewise where there has not even been an attempt to register a financing statement.

28 *NZPPSA* ss 149–52.

29 See, eg, *Personal Property Security Act*, SS 1993, c P-6.2, s 20(2).

30 Ie, transfers of accounts receivable and commercial consignments that are 'in substance' security interests are set aside but not transfers or consignments that are 'deemed' security interests.

31 One indicator of whether a transfer of an account receivable secures performance of an obligation, and is therefore an in substance security interest, is whether the transferring debtor remains liable if the account debtor defaults (ie, the transfer is 'with recourse' to the assigning debtor). A transfer that is with recourse is more likely to come within the in substance definition of security interest than a transfer that is absolute and without recourse. A consignment is more likely to evidence an in substance security interest where the consignee has no right to return the goods to the consignor.

- Registration under the New Zealand regime is technically demanding. Seemingly minor errors can invalidate a registration. This factor, combined with what might be thought to be an overly lackadaisical approach to credit control, may explain the anecdotal evidence suggesting that there is in New Zealand a surprisingly high percentage of secured suppliers who do not bother to register under the PPSR to protect their interests. Even where registrations are undertaken, it seems there is insufficient care taken to get it right. Mr Kim Powell, a director of registration service company EDX Ltd, which amongst other services audits compliance for clients, has suggested to the author that audits that EDX Ltd has undertaken indicate that around 30 per cent of registrations against motor vehicles (where there is the additional requirement of registering serial numbers) are technically deficient.[32]
- The implementation of the *NZPPSA* was accompanied by significant publicity and training aimed at those who would be dealing with the new regime. Both the Government, through the Ministry of Economic Development, and professional and research bodies such as the New Zealand Institute of Chartered Accountants, the district and New Zealand law societies and the Legal Research Foundation, offered training and seminars. Additionally, a number of judges were involved in the reform process. The consequence, in the author's respectful opinion, was that practitioners and judges exposed to the training or involved in the reforms were reasonably well prepared to deal with the new regime. But from the author's observation, gleaned as a presenter at more than 20 seminars leading up to the implementation of the new regime, barristers were under-represented at these training opportunities. If this observation is accurate, it potentially impacts on the manner in which *NZPPSA* cases are argued before the courts and the way they are analysed by the judiciary.

V THE IMPORTANCE OF INTERPRETATIVE AIDS AND ACADEMIC COMMENTARY

The *NZPPSA* (and likewise the *Australian PPSA* and the progenitor legislation of Canada and the United States) is not the type of legislation one needs only to read to gain a sufficient understanding to be able to interpret and apply it properly. It is also necessary to have a good appreciation of the economic underpinnings and intention of the legislation, and the drafting techniques that have been adopted to achieve its commercial objectives. The need to appreciate the purpose of an enactment is of general application but it is particularly apposite for personal property securities legislation modelled on Article 9. Most

32 This comment was made to the author at an Auckland District Law Society seminar on the *NZPPSA* on 11 February 2010 at which the author and Mr Powell were presenters.

lawyers understand the basic purpose of the legislation and the manner in which it emphasises economic function over legal formality but more is required if the law is to be properly applied and interpreted. The personal property securities legislation of both New Zealand and Australia contain many provisions enacted to achieve specific commercially acceptable outcomes and to apply these provisions properly it is necessary to appreciate the desired outcomes and their commercial implications. Also required is an appreciation of the overall structure of the legislation and of how different provisions that are often widely dispersed can interact and guide each other's interpretation. As noted above, the *NZPPSA* (like the *Australian PPSA*) had its genesis in the mid-20th century United States model, so the necessary background understanding can be readily gained from the ample academic literature that can be traced from Grant Gilmore's half-century old seminal work *Security Interests in Personal Property*.[33]

A A New Zealand Example and the Australian Variation

The danger of the superficial interpretation that may be gained by simply reading the *NZPPSA* is amply illustrated by reference to what in practice is one of the most important provisions in the legislation: the first to register priority rule. Priority between perfected security interests[34] will often be governed by the first to register a financing statement: section 66(b)(i) of the *NZPPSA*. But section 66(b) provides that this is so only 'where perfection has been continuous'. One mode of continuous perfection is described in section 42 but there is no general definition or explanation of where perfection is 'continuous'. Perfection is most commonly achieved through registration of a financing statement, and more than one financing statement can be registered at one time, so a security interest can effectively be 'double' perfected. In such a case, it might superficially appear that where there are overlapping financing statements (ie, a second financing statement is registered before a prior financing statement expires) and the first registered financing statement is subsequently discharged or expires, the security interest will be continuously perfected from the time the first financing statement was registered until the date the second financing statement eventually expires (and accordingly the relevant security interest will be accorded priority from the date of registration of the first financing statement). One might argue in this scenario that perfection has been 'continuous' from the date of registration of the first financing statement until the date of expiry of the second financing statement because, provided the lives of the two financing statements

33 Gilmore, above n 16. Texts devoted to the *NZPPSA* include Gedye, Cuming and Wood, above n 20; Linda Widdup and Laurie Mayne, *Personal Property Securities Act: A Conceptual Approach* (Butterworths, revised ed, 2002); Roger Tennant Fenton and J M E Garrow, *Garrow and Fenton's Law of Personal Property in New Zealand* (LexisNexis Butterworths, 7th ed, 2010) vol 2.

34 Under *NZPPSA* s 41, a security interest is perfected when it has attached (ie, the requirements of *NZPPSA* s 40 – usually being that the debtor has signed a security agreement, the debtor has proprietary rights in the collateral and the creditor has given value – have been met) and in respect of which a financing statement has been registered. Less commonly, a security interest can also be perfected by the secured party taking possession of the collateral: *NZPPSA* s 41(1)(b)(ii).

overlap, there is no time between these two dates when the security interest is not perfected. But this would be a mistake.

That a superficial analysis cannot be applied when interpreting the first to register priority rule found in section 66 is obvious from a proper understanding of the function of section 66. The priority rule embodied in section 66(b) is very straight forward: priority is given to the first party to take one of three alternative measures. For simplicity of analysis, the author will discuss only the most common of these measures: the registration of an effective financing statement in the PPSR.[35] Under this rule,[36] the first to register wins.[37] This priority rule applies even where the first registering party has knowledge of an earlier existing interest that has not been perfected by registration.[38] The intention of the rule is to provide a simple, precise and easily verifiable priority rule that financiers can rely upon, even if on occasion it may appear to work an injustice by allowing a later financier to steal a march on an earlier financier with a prior interest in the collateral.[39] The section places a high value on the commercial certainty the rule delivers. If the registration of overlapping financing statements were sufficient to achieve continuous perfection for the purposes of the priority rule, the objectives of the provision would not be achieved. Once the first financing statement had expired, it would no longer be searchable, so a searching party would no longer be able to determine the priority date of the earlier secured party. Accordingly, to achieve the objective of establishing an easily verifiable priority rule, the registration of overlapping finance statements cannot constitute a single period of continuous perfection from the time of the initial registration until the expiry of the second registration. Rather, there would be two discrete periods of perfection: an initial period from the registration date of the first financing statement until that financing statement expired and a second, though overlapping, period from the time of registration of the second financing statement until that registration expired. Once the first period came to an end with the expiration of the initial financing statement, the registering party's priority status would no longer be determined by the date of registration of the initial financing statement; instead it would be based on the date of registration of the second financing statement so that another secured party with an intervening registration might find its priority

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35 The other measures are the acquisition of temporarily perfected status under one of the temporary perfection provisions of the Act and the taking of possession of collateral by the secured party with the intention of perfecting a security interest in it: *NZPPSA* ss 66(b)(ii)–(iii).

36 Although this is the most basic priority rule in the *NZPPSA*, it is subject to many exceptions; most notably the special purchase money priority rules found in ss 73–7.

37 Obiter comments to the contrary by an associate judge of the High Court of New Zealand are, it is respectfully submitted, incorrect. See *The Healy Holmberg Trading Partnership v Grant* (Unreported, High Court of New Zealand, Robinson AsJ, 15 December 2009), discussed below and more fully in Mike Gedye, 'First to Perfect?' [2011] (4) *New Zealand Law Journal* 123.

38 However, it would be subject to exception in the event of bad faith or commercially unreasonable behaviour: *NZPPSA* s 25.

39 The Ontario Court of Justice put the matter this way: 'The integrity of the PPSA must be maintained at the expense of the equitable doctrine of actual notice.': *BMP & Daughters Investment Corporation v 941242 Ontario Ltd* (1992) 96 DLR (4th) 741, 748. This is also consistent with a further objective of the legislation: to encourage secured parties to register promptly.

status improved under the first to register rule. This will all be apparent from a proper understanding of the objectives and functioning of the regime, but it is not made explicit in the *NZPPSA* itself.[40] It is only through understanding the commercial and economic objectives of the Act as a whole, and the rationale of individual provisions, that even such black letter law as the priority rules can be applied properly.

It is interesting then to consider how Australia has dealt with the concept of continuous perfection. Whereas section 42 of the *NZPPSA* describes only one possible mode of continuous perfection,[41] the *Australian PPSA* arguably opts for a comprehensive definition. This may be the effect of section 56(1) of the *Australian PPSA*, which provides: 'For the purposes of this Act, a security interest is continuously perfected after a particular time if the security interest is, after that time, perfected under this Act at all times.'

Subsection 2 goes on to cover the same ground as section 42 of the *NZPPSA*. But the statutory example that is given then suggests quite a different outcome from that applying in New Zealand. The example appears to suggest that a security interest may be continuously perfected by two different overlapping registrations. If this approach follows through to the priority rules, it could

40 Although the author's premise is that this conclusion follows from understanding the objectives and functioning of the regime, and that such an understanding is thus essential, there are nevertheless pointers to this conclusion in the *NZPPSA*. Section 153 provides that a financing statement is no longer effective once it has expired and s 154 sets out the proper way to extend the life of a financing statement (so as to maintain continuous perfection) through the registration of a financing change statement. The conclusion is also supported by Canadian case law: see, eg, *Birch Hills Credit Union Ltd v Canadian Imperial Bank of Commerce* (1988) 52 DLR (4^{th}) 113 (Saskatchewan Court of Appeal); *Saskatoon Credit Union Ltd v Bank of Nova Scotia* (1985) 42 Sask R 185 (Saskatchewan Court of Queen's Bench). The only section in the *NZPPSA* that explicitly describes continuous perfection, s 42, deals with the situation where there is a change in the mode of perfection. There are three modes of perfection under the New Zealand Act: temporary perfection under ss 28, 47, 48 or 49 (and possibly s 27); perfection through registration of a financing statement, and perfection through taking possession of the collateral. Section 42 only applies where the mode of perfection changes (say, where a financing statement is registered when a security interest is already perfected through possession and possession is then surrendered so that the mode of perfection changes from possession to registration). Again, this is not terribly clear from reading just the Act; on a superficial reading of s 42 it may appear that following perfection through the registration of one financing statement, the registration of a second and overlapping financing statement qualifies as 'perfection in another way' under s 42(b). This is wrong: 'perfection in another way' requires use of one of the other modes of perfection.

41 Section 42 continues perfection where one of the three possible types of perfecting step (ie, registration, possession or temporary perfection) is replaced by one of the other two types of perfecting step without any intervening period of non-perfection. The New Zealand section does not comprehensively define continuous perfection and does not deal with the most common and obvious example of continuous perfection: ie, the usual case where a security interest is perfected by registration and the registration remains extant through its initial term and any number of valid renewals.

reverse the priorities that would apply under the New Zealand legislation.[42] This illustrates the uncertainty that can accompany home grown drafting when otherwise broadly adopting a foreign enactment. The author suspects that section 56 of the *Australian PPSA* was not intended to impact on priorities in this fashion, and that the Australian wording was intended to clarify rather than alter the substance of the New Zealand equivalent, but by departing from the wording of the New Zealand legislation, this remains (as with the many other instances of novel Australian drafting) a real possibility.[43]

One consequence of the need to appreciate fully the commercial and economic foundations of the regime and the raison d'être of individual provisions when applying and interpreting personal property securities legislation may be greater use by the courts of interpretative aids (such as Law Commission official reports[44] and relevant Ministry publications),[45] academic commentaries and (subject to the cultural and drafting differences noted above) reliance on foreign precedents than has traditionally been the case. If the courts ignore such analyses and go it alone when interpreting the legislation, there is a risk that the commercial objectives of the legislation may not be fully realised. While the early New Zealand cases generally display a willingness to utilise prior learning, it will be apparent from the following analysis that this enthusiasm is not universal.

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42 Under the *NZPPSA* if, eg, Secured Party 1 ('SP1') registers Financing Statement 1, Secured Party 2 ('SP2') then registers Financing Statement 2 and, before Financing Statement 1 expires SP1 registers another financing statement, Financing Statement 3, SP1 will have priority under the general first to register priority rule only while Financing Statement 1 remains current. When Financing Statement 1 expires, SP1 cannot claim continuous perfection by virtue of the overlapping Finance Statement 3. Instead, SP2 will then take priority by virtue of the prior registration of Financing Statement 2. This outcome may be in doubt under the *Australian PPSA* if s 56 plays a dominant role.

43 To deliver the same outcome under the *Australian PPSA* as applies under the New Zealand legislation, it can be argued that although s 56 and its statutory example appear to allow for continuous perfection through registration of overlapping financing statements, this must be subject to s 163. Section 163 provides that a registration ceases to be effective (and so, it can be argued, could not affect priorities) once it expires. The general priority rule under s 55(5)(a) bases priority on the registration time for collateral and presumably the registration time (as defined in s 160) means the registration time under a current registration.

44 In New Zealand, see New Zealand Law Commission, above n 1; New Zealand Law Commission, above n 24.

45 The Australian Government Attorney-General's Department website has an impressive array of historic legislative, consultation and discussion documents available for download: www.ag.gov.au/pps. Despite this, it can still be very difficult to discover the policy or intention behind some of the Australian drafting initiatives. No official table has been prepared comparing the provisions of the *Australian PPSA* with any foreign precedents, presumably because the Australian drafting departs so significantly from foreign models that this was deemed impractical. This, together with the obscure intent of some of the provisions, may lead to some uncertainty over their exact meaning until considered by Australian courts. However, private publishers have helped to fill the gap with useful comparative tables and analyses. See, eg, Steve Edwards, Craig Wappett and Bruce Whittaker (eds), *Personal Property Securities in Australia* (LexisNexis Butterworths, 2010) which contains a table setting out the equivalent provisions of the Australian, New Zealand and Saskatchewan Acts: at 903 ff, and annotates the individual sections of the *Australian PPSA* with details of the comparative legislation.

VI THE DEVELOPMENT OF THE NEW ZEALAND CASE LAW: THE EARLY CASES

NZPPSA litigation, while slow in coming, was keenly anticipated. In the early years of personal property securities legislation in Canada, some Canadian courts had struggled with the new concepts. In particular, a number of Canadian courts had difficulty accepting that the widely utilised floating charge and all of its attendant jurisprudence had been rendered irrelevant by the personal property securities legislation.[46] Some Canadian courts also struggled with the re-conceptualisation of title and the consequent impact on the *nemo dat quod non habet* rule of the common law that was brought about by the new regime.[47] The initial treatment by the New Zealand courts of these and other issues would likely influence the New Zealand jurisprudence for some years.

As the following selection of cases illustrates, the first tranche of New Zealand *NZPPSA* decisions generally shows a good understanding by the judiciary of core personal property securities concepts. These initial decisions display little of the reluctance that the early Canadian courts demonstrated in accepting the new learning. Even where counsel have framed their cases based on traditional doctrines, the New Zealand courts have readily adopted and espoused the new concepts, rejecting a traditional title based analysis. Nevertheless, a number of the early decisions reveal a lack of awareness, both by counsel and the judge, of the more technical workings of the *NZPPSA*. Several cases contain inaccurate obiter, or fail to address relevant operative provisions, even while ultimately reaching the correct outcome between the parties.[48] If the law is to develop as intended, it is incumbent on counsel to become familiar with the machinery provisions in the personal property securities legislation and to draw relevant provisions to the courts' attention. But of greater concern is the impression the author has gained from some of the most recent New Zealand decisions that the courts are at risk of reverting to the old way of thinking and failing to realise fully the functional approach and commercial objectives mandated by the *NZPPSA*.

A *Portacom*

The first New Zealand decision did in fact deal with some of the fundamental issues that had plagued the Canadian courts. *Graham v Portacom New Zealand*

46 See, eg, *Access Advertising Management Inc v Servex Computers Inc* (1993) 15 OR (3rd) 635 (Ontario Court of Justice). But see *Rehm v DSG Communications Inc* [1995] 4 WWR 750, 758 (Saskatchewan Court of Queen's Bench).

47 See, eg, *Sprung Instant Structures Ltd v Caswan Environmental Services Inc* [1998] 6 WWR 535 (Alberta Court of Appeal). The reasoning in the Alberta Court of Appeal's remarkably brief judgment is inconsistent with the Supreme Court of Canada's analysis in *Re Giffen* (1998) 155 DLR (4th) 332.

48 For example, applying *NZPPSA* s 103 would readily have resolved *McTainsh v REM Holdings Ltd* (Unreported, High Court of Tauranga, Harrison J, 27 January 2005) and *NZPPSA* s 89 or *NZPPSA* s 90 would have resolved *Orix New Zealand Ltd v Milne* [2007] 3 NZLR 637. Despite ultimately reaching the right outcome, neither case considered these provisions.

Ltd[49] considered whether assets to which the debtor did not have legal title could be subject to a floating charge. A creditor secured over all the assets of the debtor claimed to be entitled to assets held on lease by the debtor. Before the *NZPPSA* took effect, such a claim could not have been made. Through application of the common law rule of *nemo dat quod non habet*,[50] a secured creditor's security could only reach assets owned by the debtor. A debtor that held assets on lease would own a leasehold interest in the assets, and could grant security over that leasehold interest, but could not grant security over the assets themselves. This meant that historically, through application of the *nemo dat* doctrine, absent any statutory override, the lessor would always prevail over the secured party. But the *NZPPSA* largely did away with the traditional *nemo dat* rule in the context of claims to the same asset by two or more secured parties and assimilated any resulting priority conflicts into the set of codified priority rules enacted by the Act. Because the *NZPPSA* also re-conceptualised many leasing transactions as secured lending transactions, a conflict between a lessor's interest and a secured party will often fall to be resolved by the codified priority rules.[51]

In a well-reasoned judgment, Hansen J in *Portacom* recognised the need to abandon the historic approach. Noting that the Canadian authorities had direct application,[52] and that the *NZPPSA* required 'a fresh approach to traditional ideas of property ownership',[53] his Honour adopted comments from the Supreme Court of Canada that the *NZPPSA* 'has set aside the traditional concepts of title and ownership to a certain extent … [and has] redefined traditional concepts of rights in property'.[54] Armed with the Canadian Supreme Court's analysis, Hansen J analysed and rejected a much criticised decision of the Alberta Court of Appeal, preferring the reasoning at first instance.[55] In addition to the important recognition of 'the fundamental changes made to established rights of ownership'[56] wrought by the *NZPPSA*, the decision is significant as an early indication of the courts' willingness to adopt Canadian jurisprudence, both

49 [2004] 2 NZLR 528 ('*Portacom*'). See generally Mike Gedye, 'What's Yours is Mine: Attachment of Security Interests to Third Party Assets' (2004) 10 *New Zealand Business Quarterly* 203.

50 Loosely translating as: you cannot give away something you do not have. In the context of secured transactions, this traditionally translated into: a debtor cannot give a secured creditor security over assets that belong to a third party.

51 Where the lessor's interest does not fall within the definition of security interest under *NZPPSA* s 17, the *nemo dat* rule will continue to apply and the lessor will usually prevail over a third party claiming a security interest over the leased assets. Because of the expansive definition of security interest, this will largely follow only where the lease is for a fixed term of less than one year: see Gedye, Cuming and Wood, above n 20, [17.2.2], [17.3.3].

52 See *Portacom* [2004] 2 NZLR 528, 534.

53 Ibid 535.

54 Ibid, citing *Re Giffen* (1998) 155 DLR (4th) 332, [26].

55 Justice Hansen reasoned that 'The Court of Appeal's decision [in *Sprung Instant Structures Ltd v Caswan Environmental Services Inc* [1998] 6 WWR 535] offers no answer to the reasoning at first instance or to the careful analysis of the underlying principles of the personal properties securities legislation in *Re Giffen*': *Portacom* [2004] 2 NZLR 528, 536.

56 Ibid.

academic commentary and judicial reasoning, where it is appropriate to do so, and also to look to relevant New Zealand academic commentary.

In *Portacom,* Hansen J was plainly aware that he was dealing with novel and radical legislation and his judgment demonstrated a clear appreciation of the need to be cognisant of the commercial objectives of the *NZPPSA* and to adopt a doctrinal analysis when determining disputes concerning the legislation. But although his Honour demonstrated an admirable understanding of core concepts, there was, as may be expected when a court is called on to apply a new piece of unfamiliar and complex legislation, some imprecision in language (not affecting the outcome of the case but potentially relevant in other contexts). For example, in his preliminary comments, his Honour referred to a debenture as being 'registered'.[57] It is not uncommon for practitioners, and also academic commentators, to refer in shorthand to a 'registered' security interest but this nomenclature is potentially misleading.[58] It is more correct to refer to a security interest as being 'perfected by registration'. Neither a security agreement (such as a debenture) nor a security interest is registered; rather a security interest is perfected by the registration of a financing statement. This is not mere pedantry. The essential aspects of a financing statement are no more than a brief description of potential collateral and precise details of the debtor. This, and the fact that security agreements are not registered, has several important consequences. A single registration, whether made before or after a security agreement is entered into, can serve to perfect multiple secured transactions as long as the collateral description is adequate. This holds even if it might not have been the initial intention of the registering party, so that a registration intended to perfect a particular secured transaction may additionally perfect either an earlier or later security interest that would otherwise go unperfected (perhaps because of a defective registration that was intended but failed to perfect the earlier or later security interest or where another registration has expired or been discharged). Wrongly reasoning in terms of 'registration of a security agreement' may lead one to the error of concluding that a particular security interest is unperfected. For example, it is not uncommon in the motor vehicle industry for the secured financiers of car dealers to register both an all-encompassing financing statement describing the collateral as present and after-acquired motor vehicles financed by the secured party as well as subsequently registering individual financing statements that incorporate the vehicle's serial number and other required descriptors for each vehicle financed. Although in New Zealand serial numbers and detailed descriptors will generally be required for motor vehicle collateral, this is not so where the debtor holds the collateral as inventory, as will be the case for a car dealer.[59] Where an adequate general financing statement has been

57 *Portacom* [2004] 2 NZLR 528, 529.

58 Presumably to avoid what would otherwise be particularly cumbersome drafting, this shorthand approach is even used in two sections of the *NZPPSA*. Sections 89 and 90 refer to 'a perfected security interest ... that is registered'.

59 *NZPPSA* s 150(b) (by negative implication); *Personal Property Securities Regulations 2001* (NZ) SR 2001/79, sch 1 cl 9(2)(b).

registered, the additional registration of a specific financing statement is seen as having commercial benefit but is of little relevance under the *NZPPSA*. In such cases it is wrong to conclude that a defective specific registration, or an adequate specific registration that is subsequently discharged, leaves the secured party's security interest unperfected; yet in the author's experience this is not an uncommon mistake for practitioners to make, probably brought on by the mindset of thinking that each transaction or each security agreement needs to be registered. In the example given, the security interest remains perfected by the general registration, unless extinguished by one of the buyer protection rules in the *NZPPSA* or upon enforcement of a prior ranking security interest. Avoiding the use of language such as 'the security agreement (or security interest) was registered' will help to remind courts and practitioners that a security interest can be perfected by any valid financing statement that adequately describes the collateral and that was registered by the secured party before or after a security agreement has been entered into, whether or not the particular financing statement was intended to have this effect. For example, where a financing statement intended to perfect a particular security interest is invalid or has been discharged, the security interest may nevertheless be perfected by some other valid financing statement originally registered to perfect some other security interest.

B *Bloodstock*

The first decision to go to the New Zealand Court of Appeal involved remarkably similar issues to *Portacom.* In *Waller v New Zealand Bloodstock Ltd*,[60] a thoroughbred stallion was leased to a debtor horse stud that prior to the introduction of the *NZPPSA* had given a general security agreement over 'all its present and future assets'. Both the lessor of the stallion and the creditor secured by the general security agreement claimed the horse. As in *Portacom*, the holder of the general security agreement had registered a financing statement but the lessor had not. Prior to the *NZPPSA*, the lessor would have won through application of the common law *nemo dat* rule, but because the lease in issue came within the definition of security interest under the *NZPPSA*, the conflict between the lessor and the general secured creditor would fall to be resolved by the priority rules in the Act *if the general security interest encompassed the stallion*. In addition to re-litigating the issue settled in *Portacom*, counsel for the lessor put forward a refined version of the lessor's argument in *Portacom* that a security interest over assets 'of the debtor' (or words to like effect) did not, as a matter of contractual interpretation, cover assets held on lease by the debtor. *Portacom* had already held otherwise, but counsel in *Bloodstock* argued that the *Portacom* analysis should not apply where the general security agreement had been entered into prior to the implementation of the *NZPPSA* (as indeed it had in *Portacom* itself). It was argued that at the time the general security agreement was entered into, collateral described as 'all [the debtor's] present and future

60 [2006] 3 NZLR 629 ('*Bloodstock*').

assets' would not, both as a matter of contractual interpretation and under the general law, extend to leased assets and that a contract, including a security agreement, fell to be interpreted at the time it was made. At that time the general security agreement, it was argued, was not intended to, and did not, cover leased assets and the subsequent introduction of the *NZPPSA* should not change this interpretation.

In a closely reasoned minority judgment, William Young J accepted this argument. But, with respect, it is suggested that his Honour over-thought the analysis. While it may be correct to say that a security agreement falls to be interpreted at the time it was entered into, it does not follow that an all present and after-acquired assets charging clause would not apply to after-acquired assets of a kind not contemplated at that time. The charging clause in issue clearly covered assets not in existence at the time the security agreement was entered into. Although the debtor's right or power to grant a security interest in the lessor's interest in the horse did not exist at the time the security agreement was made, or at any time before the *NZPPSA* was implemented, it came into existence along with the Act. Perhaps one might argue that this right or power is property of a different nature or quality to property that comes into existence by some other means, such as manufacture. But then it would also be necessary to explain why property of that nature is not subject to an all assets charging clause when an asset such as a chattel not contemplated by the secured party when the security agreement was entered into but that was created afterwards, or even, say, a new form of intellectual property not contemplated at the time the agreement was signed, clearly would be so subject. Also, of course, it is wrong to suggest that prior to the implementation of the *NZPPSA*, the lessee's rights or powers in relation to the horse were not subject to the general security agreement. The leasehold interest was always subject to the general security interest and post-*NZPPSA* that leasehold interest included the power to grant interests in the horse to third parties.[61] But it is much simpler just to say that a security over all present and future property of a debtor covers property rights of every conceivable kind that a debtor is empowered, either by the *NZPPSA* or general law, to transfer or encumber.

Justice William Young's analysis would have created a transitional problem of some magnitude. Although he was dealing with a single leased asset, his reasoning would apply equally to any property where the debtor did not hold traditional legal title. This would extend to any goods supplied to the debtor on retention of title terms, as is commonly the case with both inventory and equipment acquired by debtors. Secured creditors who intended to be secured over a debtor's inventory, equipment and other goods would not, under a pre-*NZPPSA* general security agreement, be secured as they had intended, either before or after the expiry of the *NZPPSA*'s six month transitional period.[62] But, on Justice William Young's analysis, they could be secured over such assets

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61 See, eg, *NZPPSA* s 87.

62 The transitional provisions are found in *NZPPSA* pt 12.

under a post-*NZPPSA* interest and so it would be necessary to re-document all pre-*NZPPSA* interests where this was a concern. Nationwide, this would have involved thousands of security agreements and considerable unnecessary expense and inconvenience. Also, the analysis is clearly contrary to the intention of Parliament to bring the new regime into full effect as quickly as possible by applying the new law equally to pre- and post-*NZPPSA* interests once the short transitional period had expired.

Fortunately, the majority agreed both that the all assets charging clause in the general security agreement encompassed the stallion held on lease and that the position did not change when the lessor terminated the lease. The majority judgment noted:

> We do not see the case as turning on the fine nuances of how the charging clause was drafted. ... While until 1 May 2002 [the date the *NZPPSA* came into force] the charge did not extend to the stallion, on that day [the debtor] acquired 'rights in goods' ... Such 'rights' in our view fall clearly within the scope of the charging clause ... It would be difficult to find language more apt to embrace whatever security may be available than that contained in the charging clause.[63]

The majority also addressed the transitional issue that troubled William Young J:

> We see no reason of policy why the new regime should fail to apply to such collateral when, on our construction of it, it would have fallen within the debenture if it had been executed after 1 May. ... We prefer the view that the new regime is of general application once the transition period has passed ...[64]

With respect, this must be correct. Any other interpretation could cause great uncertainty and inconvenience for years to come.

The majority went on to say that with respect to the priority of competing security interests under the *NZPPSA*, the *nemo dat* principle has been ousted.[65] This statement needs to be treated with caution. While it is true that the common law *nemo dat* principle has largely been ousted in this context, the *NZPPSA* itself contains a limited statutory version of the *nemo dat* rule in section 88, so that a secured party of a transferor can prevail over a secured party of a transferee, even though the transferee's secured party may be first to register a financing statement.[66] And of course, as the statement in the judgment makes clear, it is limited to the context of competing security interests. The common law *nemo dat* rule can still apply where a security interest competes with a non-security interest, such as the interest of a lessor under a lease that does not fall within the definition of security interest in *NZPPSA* section 17.

63 *Bloodstock* [2006] 3 NZLR 629, 645.

64 Ibid 646.

65 Ibid 649.

66 In fact, the *NZPPSA* does not make it entirely clear that the common law *nemo dat* rule has always been ousted in those cases where s 88 does not apply and where collateral has been transferred from one debtor to another debtor, each of whom has given security interests to different secured parties: eg, where the transferor's secured party is unperfected at the time of transfer but the transferee does not take free of the security interest because of the transferee's fraud or because the transfer was by way of gift.

One peculiar aspect of the majority judgment that is worth noting was the nature of much of the authority relied on. A great deal of reliance seems to have been placed on the English Law Commission's analysis in its *Company Security Interests* reports.[67] The judgment cites comments in the English reports that seem to bear little or no relevance to the issues at hand.[68] There is also discussion of seemingly irrelevant provisions of the *NZPPSA* itself.[69] On the other hand, the majority appears almost reluctant to apply New Zealand sources such as the New Zealand Law Commission's reports and New Zealand academic commentary. Again, when discussing whether the requisite value had been given by the secured creditor to satisfy the attachment requirements of the *NZPPSA*, the majority cited the definition of 'loan' from *Chitty on Contract*, which bore no relevance to the issue, and ignored the definition of 'value' in section 16 of the *NZPPSA* that was directly on point.[70] The majority almost appears to have deliberately eschewed New Zealand and North American authority in preference for English commentary, which, ironically, is a jurisdiction that has so far rejected Article 9 style legislation.[71] In this regard, the majority judgment represented an unwelcome step back from the willingness to embrace North

67 The Law Commission (UK), *Company Security Interests*, Report No 296 (2005); The Law Commission (UK), *Registration of Security Interests: Company Charges and Property Other Than Land*, Consultation Paper No 164 (2002); The Law Commission (UK), *Company Security Interests: A Consultative Report*, Consultation Paper No 176 (2004).

68 For example, the English Law Commission's conclusion that further work was required on its proposals relating to registration of corporate security interests was deemed to be relevant to the interpretation of the *NZPPSA*: *Bloodstock* [2006] 3 NZLR 629, 634. It is not clear how this was relevant, particularly as the English Law Commission's comments were made in the context of deciding whether its proposals should extend to unincorporated debtors and as a consequence of the perceived need to protect buyers and subsequent lenders: The Law Commission (UK), *Company Security Interests* (2005), above n 67, 19–20 [1.64]–[1.65]. Neither of these issues arises in New Zealand because the *NZPPSA* unquestionably covers unincorporated debtors and includes provisions prioritising competing claims of secured lenders and buyers. In addition, the majority quote extensive passages from The Law Commission's 2004 report (above n 67) that question whether to adopt the New Zealand approach but do not purport to explain it: *Bloodstock* [2006] 3 NZLR 629, 644. Indeed, one of the extracts quoted from the 2004 report (the discussion on the consequences of insolvency: at 41 [2.109]) does not follow in New Zealand. It is not clear how any of this can be regarded as the most appropriate authority for the correct interpretation of the *NZPPSA*, especially since the English Law Commission's analysis of the New Zealand position was largely based on New Zealand writings that the majority judgment did not reference (in particular The Law Commission (UK), *Company Security Interests* (2004), above n 67) and which would seem to be more appropriate direct authority.

69 Although there was no suggestion that registration was in issue, their Honours spend some time setting out the provisions of the Act dealing with registration of financing statements: *Bloodstock* [2006] 3 NZLR 629, 638–9.

70 Indeed, in an irrelevant digression on whether value is given when a loan is drawn down, the majority said that value could not be said to be given *anew* for *NZPPSA* purposes whenever credit is drawn down: ibid 646. While this comment is merely obiter, it could have consequences in those cases where the Act requires new value and, it is respectfully suggested, is probably wrong.

71 For example, raising the spectre of the New Zealand drafting peculiarities mentioned above, their Honours note, 'the present decision must turn on the effect of the New Zealand legislation, which is not wholly identical to that of the various Canadian jurisdictions', without saying in what material way the Canadian legislation differed: ibid 634. And, in declining to consider further Canadian authority, the majority stated: 'Our decision turns on the legislation adopted by the Parliament of New Zealand': at 649.

American jurisprudence evident in *Portacom*. However, subsequent cases have re-emphasised the relevance of North American precedents.[72]

While on one level, *Portacom* and *Bloodstock* are important doctrinal decisions emphasising the re-characterisation of concepts of title and the redefinition of property rights that is required under the *NZPPSA*, from a practical perspective the two cases simply illustrate a transitional lesson about the importance of registration. Both of the losing lessors would have won had they taken the cheap and simple step of registering a financing statement in a timely fashion. This was doubtless an expensive lesson for the particular lessors but one that has hopefully now been learnt by lessors and other title based financiers in the transition from the old law to the new.

C *Service Foods Manawatu v NZARFD*

In *Service Foods Manawatu Ltd (rec apptd, in liq) v New Zealand Associated Refrigerated Food Distributors Ltd*,[73] counsel for the receivers of the debtor company advanced a number of curious arguments that were inconsistent with central tenets of the legislation. The terms of trade between the debtor and one of its suppliers included not only a retention of title arrangement but also a provision explicitly stating that the supplier had a security interest in the goods supplied to the debtor and a clause establishing a trust in favour of the supplier for the proceeds of resale of goods supplied. In the High Court it was argued that the written terms of trade did not apply because of some indulgence granted by the secured party over the timing of payments. This argument was rightly rejected.[74] Perhaps even more inexplicably, counsel for the receivers advanced the argument that the retention of title and the trust of proceeds clauses were inconsistent with the *NZPPSA* and did not constitute security interests. Not surprisingly, this argument too was peremptorily dismissed by the High Court and Court of Appeal.[75] The Act itself expressly recognises that an agreement to sell subject to retention of title will constitute a security interest,[76] and a trust of proceeds clause clearly comes within the in-substance definition of security interest in section 17(1).[77] Far from being inconsistent with the Act, these arrangements illustrate its intended scope. One of the basic objectives of the legislation was to encompass (and apply consistent rules to) all contractual arrangements, such as these, that: (a) evidenced proprietary rights in personal property; and (b) secured performance of an obligation, without forcing the parties to adopt a particular form.

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72 See, eg, *Orix New Zealand Ltd v Milne* [2007] 3 NZLR 637.

73 (Unreported, High Court of New Zealand, Goddard J, 30 January 2006) ('*Service Foods* (HC)'); *Service Foods Manawatu Ltd (rec apptd, in liq) v New Zealand Associated Refrigerated Food Distributors Ltd* [2006] NZCA 349 (11 November 2006) ('*Service Foods* (CA)').

74 See *Service Foods* (HC) (Unreported, High Court of New Zealand, Goddard J, 30 January 2006) [13].

75 Ibid [14]; *Service Foods* (CA) [2006] NZCA 349 (11 November 2006) [24].

76 Section 17(3), provided it 'secures payment', as it almost invariably will.

77 See Gedye, Cuming and Wood, above n 20, [17.5]; *North Shore City Council v Stiassny* [2009] 1 NZLR 342, 349 ff.

A further argument advanced by the receivers was that the supplier's financing statement was seriously misleading and therefore ineffective to perfect its security interest. The supplier had, in its financing statement, described the collateral as all of the debtor's assets, whereas its security interest was limited to goods supplied and the proceeds of their resale. But a financing statement is intended to do no more than warn searchers that *potentially* a security interest may be claimed in collateral of the type described. Because a financing statement may be registered before a security agreement is entered into, or may be intended to cover future security interests in collateral not immediately contemplated at the time of registration, it does not signify that a security interest is in fact claimed in the collateral described in the financing statement and a searcher must be taken to understand this. Accordingly, an overly broad collateral description will not mislead a searcher. A searcher will only be misled by a collateral description that is insufficiently broad to cover collateral that is in fact subject to a security interest, and then only in respect of any collateral that falls outside the description given.[78] Both the High Court and Court of Appeal usefully confirmed that an overly broad collateral description is not a 'defect, irregularity, omission or error',[79] and, even if it were otherwise, it would not invalidate the financing statement because such an error would not be 'seriously misleading'.[80]

The significance of the *Service Foods* decisions to secured transactions jurisprudence lies not so much in what the Courts held but in the arguments that were put to the Courts. Arguments were advanced that to the author appear to have been untenable in the light of the concepts introduced by the *NZPPSA*. It is important for the proper development of New Zealand's secured transactions jurisprudence, as in other novel areas of the law, that the arguments advanced before the courts are consistent with the doctrines introduced by the new regime. Faced with the sometimes novel and difficult concepts of the *NZPPSA*, the courts will benefit from well researched and reasoned argument. Although in *Service Foods* the Courts had little trouble in rejecting the flawed arguments that were advanced, and demonstrated a sound understanding of the new concepts, there

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78 See *NZPPSA* s 152.

79 See *Service Foods* (HC) (Unreported, High Court of New Zealand, Goddard J, 30 January 2006) [42]; *Service Foods* (CA) [2006] NZCA 349 (11 November 2006) [28].

80 '[S]eriously misleading' is the test for invalidity contained in *NZPPSA* s 149: *Service Foods* (CA) [2006] NZCA 349 (11 November 2006) [33]. But in obiter, the Court of Appeal went on to say: 'we emphasise that best practice suggests that the description of collateral in a financing statement should reflect accurately the description of the security agreement': at [34]. With respect, this comment does not consider the common and prudent practice of registering a broad collateral description, sufficient to cover future security agreements between the parties, where it is contemplated that further security agreements may be entered into. A financing statement is not limited to perfecting a particular security interest. A secured party that contemplates over time entering into a number of security agreements with a debtor will legitimately want to secure its priority status by registering an initial financing statement that contains a description of the anticipated future collateral. Of course, it is wise to ensure the debtor does not object to the collateral description. If the debtor objects, the secured party may be put to the trouble of amending or justifying the description under the procedure prescribed in *NZPPSA* ss 162–7.

are other cases where the courts have been led astray by arguments that failed to follow the analysis mandated by the legislation.[81]

D *Sleepyhead*

The outcome of *Dunphy v Sleepyhead Manufacturing Co Ltd*,[82] must have caused concern to liquidators, who have the invidious task of giving effect to unperfected security interests that they cannot independently verify through the Register. This is not to suggest that either the High Court or Court of Appeal got it wrong. The Courts correctly applied the legislation; the outcome is a consequence of the unique and controversial approach adopted by the *NZPPSA* not to invalidate unperfected security interests upon the debtor's insolvency.

Sleepyhead supplied inventory to a retailer on terms that, the Courts held, included a security interest in the form of a retention of title arrangement. Sleepyhead had neglected to obtain the debtor's written agreement to these terms but the terms had become part of the contract of supply through a course of dealing. Because there was no written security agreement, Sleepyhead's security interest did not fully attach to the collateral and was unenforceable against third parties.[83] Sleepyhead acknowledged that its interest was accordingly subordinate to the debtor's bank, which held a duly perfected security interest over all of the debtor's present and after-acquired assets, but argued that once the bank had been repaid in full, Sleepyhead was entitled to payment in priority to the liquidators. On the facts before the Court, the issue was simply whether or not the liquidators were to be identified with the debtor for the purposes of *NZPPSA* section 40(1)(c) or were 'third parties' within the meaning of section 36. If the former, then the unwritten security agreement took priority over the liquidators; if the latter then the security agreement was unenforceable against the liquidators. Both the High Court and the Court of Appeal held, correctly in the author's opinion, that the liquidators were the agents of the debtor and therefore not third parties and so Sleepyhead's unwritten security agreement (and unperfected security interest) was effective to give priority over the liquidators. This outcome would not follow in Australia because under the *Australian PPSA* the lack of perfection of the retention of title security interest would result in the security interest being vested in the debtor/grantor.[84] While the *res judicata* in *Sleepyhead* turned on a relatively simple issue of interpretation and the controversial New Zealand

81 See, eg, *McTainsh v REM Holdings Ltd* (Unreported, High Court of Tauranga, Harrison J, 27 January 2005). The case should have involved a simple application of *NZPPSA* s 103 but this provision appears not to have been drawn to the Court's attention and the Court accordingly proceeded on entirely the wrong basis – though nevertheless reached the correct outcome.

82 *Sleepyhead* [2007] 3 NZLR 602; see also *Sleepyhead Manufacturing Co Ltd v Dunphy* (Unreported, High Court of New Zealand, Harrison J, 23 February 2006).

83 See *NZPPSA* ss 36, 40(1)(c).

84 Section 267 of the *Australian PPSA* (this is the equivalent of invalidating the security interest against the liquidator). But as a result of the saving in s 268(1)(a)(iii) of the *Australian PPSA*, the New Zealand issue would arise in Australia if the security interest had been a commercial consignment that did not secure performance of an obligation.

approach to the insolvency ranking of unperfected security interests, the case is significant for at least two other reasons. First, the decision highlights the need for a timely review of the New Zealand legislation. The result in *Sleepyhead* would have been different if the suggestion to amend the legislation to provide that a liquidator was a third party for the purposes of *NZPPSA* section 36 had been adopted.[85] Secondly, O'Regan J in the Court of Appeal took the opportunity to export *NZPPSA* concepts to other legislation. He commented:

> Now that the PPSA governs the method by which creditors obtain security, 'owned' [where it appears in the *Companies Act*] must be read in a manner that is consistent with the PPSA, which means that [the interest of a person acquiring goods on retention of title terms] must be treated as sufficient for them to be 'owned' by [that person] for the purposes of [the *Companies Act* definition].[86]

This comment is further welcome evidence of the courts' willingness to embrace the doctrinal changes wrought by the *NZPPSA* but it raises the issue of how far this approach should be taken beyond the confines of that Act. New Zealand legislation enacted since the *NZPPSA* has continued to use pre-*NZPPSA* secured transactions terminology and concepts.[87] Various recommendations the author has made from time to time to relevant authorities to draft new legislation in a manner consistent with *NZPPSA* concepts have not been taken up and this, together with informal discussions the author has had with those involved in the drafting process, suggests that the use of traditional secured transactions terminology and concepts in post-*NZPPSA* legislation is a deliberate choice intended to distinguish these old fashioned security devices from the *NZPPSA*'s modern functional security interest and to retain the consequences of this distinction. While the author does not favour this drafting approach, it is important to understand that traditional concepts of ownership and title will continue to be relevant outside the *NZPPSA*, just as it is important to understand that the notion of ownership has been re-conceptualised, and the location of title is irrelevant, when the *NZPPSA* governs. This is apparent from the High Court and Court of Appeal decisions in *JS Brooksbank and Company (Australasia) Ltd*

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85 This suggestion had originally been made to the Ministry of Economic Development, before the Act came into force, by the New Zealand Law Society Personal Property Securities Act subcommittee and was picked up by the Ministry in a discussion document circulated in May 2001, wherein the Ministry stated (as recommended by the Law Society): 'It is proposed to add a new subsection to make it perfectly clear that, for the purposes of s 36, a "third party" includes the liquidator or official assignee of the debtor.' It seems that a differently constituted committee of the Law Society, no doubt to the great frustration of the Ministry, subsequently resiled from the previous recommendation and the proposal did not proceed: see *Sleepyhead* [2007] 3 NZLR 602, 608–9. In the author's opinion, the amendment should still be made.

86 [2007] 3 NZLR 602, 611.

87 See, eg, *Property Law Act 2007* (NZ) (which deals, among other things, with certain enforcement procedures for 'mortgages'); *Companies Amendment Act 2006* (NZ) (which introduced voluntary administration into New Zealand).

v EXFTX Ltd (rec apptd, in liq),[88] which is probably the most difficult New Zealand *NZPPSA* case to date.

E *Brooksbank*

Brooksbank is a difficult case because of the atypical contractual arrangement, compounded by the unusual way in which the facts played out. It is a case on the boundary of what type of property rights do or do not constitute security interests and is a useful reminder that although traditional concepts of ownership are largely redundant within the context of the *NZPPSA*, they remain highly relevant outside the confines of the Act. That *Brooksbank* is a boundary case is clear from the differing conclusions reached by the High Court and Court of Appeal; the former found a security interest while the Court of Appeal held otherwise.

Brooksbank supplied wool to Feltex, a carpet manufacturer known to be in financial difficulty. Aware of the problems that Feltex faced, Brooksbank insisted on full payment before delivery. One clause in the standard sale terms referred to 'cash on delivery', while a handwritten amendment elsewhere referred to 'delivery made on reciept [sic] of cleared Bank funds'. But both parties understood the arrangement to be that Feltex would instruct its bank to pay Brooksbank in cleared funds and when Brooksbank had notice of this, it would instruct its agents to release wool to Feltex. Clause 4.0(1) of the supply agreement provided that ownership of the wool passed to Feltex upon receipt of notification of cleared funds, so that ownership could pass before delivery. In the author's opinion, consistent with the view taken by the High Court, this clause, while not as clear as some, should be regarded as a retention of title arrangement because it *potentially* deferred the passing of title from the time the goods were unconditionally appropriated to the contract (which is the default rule for the passing of title under section 20 rule 5 of the *Sale of Goods Act 1908* (NZ)) until the time that the seller received confirmation of payment.[89]

As the Court of Appeal noted,[90] the arrangement was atypical because in the usual retention of title arrangement delivery is made before payment and before title passes. But, although the arrangement contemplated payment before delivery, the clause could clearly function as a standard retention of title arrangement where lawful delivery in fact took place before payment. Through a misunderstanding acknowledged by all parties, and as a consequence of Brooksbank's agents improperly releasing wool to Feltex without authority

88 *JS Brooksbank and Company (Australasia) Ltd v EXFTX Ltd (rec apptd, in liq)* (Unreported, High Court of New Zealand, Stevens J, 21 November 2007) ('*Brooksbank* (HC)'); *JS Brooksbank and Company (Australasia) Ltd v EXFTX Ltd (rec apptd, in liq)* [2009] NZCA 122 (6 April 2009) ('*Brooksbank*').

89 It probably did not operate this way in practice because it seems the wool was not appropriated to the contract until after payment. There would also be a substantial overlap between the protection the seller gained from the clause, if any, and the protection derived from the unpaid seller's lien provided by s 42 of the *Sale of Goods Act 1908* (NZ). The unpaid seller's lien is not a security interest because it arises by operation of law: see Gedye, Cuming and Wood, above n 20, [17.4], [23.3].

90 *Brooksbank* [2009] NZCA 122 (6 April 2009) [6].

(either actual or apparent), Feltex did in fact end up in possession of wool that it had not paid for. The Feltex manager, aware of the error, had the wool put aside and did not use it. Feltex then went into receivership and the receivers appointed by Feltex's banker, which held a general security interest, claimed the wool. The receivers argued, and the High Court accepted, that Brooksbank's retention of title arrangement constituted an unperfected security interest that was subordinate to the perfected general security interest under which the receivers were appointed. The Court of Appeal disagreed, stating that, 'the supply agreement was not intended to secure payment in the manner contemplated by the definition',[91] (of security interest in *NZPPSA* section 17) and again noting that the supply agreement was not a retention of title clause as that term is generally understood. But in the author's respectful opinion, the Court of Appeal placed too much reliance on the payment terms and the atypical nature of the retention of title arrangement. There are many transaction types on the periphery of the definition of security interest (and this was undoubtedly one) but this just emphasises the need in these difficult cases to apply the functional definition of security interest to the transaction in question without preconceived notions concerning the form of the transaction.

In *Brooksbank*, the relevant question when determining whether the interest created by the clause in issue came under the statutory definition of security interest was whether the interest in personal property (in this case, the retained ownership in the wool) 'in substance secures payment': *NZPPSA* section 17(1)(a). One might perhaps answer this issue by asking: 'If the contractual arrangement did not secure payment, what other function did it serve?' The retention of title clause itself provided that the 'arrangement *includes* any wool held by the seller',[92] implying the possibility that the clause could apply where the wool was held by the buyer. In this latter eventuality, the retained ownership would clearly secure performance of the obligation to pay the purchase price. Although the arrangement may have been redundant before the wool was appropriated to the contract (because until then ownership would not have passed anyway), and so would never come into play if the agreed payment terms were met (which were essentially payment before appropriation), in the author's view this factor does not necessarily take the contractual arrangement outside the statutory definition of security interest.[93] It is common practice for terms of supply to provide for both cash on delivery and retention of title until payment. While the retention of title serves little purpose when the payment terms are met, it is not uncommon for a supplier to waive strict compliance with the payment terms and rely on the retention of title clause when possession is given before payment is made. Furthermore, an argument made elsewhere that a variation or

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91 Ibid [50].

92 Ibid [6].

93 Likewise the author believes it is irrelevant that the unpaid seller's lien under the *Sale of Goods Act 1908* (NZ) arguably made the retention of ownership arrangement redundant if the payment terms had been complied with.

waiver of strict payment terms had the effect of nullifying an agreed security interest was rightly rejected.[94]

However, the Court of Appeal concluded that the contractual arrangement was not intended to function as a security interest. Because Brooksbank thus retained ownership other than through a security agreement, Feltex had no rights in the wool to which the bank's security interest could attach. In effect, Brooksbank could fall back on its common law title and the *nemo dat* rule to defeat the bank. But if it is accepted that the contractual arrangement in *Brooksbank* could have created a security interest, the analysis proceeds on a different basis; although it does not necessarily lead to a different result. There is insufficient detail in the judgments to say with certainty if any of the following arguments could have been convincingly made out, but they illustrate the continued relevance of non-*NZPPSA* principles even if a security interest had been involved:

- One could argue that Brooksbank's unpaid seller's lien, which was not a security interest because it was not provided for by a transaction but rather was implied by the *Sale of Goods Act 1908* (NZ), would only have been terminated under section 44(1)(b) of the *Sale of Goods Act 1908* (NZ) if Feltex had 'lawfully' obtained possession of the wool, and in the circumstances Feltex's possession could be said to be 'unlawful';
- Brooksbank's security interest was arguably perfected by possession whilst the wool was held by its broker agents and the mistaken delivery by the agents, acting outside the scope of their authority, could be argued not to have dispossessed Brooksbank and unperfected its security interest, particularly as the buyer segregated the wool in question from its other inventory. Against this argument, *NZPPSA* section 18(3) provides that a secured party is not in possession of collateral that is in the actual or apparent possession of the debtor (and unlike section 44 of the *Sale of Goods Act 1908* (NZ) there is no express requirement that the debtor's possession be lawful) and the High Court expressly held that Feltex obtained possession within the meaning of this subsection when Brooksbank's brokers released the wool to Feltex's carriers;[95]
- Regardless of contractual terms concerning the passing of property, property in unascertained goods the subject of a contract for sale cannot pass to the buyer until the goods are ascertained. It could be argued that the unauthorised delivery by Brooksbank's agents was not lawful appropriation of the wool to the contract, so that, even absent the retention of title arrangement, Feltex had insufficient rights in the wool to allow the bank's security interest to attach. Feltex, it would be argued, had unlawful possession of the wool and unlawful possession would not satisfy the requirement in section 40(1)(b) of the *NZPPSA* that the debtor

94 See *Service Foods* (CA) [2006] NZCA 349 (11 November 2006) [13].
95 *Brooksbank* (HC) (Unreported, High Court of New Zealand, Stevens J, 21 November 2007) [56].

must have rights in the collateral before a security interest can attach. On this analysis, the bank had no interest in the wool.[96] Putting it another way, it would be argued that Feltex did not hold possession under Brooksbank's putative security interest (which if unperfected would concede priority to the bank's perfected security interest) but had bare physical possession acquired through the unauthorised delivery. Even if, contrary to the above argument, this bare possessory interest were sufficient to allow the bank's security interest to attach, it would only attach to the limited possessory interest and the resulting conflict between Brooksbank and the bank would not be governed by the *NZPPSA* priority rules. It would be governed by the common law *nemo dat* rule and Brooksbank would prevail. This final argument is close to the position taken by the Court of Appeal but recognises that the contractual arrangement between the parties did provide for a security interest although the security interest did not govern the outcome because it never came into play. While this distinction makes no difference in *Brooksbank*, it could be significant in other circumstances.

Both the High Court and Court of Appeal gave fair recognition to the principles of the *NZPPSA*, and in particular to the definition of security interest, but their views differed as to which side of the boundary line the transaction in question fell on.[97] The value of *Brooksbank* as a precedent lies in its recognition of the potential ongoing relevance of the common law in those cases that do not fall within the confines of the Act. But the real lesson of *Brooksbank* for practitioners is the desirability of undertaking a cautionary registration in boundary cases. A cautionary registration is one made where there is some doubt that a transaction may provide for a security interest. The registration of a financing statement does not turn a transaction that is not a security interest into one, so there is no downside to registering, and it is better to be safe than sorry. Although in *Brooksbank*, unlike *Portacom* and *Bloodstock*, the non-registering creditor ultimately prevailed (because the Court of Appeal held the transaction in issue did not provide for a security interest), it could have saved itself much trouble and expense through the simple expediency of registering a cautionary financing statement.

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96 See especially *Brooksbank* [2009] NZCA 122 (6 April 2009) [56].

97 However, the High Court judgment is another example of the Court properly recognising the conceptual changes wrought by the *NZPPSA* while misconstruing operative provisions of the Act. Justice Stevens opined in obiter that Brooksbank could have obtained priority under s 73 of the Act by registering a financing statement within 10 days of delivery: *Brooksbank* (HC) (Unreported, High Court of New Zealand, Stevens J, 21 November 2007) [62]. In fact, the wool would have been inventory of Feltex and Brooksbank could have obtained priority only under s 74, not s 73, and only by registering *before* delivery, not within the 10 day grace period provided in s 73. It goes without saying that this could reverse the priorities in relevant circumstances.

VII THE ANALYSIS SO FAR

By and large, the initial New Zealand decisions have demonstrated an encouraging willingness to recognise and give effect to the significant conceptual reforms brought about by the *NZPPSA* but have occasionally demonstrated less familiarity with the mechanical workings of the Act. Perhaps not surprisingly, the early cases commonly involved conceptual questions, such as whether a security agreement drafted as a floating charge covered assets not owned in the traditional sense by the debtor and whether a particular transaction came within the section 17 definition of security interest. These conceptual questions often determined the outcome of the cases and in such cases, on a practical level, it did not much matter where a court misconstrued mechanical provisions of the Act. But now that the fundamental concepts are widely known and accepted, the focus of the regime has shifted to more technical, but no less important, considerations. So far as financiers are concerned, one of the most significant products of the Act are the rules that determine the priority of two competing security interests or when a buyer (or lessee) prevails over a security interest. In the respectful opinion of the author, several recent cases have fallen short in their analysis of these critical questions. What is not yet clear is whether this is indicative of a trend away from the willingness of the early cases to discern and embrace the concepts introduced by the Act or simply further evidence that the courts have yet to become fully acquainted with the mechanical operation of the Act.

One of the most important provisions of the Act is the provision (*NZPPSA* section 53; *Australian PPSA* section) that gives buyers in the ordinary course of business priority over a security interest, whether or not the security interest is perfected. The phrase 'ordinary course of business' has had a chequered history in Australasian voidable transactions law and in New Zealand was finally abandoned in that context when section 292 of the *Companies Act* was amended in 2007. The phrase has been used elsewhere in legislation but each iteration must be interpreted in the context in which it is used. In the context of the *NZPPSA*, it should not be given the same meaning as under either floating charge or voidable transactions jurisprudence. This point was confirmed in *Orix New Zealand Ltd v Milne* where Rodney Hansen J noted that '[t]he North American cases which consider the identical phrase in personal property security legislation provide the best guidance'.[98] While this decision was a promising starting point for New Zealand jurisprudence on this important issue, two more recent cases are, in the author's view, less supportable.

98 [2007] 3 NZLR 637, [62].

VIII SOME OF THE MORE RECENT CASES: CAUSE FOR CONCERN?

A *Motorworld v Turners*

The first 'ordinary course of business' decision that the author wishes to take issue with is *Motorworld Ltd (in liq) v Turners Auctions Ltd*.[99] One aspect of the case involved a claim by the third plaintiff in conversion against an auctioneer. Although the actual outcome of the case is readily supportable on the grounds that the third plaintiff effectively condoned the auctioneer's conduct, and so could not later complain about it,[100] the Judge's treatment of the third plaintiff's argument that certain transactions were outside the ordinary course of business is problematic.

The third plaintiff was a secured financier of inventory and argued that the inventory had been sold outside the ordinary course of business within the meaning of *NZPPSA* section 53. Opposing counsel argued that the financier had impliedly authorised the sales so that the financier's security interest was extinguished under section 45(1)(a) of the Act.[101] To a large extent, counsel were arguing across each other rather than against each other: counsel for the financier was arguing section 53 and opposing counsel was arguing section 45. Only rarely will an inventory financier be able to argue that the financier did not intend for the debtor to sell the inventory so counsel for the financier conceded that the debtor had implied authority to sell the inventory in the ordinary course of business. This concession is consistent with a long line of both pre- and post-*NZPPSA* authority.[102] Furthermore, under section 53, a secured party cannot prevent the debtor, acting in the ordinary course of business, from selling collateral free of the security interest so there is no reason not to make the concession. But there is no good reason why a prudent secured creditor would *ex ante* allow the debtor any wider licence to deal with the collateral; hence counsel's concession that a clause should be implied authorising the debtor to deal with its inventory but that the authorised transactions should be limited to sales made in the ordinary course of business. This is both logical and consistent

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99 (Unreported, High Court of New Zealand, Lang J, 17 February 2010) ('*Motorworld*'). The author discloses an interest in this decision. He advised counsel for the third plaintiff, the unsuccessful secured financier.

100 Ibid [48].

101 In simple terms, *NZPPSA* s 45(1)(a) (the *Australian PPSA* equivalent is s 32) provides that a security interest does not continue in collateral that the secured party has expressly or impliedly authorised the debtor to deal with free of the security interest.

102 See, eg, *Insurance and Discount Corporation Ltd v Motorville Car Sales* [1953] 1 DLR 560, 566 ff (and the collected authorities there referred to) (pre-*NZPPSA*); *Estevan Credit Union Ltd v Dyer* (1997) 146 DLR (4th) 490, 495 (post-*NZPPSA*).

with the general law that a term will be implied when it is necessary to give business efficacy to the contract.[103] Despite this, Lang J stated:

> I do not consider that the term for which counsel for [the secured creditor] contends can be implied into the agreement between [the secured creditor] and [the debtor]. … [The witness for the secured creditor] never referred to any belief that [the secured creditor] would be subject to any restrictions at all in the way that it sold [its inventory that was collateral] …[104]

Presumably, his Honour meant by this that there was authority to deal, but in this particular case the authority was not limited to dealings in the ordinary course, and he did not mean that there was no authority to deal at all. Elsewhere, his Honour states that the terms of trade 'expressly' permitted the sales,[105] and he goes on to acknowledge that: 'Where a creditor holds a security interest over a debtor's inventory, both parties will generally accept and understand that the debtor may only deal with that inventory in the ordinary course of business'.[106]

While some comfort can be taken from this last comment, so that the instant case may be restricted to its facts, his Honour's conclusion in the case that the debtor was not 'subject to any limitation *at all* in the way it disposed of [the collateral]'[107] is still troubling. No prudent secured creditor would agree to give the debtor an unlimited right to dispose of the collateral. If such a term is implied by the courts, it raises the prospect that creditors secured over inventory will need to include in security agreements an express provision limiting the debtor's right to deal with the collateral to transactions in the ordinary course of business, if the secured party is to avoid the risk of extinguishment of its security interest under section 45. Absent such a clause, there is a risk, if *Motorworld* is given an expansive interpretation, that a sale of inventory may routinely extinguish a security interest under section 45 even where the sale was outside the ordinary course of business so that the buyer would not acquire the collateral free of the security interest under section 53. Section 45 would then become far more significant than previously anticipated and could potentially emasculate section 53. Routinely, section 53 should be allowed to deal with sales of inventory. Resort to section 45 should by and large be left to unusual sales of inventory (such as a bulk sale below cost) and to sales of non-inventory items where a prudent buyer has required that the express consent of the secured party be given to the particular transaction. Perhaps the Court was reluctant to apply the ordinary course of business test to the unusual facts, but if that is so it is

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103 See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. In *McNeill v Gould* (2002) 4 NZConvC 193, 557 (relied on by the Court in *Motorworld* (Unreported, High Court of New Zealand, Lang J, 17 February 2010) [31]) the New Zealand Court of Appeal preferred a less complicated statement of the law (from *Chitty on Contract*) as to when terms will be implied, but both approaches would imply a term where it was necessary to give business efficacy to the contract.

104 *Motorworld* (Unreported, High Court of New Zealand, Lang J, 17 February 2010) [33].

105 Ibid [34]. In fact, the written terms of trade were silent on the point, which is precisely why the secured creditor conceded that there was implied authority. Perhaps his Honour meant that on his view of the facts, the written terms of trade must subsequently have been expressly varied.

106 Ibid [37].

107 Ibid (emphasis added).

respectfully submitted that it would have been better to limit the judgment to the uncontroversial point that a party cannot claim conversion where it has consented to the conduct that constitutes the alleged conversion.

Unlike the earlier cases discussed above, there was little doctrinal analysis in *Motorworld.* An analysis of the rationale for sections 45 and 53 would have been appropriate and may have encouraged the Judge to give greater weight to section 53. The brief discussion of the interplay between sections 45 and 53 includes the surprising comment that '[t]his case does not relate to the position of a purchaser of goods that are subject to a security interest'.[108]

B *Tubbs v Ruby*

The other 'ordinary course of business' case with which the author takes issue is *Tubbs v Ruby 2005 Ltd.*[109] A company called Waimate, which had given an all assets security interest to its bank, experienced financial difficulties. Its directors decided to establish a separate company, Ruby, 'as an additional means of assisting Waimate with its cashflow problems'.[110] This was done by 'selling' inventory from Waimate to Ruby at market value. The outcome of the case principally turned on whether the sales were in the ordinary course of Waimate's business,[111] and both the High Court and Court of Appeal, in what the author regards as surprising conclusions, held that they were. Although North American case law defining the ordinary course of business has established some broad principles of general application, because section 53 of the *NZPPSA* and section 46 of the *Australian PPSA* require a determination of the ordinary course of business *of the seller*,[112] rather than the practice of business generally, it is in each case ultimately a question of fact that may require the balancing of competing factors. In *Tubbs v Ruby* there were factors pointing both ways. The Court of

108 Ibid [39]–[40].

109 (Unreported, High Court of New Zealand, French J, 26 February 2010) ('*Tubbs v Ruby*'); *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353 (5 August 2010).

110 *Tubbs v Ruby* (Unreported, High Court of New Zealand, French J, 26 February 2010) [12].

111 Other issues included whether the 'sales', which the Court accepted were for the purpose of providing financial assistance to Waimate, should have been reconceptualised as disguised security interests and, even if Ruby had acquired the inventory free of the bank's security interest, whether Ruby had then taken on the status of an unperfected secured creditor by bailing the inventory back to Waimate.

112 This is also true of Canadian jurisdictions apart from Ontario: cf *Personal Property Security Act*, SS 1979–80, c P-6.1, s 30(2); *Personal Property Security Act*, RSO 1990, c P-10, s 28(1). The section will primarily apply to inventory but, at least in New Zealand, is not limited to inventory as a matter of law: see generally Gedye, Cuming and Wood, above n 20, [53.4]. For example, the section could potentially apply to sales of obsolete equipment if such sales are an ordinary part of the seller's business. Section 46 of the *Australian PPSA* contains additional words limiting the application of the section to sales where the seller's business is selling property 'of that kind'. Although it could be argued that these additional words further limit the coverage of the section, so that the Australian section is less likely to apply to non-inventory sales than the New Zealand section, the Australian qualification is probably no more than a statutory expression of the test adopted in Canadian cases that (while still recognising the section is not exclusively limited to the sale of inventory) proposed the two stage test of: (1) Is the seller in the business of selling goods of that kind; and (2) did the transaction take place in the ordinary course of that business: see *Camco Inc v Frances Olson Realty (1979) Ltd* [1986] 6 WWR 258 (Saskatchewan Court of Appeal) [20], [26].

Appeal was greatly influenced by the fact that the sales were for full market value.[113] While a sale at market price is more likely to be ordinary course than a sale below market price, this is only one of the factors to be taken into account. The factors pointing the other way, which in the author's opinion heavily outweighed the fact that the buyer gave full value, included:

- the sales were a response to Waimate's financial distress;
- they were undertaken 'expressly for the purpose of assisting Waimate's cashflow difficulties'.[114] In other words, they were part of a financing arrangement and were not made for the purpose of generating arm's length profits;
- the sales were to a related company formed solely for the purpose of assisting Waimate in this fashion;
- despite the sales to Ruby, Waimate retained the right to resell the goods to genuine arm's length buyers;
- despite the sales, Waimate could take the goods back at any time by providing alternative goods of equivalent value to Ruby;
- Waimate always retained possession of the goods; and
- Ruby had no staff, no customers and no use for the goods and was entirely dependent on Waimate to resell the goods on Ruby's behalf. Such resales were achieved by diverting customer orders from Waimate to Ruby.

These factors all point to the 'sales' (if they can even be called that) being extraordinary, yet in relation to the primary sales the Court of Appeal held otherwise.[115] In the author's opinion, although the Court did consider the policy behind section 53,[116] it failed to weigh up properly, or even consider, all of the competing factors.[117]

The decision is also arguably contrary to a core policy of the *NZPPSA*. The legislation allows a later financier to obtain priority over an earlier financier

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113 The Court was also influenced by the belief that there was no need to protect Waimate's bank (the secured creditor), stating that 'the transactions did not diminish, and quite possibly enhanced, the value of its security by less liquid stock being converted into cash': *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353 (5 August 2010) [38]. But the Court had no evidence that the cash proceeds stayed with the bank. If the cash proceeds were used to pay unsecured creditors, which is quite likely, the sales did diminish the bank's security by effectively using its collateral to pay unsecured creditors in priority to the bank.

114 *Tubbs v Ruby* (Unreported, High Court of New Zealand, French J, 26 February 2010) [42].

115 Ultimately, the Court of Appeal found for the secured creditor by holding that a final tranche of sales involving a reinvoicing arrangement was outside the ordinary course of business. The substantive decision in *Tubbs v Ruby* was handed down after this article was written (judgment of Chisholm J, 27 July 2011). This final decision, which in the author's respectful opinion is deeply flawed and heightens concerns regarding the recent approach of the courts to the *NZPPSA,* held, contrary to the Court of Appeal's interlocutory ruling, that even the reinvoicing arrangement allowed Ruby to take title clear of the bank's perfected security interest.

116 *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353 (5 August 2010) [38].

117 For example, the Court stated: 'The fact these sales were to a related party is here immaterial': ibid [36]. In the author's opinion, related party transactions should rightly be viewed with suspicion.

through the mechanism of the purchase money security interest, but only where the notification and other formalities required by the Act are met. If Ruby wished to assist Waimate in a way that gave Ruby property rights that prevailed over those of the bank, it could easily have structured the transactions as purchase money security interests. Of course, this would have entailed timely registration of a financing statement, as intended by the legislation. The bank and any other creditors would, and should, have been able to search and take account of this registration when deciding whether to provide, or to continue providing, credit to Waimate. By recognising what from all accounts was a financing arrangement as an ordinary course sale, the Court gave Ruby licence to escape the registration requirement and undermine the public notification objective of the legislation.

Furthermore, if, contrary to the author's above analysis, *Tubbs v Ruby* and *Motorworld* are correct, these cases point to an undesirable development in *NZPPSA* jurisprudence: in each case the precedent they would set could be circumvented by suitable drafting. In both cases, a clause in the pertinent security agreement limiting the debtor's right to deal with collateral to sales in the ordinary course of business, and further defining that term, would have produced a different analysis. In *Motorworld*, such a clause would have prevented the Court from implying a wide authority to deal under section 45 and in *Tubbs v Ruby* a clause prohibiting related party transactions would, because Ruby would be deemed to have knowledge of the prohibition by virtue of the relationship with Waimate, have barred Ruby from relying on section 53.[118] Except as provided by the Act itself,[119] the *NZPPSA* regime was intended to apply uniformly without regard to the form of transaction or drafting techniques and any court decision that turns on the vagaries of drafting runs counter to this objective. Nevertheless, in the face of these decisions, prudently drafted security agreements will contain wording that seeks to limit a debtor's ability to sell collateral free of the security interest under section 45 or section 53.[120]

There are other aspects of both *Tubbs v Ruby* and *Motorworld* that hint at an unwelcome return to pre-Act title based thinking. As previously noted, title is irrelevant once the *NZPPSA* is engaged. Similarly, the pre-Act distinctions between legal and equitable interests have, within the Act, been abolished. Yet both cases referred to these issues. In *Tubbs v Ruby*, the Court of Appeal referred to Ruby as

118 *NZPPSA* s 53 and *Australian PPSA* s 46 do not apply where the buyer has actual knowledge that the sale constitutes a breach of the security agreement and, it is suggested, common directorships, as in the case of Waimate and Ruby, would give such knowledge.

119 There are many instances in the legislation where one type of transaction is favoured over another but in each case there is a considered commercial justification for the special treatment. For example, purchase money security interests that meet certain formalities are given priority over non-purchase money security interests.

120 The efficacy of a clause that seeks to define the particular debtor's ordinary course of business is uncertain. It can be strongly argued that a buyer should not be affected by a clause of which the buyer is unaware and that seeks to define narrowly the debtor's ordinary course of business. But there was a comment in a recent New Zealand case that may imply such drafting could have some effect. In *Gibson v Stockco Ltd* (Unreported, High Court of New Zealand, White J, 17 December 2010), White J said that 'covenants in the security documentation served to limit the authorised scope of [the debtor's] ordinary course of business': at [150].

'already holding the highest interest known to the law' since it 'owned' the relevant goods.[121] The 'highest interest known to the [common] law' and traditional concepts of ownership are immaterial under the *NZPPSA*. The relevant issues in *Tubbs v Ruby* were not whether the purchaser 'owned' the goods but whether the property rights acquired by the purchaser should have been re-characterised as security interests within the statutory definition in section 17 and whether the sales were in the ordinary course of business within the meaning of section 53. In *Motorworld*, Lang J commented that the secured party remained the 'equitable owner' of the collateral.[122] With respect, this comment is neither accurate nor relevant. The *NZPPSA* draws no distinction between legal and equitable security interests but, to the extent it is thought desirable to attempt to characterise security interests in terms of pre-Act concepts, a security interest can be viewed as akin to a fixed legal charge that can attach to both present and future property.[123] Nor was the relevant interest in *Motorworld* equitable even in pre-Act terms: the secured party had retained title so under the old law also the seller would have held a legal interest.

Although only interlocutory, *Tubbs v Ruby*, being a Court of Appeal decision, carries weight as a precedent. But it may be that the author is overstating the danger. A subsequent High Court decision concerning a complex set of transactions that essentially boiled down to a financing arrangement disguised as a sale was able to acknowledge *Tubbs v Ruby* as a precedent while still managing to balance the competing factors and conclude that the sales were not in the ordinary course of business.[124]

C *Healy Holmberg*

A third recent decision that in the author's opinion exemplifies an erroneous analysis of the *NZPPSA* is *The Healy Holmberg Trading Partnership v Grant*.[125] The comments of concern are arguably obiter only,[126] but they again illustrate the author's concern that recent cases have not always demonstrated the careful *NZPPSA* analysis of the early decisions discussed above.

Healy Holmberg had registered a financing statement. Subsequent financing transactions were, according to the Judge's finding of fact, ultimately documented after an intervening security interest was perfected. If questions concerning the validity of Healy Holmberg's security agreements are put to one side, the result was that Healy Holmberg was first to register a financing statement but its security

121 *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353 (5 August 2010) [31].
122 (Unreported, High Court of New Zealand, Lang J, 17 February 2010) [27].
123 See *Royal Bank v Sparrow Electric Corporation* [1997] 1 SCR 411.
124 See *Gibson v Stockco Ltd* (Unreported, High Court of New Zealand, White J, 17 December 2010).
125 (Unreported, High Court of New Zealand, Robinson AsJ, 15 December 2009) ('*Healy Holmberg*'); Gedye, above n 37.
126 The case involved security agreements that were allegedly backdated. If the Judge's finding of fact that the security agreements were executed after the debtor went into liquidation is correct, the security agreements were of no effect as they were not executed by the liquidator. This was sufficient to rule against the secured party and the Judge's discussion on priorities can be treated as obiter.

interest would not have been perfected until after that of the intervening secured creditor.[127] The applicable priority rule in such cases involving two competing non-purchase money security interests perfected by registration could not be clearer: the first to register a financing statement wins; not the first to perfect.[128] This is just as the legislature intended, and for good reason. The rule is both certain and simple and is a powerful incentive to register promptly. Despite this, the Judge appears to have disapproved of the rule and substituted one of his own making: 'the general rule [is] that the greatest priority is given to a security interest holder who perfects first'.[129] With respect, this is clearly wrong. If this priority rule were to take root, it would, contrary to the objective of the legislation, make determination of priorities complex and uncertain. The date of registration is easily verifiable; the date of perfection is not.

While the early decisions concerned doctrinal issues and necessarily involved discussion of core concepts, it is to be expected that as the regime matures the focus will shift to the application of the specific rules in the Act, such as the priority rule in issue in *Healy Holmberg*. Nevertheless, an understanding of the underlying principles of the regime as a whole, and the rationale for particular provisions, is required when it comes to applying the mechanical rules. Although it will not always be necessary for the court to record its consideration of these matters, the absence of any such analysis in *Healy Holmberg* may indicate that they were not given due consideration. This may have led the Judge to prefer the traditional equitable principle of *qui prior est tempore potior est jure* and to eschew the first to register rule chosen for good reason by the legislature.

IX CONCLUSION

The reforms instituted by the *NZPPSA* and *Australian PPSA* involve concepts very different to those underpinning the prior law. Both regimes are based on carefully considered commercial imperatives determined by the underlying economic function of those transactions that are subject to the regimes. Consequently, the proper application of the Acts requires an understanding of the conceptual foundations and objectives of the legislation, and of how the operative provisions support these concepts and objectives.

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127 Because a security interest is not perfected until it has fully attached, and full attachment of a non-possessory security interest requires a written security agreement: see *NZPPSA* ss 36, 40, 41.

128 See *NZPPSA* s 66(b)(i).

129 *Healy Holmberg* (Unreported, High Court of New Zealand, Robinson AsJ, 15 December 2009) [37]. There are a number of internal inconsistencies and flaws in the analysis leading to this conclusion. For example, the Judge erroneously equates the dates of perfection and registration: at [30], [37]. But he correctly observes that perfection does not occur until attachment: at [25], [34]. Contrary to the Judge's comment at [37], s 66(b) is not concerned with a security interest that has been perfected in two different ways. Also, it is unclear whether the Judge believes he was dealing with an oral security agreement that was to be subsequently documented or whether there was to be no security agreement until it was documented. This is a potentially significant distinction: see Gedye, above n 37, 125–6 (the judgment has clues pointing both ways: at [32], [42]).

Although novel drafting in the *NZPPSA* risks producing different outcomes to those in North America, and even more so with the Australian drafting, the Australasian regimes are based on the same economic and commercial objectives as the North American regimes, and have been designed to achieve substantially similar results. Courts should therefore look to North American precedents (and local and North American commentary) for assistance in understanding the statutory provisions, and should be reluctant to depart from these authorities without good cause.

Early New Zealand decisions demonstrated a good understanding of the doctrinal issues and a willingness to engage with them. Similarly, with some exceptions, the courts have been willing to adopt academic analysis and North American precedents. But at the same time, the operation of the mechanical provisions of the legislation has not always been fully understood. As the New Zealand regime has matured, the focus has shifted from core concepts to the operation of the Act, so that the proper application of the operative provisions of the legislation has come to the fore. A number of recent cases, of which the author has been critical, suggest that the scope and context of these operative provisions is receiving insufficient consideration and as a result the provisions are not always being applied correctly. The broad appreciation of the objectives of the regime demonstrated by the early cases has been less evident in these recent decisions. Courts must remain responsive to the new way of thinking and not revert to the old law analysis that was based on the location of title and the time at which it was acquired.

On the other hand, the difficult decision in *Brooksbank* is a timely reminder that the common law remains relevant both to supplement the Act in a manner consistent with the principles and provisions of the regime and to operate fully when the Act is not engaged. This case also demonstrates that there is room to disagree over even core issues such as what is or is not a security interest and, consequently, that determining exactly when and how the common law should apply will not always be easy.

Training helps to ensure stakeholders have the necessary appreciation of the context within which the provisions of the Acts operate. Although the introduction of the *NZPPSA* was accompanied by a stellar seminar programme and other learning opportunities supported by the professions and the Government, which doubtless contributed to the early success of the regime, there has been little emphasis on continuing education. This may go some way to explaining why in the author's opinion some more recent decisions appear not to have fully appreciated the context in which the provisions in issue in those cases operated. A lesson here for Australia is the importance of both initial and ongoing training. As far as it is possible to tell from the eastern side of the Tasman, the impression one gets is that to date Australia has placed less initial emphasis on this vital aspect of transitioning to the new regime than happened in New Zealand.

But the proper development of secured transactions jurisprudence requires a two-pronged approach. In addition to informed and well reasoned argument and analysis by counsel and the courts, it requires periodic reviews of the legislation to address problems that have arisen and to respond to local and foreign developments. Although Australia has sensibly provided for a mandatory review of its regime, there is no such agenda in New Zealand.

It is now 12 years since the *NZPPSA* was enacted and nine since it came into force. In that time, the courts have rightly had regard to the functional focus and commercial objectives of the regime when addressing issues of a conceptual nature. But while these conceptual issues are now generally settled, the developing jurisprudence concerning the operative provisions of the Act remains a work in progress.