

# A HOARY CHESTNUT RESURRECTED: THE MEANING OF ‘ORDINARY COURSE OF BUSINESS’ IN SECURED TRANSACTIONS LAW

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*The purpose of this article is to provide some guidance to practitioners and the judiciary in both Australia and New Zealand on the vital question: when is a sale in the ‘ordinary course of business’ for the purposes of the Personal Property Securities Acts of Australia and New Zealand? It is not uncommon for the courts to say that in any given case this is a question of fact. But, while not denying the importance of the particular factual circumstances in issue, the author seeks to demonstrate that the analysis will be facilitated by adopting a structured approach that initially recognises the primacy of security interests and that follows sound legal principles developed by the North American courts. Differences between the Australian and New Zealand legislative provisions are analysed to determine whether they lead to different outcomes on either side of the Tasman.*

## CONTENTS

I	Introduction.....	2
II	A Starting Point.....	3
III	Defining Buyers.....	6
IV	The Role of Ordinary Course Transactions.....	9
V	The Buyer’s Seller Rule .....	10
VI	Australasian Drafting Differences in the Ordinary Course Provisions.....	12
VII	General Principles.....	19
VIII	How Relevant Is Price?.....	28
IX	<i>Tubbs v Ruby</i> Revisited: Drafting Strategies to Protect the Secured Party.....	31
X	Limits to the Subjective Approach.....	31
XI	Sales Authorised by the Secured Party.....	35

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XII	The Australian Twist.....	38
XIII	The Impact of Subversive Corporate Structures.....	39
XIV	Conclusion.....	42

## I INTRODUCTION

It is common for a debtor to sell goods that the debtor has previously given as collateral. Often, this will be in conformity with the mutual intention of the debtor and the secured creditor. This would be the case, for example, where the creditor is secured over inventory that both parties expect the debtor to sell at a proper price in the course of the debtor's business. With inventory financing, the secured creditor will commonly expect much of the sale proceeds to be applied towards repaying the secured creditor but, if the debtor is financially distressed or dishonest, this expectation may not be met. If the inventory financier goes unpaid, there will be times when the creditor will look to recover the inventory, even where it has been on sold.

In addition to the sale of inventory, there may be other times when the secured creditor expects, or at least accepts, that the debtor will dispose of collateral. This may be the case, for example, where the debtor regularly acquires new equipment and disposes of obsolete equipment. Conversely, there may be occasions when a secured creditor objects even to the sale of inventory, such as where inventory is sold in suspect circumstances to a party related to the debtor or is otherwise sold on terms unacceptable to the secured creditor.

Whenever the secured creditor disapproves of the sale of collateral, whether it be inventory, equipment or some other type of asset, the scene is set for a conflict between the secured creditor and the buyer. Provisions of the *Personal Property Securities Act 2009* (Cth) ('PPSA (Aus)') and *Personal Property Securities Act 1999* (NZ) ('PPSA (NZ)') comprehensively deal with such conflicts and determine which of the secured party and buyer prevails.<sup>1</sup> The provisions in the PPSA (Aus) and PPSA (NZ) ('Australasian PPSAs') set out the different instances when buyers of property acquire the property free of any security interests to which the property had been subject.<sup>2</sup> The various

<sup>1</sup> The Personal Property Securities legislation of Australia, New Zealand and Canada derived originally from Article 9 of the United States *Uniform Commercial Code*.

<sup>2</sup> In Australia, these provisions are sometimes referred to as the 'extinguishment provisions'. In this article, the author refers to them as the 'buyer protection provisions' because, while they protect a buyer's or lessee's interest, they do not always permanently extinguish affected

provisions may overlap, and a buyer need only come within any one or more of them, but together they comprehensively spell out when a buyer prevails over a secured creditor. If a buyer does not fall precisely within one of these provisions, a creditor that was secured over the property bought will be able to claim it back from the buyer. This article addresses one such provision — s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) — regarding sales in the 'ordinary course of business'. These particular sections specify when a buyer in the ordinary course of the seller's business takes the property free of any security interest that was attached to the property.

If the Australian experience mirrors that of New Zealand, it will be some time before there is any significant litigation over the meaning of 'ordinary course of business' in this context. Initially, litigation concerning the *PPSA* (NZ) focused on conceptual aspects arising under the Act, before the natural progression to a consideration of more operational issues. But, in due course, there will be litigation in Australia, as there has been in New Zealand, over the meaning of the 'ordinary course of business' because the concept is as significant in the context of the Personal Property Securities ('PPS') legislation of Australia and New Zealand as it was in the past in relation to Australasian voidable transactions law.

It is worth noting, though, that secured creditors will not challenge the vast majority of sales that occur daily. Most everyday sales will be in the ordinary course of business and this will be obvious. Section 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) are essentially straightforward sections that will quietly and efficiently operate as intended and almost unnoticed. It will only be necessary to examine the finer nuances of the sections where the secured creditor has concerns over the propriety of a sale, either because it involved property that the debtor did not usually hold for resale or because the secured creditor had reason to be alarmed about the terms of the sale or the parties to it.

## II A STARTING POINT

When faced with the competing claims of a secured creditor and a buyer to whom the debtor has sold the secured creditor's collateral, it is sensible and logical to begin with the assumption that the security interest is effective against both the debtor and the buyer and then to ask whether there is any applicable exception to this starting point. Statutory recognition of

security interests. For example, a lessee may take its leasehold interest free of a prior security interest but the lessor's reversionary interest may remain subject to the security interest.

this starting point is found in s 18(1) of the *PPSA* (Aus) and s 35 of the *PPSA* (NZ). These provisions confirm that a security interest is effective according to its terms. The New Zealand provision expressly provides that this potentially powerful proposition is subject to the other provisions of the Act. The Australian provision does not state this expressly, but it is necessarily so. These ‘effectiveness provisions’ are reinforced by s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ), which provide, amongst other things, that a security interest continues in collateral sold by the debtor unless the secured party authorised the sale.<sup>3</sup>

The most obvious provisions of the Australasian PPSAs that must override the effectiveness provisions, where there is any conflict between the terms of a security agreement and the rights of third parties, are:

- the provisions requiring certain formalities to be satisfied before a security interest is enforceable against third parties;
- the provisions determining the respective priorities of competing security interests; and
- the provisions giving buyers clear title despite the existence of a security interest over the purchased property.<sup>4</sup>

By starting with the presumption that a security agreement is effective against third parties (provided the formalities required by the Act have been complied with),<sup>5</sup> it is clear that a secured party will prevail over a buyer unless the buyer comes squarely within one of the buyer protection provisions.<sup>6</sup> In *Associates Commercial Corp of Canada v Dependable Transportation Inc* the matter was put this way: ‘The law is clear that the onus is on the [buyer] to

<sup>3</sup> Sales authorised by the secured party in accordance with *PPSA* (Aus) s 32 and *PPSA* (NZ) s 45 are discussed in Part XI below.

<sup>4</sup> The ‘effectiveness provisions’ of both the *PPSA* (Aus) and the *PPSA* (NZ) are also stated to be subject to other laws. This is provided within New Zealand’s effectiveness provision of s 35, but in Australia is located separately in s 257. Although this allows the general law to continue to apply in areas the Act does not cover, such as contractual capacity, illegality, fraud and duress, the general law should not be applied in a manner inconsistent with the scheme of the legislation.

<sup>5</sup> For non-possessory security interests, this commonly requires a written security agreement signed or acknowledged by the debtor: *PPSA* (Aus) s 20; *PPSA* (NZ) s 36.

<sup>6</sup> It is not difficult to locate cases where the failure to follow this structured approach has led the Court astray: see, eg, the discussion in Part V below regarding *Royal Bank v Bank of Nova Scotia* (1994) 6 PPSAC (2d) 250.

establish beyond the balance of probability that it falls within the scope of [a buyer protection provision]'.<sup>7</sup>

This approach requires the litigants and the court to identify correctly the relevant transaction by which a security interest has allegedly been subordinated or cut off. This is most commonly an issue when collateral has been sold and then resold. Depending on which provision of the Act is in issue, the relevant transaction may be the first or a subsequent sale in a chain of sales,<sup>8</sup> and in a number of cases the court has been compelled to draw counsel's attention to the right transaction when counsel has been intent on examining some other transaction in the chain.<sup>9</sup>

The various buyer protection provisions can overlap but it is necessary only that a buyer comes within any one or more of these provisions to prevail against a secured creditor.

Essentially, provided a buyer satisfies the requirements of the relevant provision, the interest acquired by a buyer will prevail over a security interest:

- where the security interest is unperfected at the time the buyer becomes a buyer;<sup>10</sup>
  - where the security interest is temporarily perfected;<sup>11</sup>
  - where the regulations require the secured party to register serial numbers for the collateral and the secured party has failed to do so correctly;<sup>12</sup>
  - in the case of motor vehicles, where the seller is a dealer and the buyer is not;<sup>13</sup>
  - where the buyer is buying low value consumer goods for personal use;<sup>14</sup>
- and

<sup>7</sup> (1994) 8 PPSAC (2d) 172, 176 [11] (McGarry J).

<sup>8</sup> In respect of the subject of this article (ie sales in the 'ordinary course of business' under s 46 of the PPSA (Aus) or s 53 of the PPSA (NZ)), the relevant transaction will, as a consequence of the buyer's seller rule discussed in Part V below, be the first sale in a chain.

<sup>9</sup> See, eg, *Wandering Creek Farms Ltd v Sphenical Capital Inc* (2010) 18 PPSAC (3d) 59 ('*Wandering Creek Farms*'); *StockCo Ltd v Gibson* [2012] NZCA 330 (26 July 2012) [145] (O'Regan P for O'Regan P, Randerson and Asher JJ) ('*StockCo*'). Both of these cases are discussed further at below n 22.

<sup>10</sup> PPSA (Aus) s 43; PPSA (NZ) s 52.

<sup>11</sup> PPSA (Aus) s 52; PPSA (NZ) s 56.

<sup>12</sup> PPSA (Aus) ss 44–5; PPSA (NZ) s 55.

<sup>13</sup> PPSA (Aus) ss 45(3)–(4); PPSA (NZ) s 58.

<sup>14</sup> PPSA (Aus) s 47; PPSA (NZ) s 54.

- the subject of this article, where the buyer buys in the ordinary course of business of the seller.<sup>15</sup>

In each of the above cases, lessees are protected as well as buyers but for ease of reference, this article will refer only to buyers. Further sections (not dealt with in this article) protect persons, who could include buyers, acquiring interests in investments (such as shares)<sup>16</sup> and other negotiable and quasi-negotiable collateral (such as money and chattel paper).

If none of these provisions exactly cover a buyer's circumstances, a secured party whose security interest has attached to the property bought will prevail against the buyer. The effectiveness provisions can be taken as confirmation of this.

### III DEFINING BUYERS

'Buyer' is not defined in the Australasian PPSAs. However, it is clear that the term should be given its common meaning, which is deliberately different to that of the defined term 'purchaser'. Put simply, a purchaser is someone who acquires a proprietary interest under any form of consensual transaction.<sup>17</sup> On the other hand, 'buyer' should be limited to someone who acquires property under a contract of sale and is thus a narrower term than 'purchaser'. The term 'purchaser' would include a buyer but would also cover, for example, a secured creditor and, at least in New Zealand, a donee of a gift.

Some transactions structured as sale and purchase agreements may in fact be disguised financing arrangements. For example, this could be the case where an agreement for the sale of goods that contained 'put and take' options would likely result in the goods later being reacquired by the original seller at a price calculated to provide the original buyer with a predetermined return on the original purchase price. Where any such transactions come within the statutory definition of security interest, they should be characterised as such and not as sale transactions. The original 'buyer' would then not be a buyer for the purposes of the buyer protection rules and instead would be classified as a secured party for the purposes of the priority provisions of the Act.<sup>18</sup>

<sup>15</sup> *PPSA* (Aus) s 46; *PPSA* (NZ) s 53.

<sup>16</sup> See, eg, *PPSA* (Aus) ss 49–51; *PPSA* (NZ) s 97.

<sup>17</sup> See, eg, *PPSA* (Aus) s 50(3) (definition of 'purchaser'); *PPSA* (NZ) s 16(1) (definitions of 'purchase' and 'purchaser').

<sup>18</sup> The Australian Act expressly mandates this outcome: *PPSA* (Aus) s 42(b). But, it is equally clear that by applying a purposive interpretation to the New Zealand Act, the same analysis applies, even though the Act is silent on the point.

However, while it is clear that a transaction which takes the form of a sale, but that in substance creates an interest which comes within the statutory definition of security interest, will, under the relevant PPSA, be regulated as a secured transaction and not as a sale, this will not always be an easy classification to make. The argument that a transaction that had been documented as a sale was in fact a disguised security interest, and should have been regulated as such, was made and rejected in the '*Tubbs v Ruby*' litigation in New Zealand.

The *Tubbs v Ruby* litigation refers to three decisions: the initial application for an interim injunction in the High Court ('*Tubbs v Ruby (initial)*'),<sup>19</sup> the interim injunction appeal in the Court of Appeal ('*Tubbs v Ruby (appeal)*'),<sup>20</sup> and the substantive hearing in the High Court ('*Tubbs v Ruby (substantive)*').<sup>21</sup> The core facts were largely undisputed. The debtor company, Waimate, had given an all assets security to the ANZ bank. Waimate experienced financial difficulties and its directors established a new company, Ruby, to 'buy' inventory from Waimate for the purpose of 'assisting Waimate with its cash flow problems'.<sup>22</sup> Ruby paid full price but the inventory never left Waimate's possession and Waimate continued to deal with the inventory, either by swapping it for other inventory on hand whenever Waimate needed to use the inventory 'sold' to Ruby or by onselling the inventory to Waimate's customers on Ruby's behalf. The 'buyer', Ruby, had no premises, no staff and no customers of its own. Ruby's only means of realising on the inventory that it 'bought' was through Waimate. As Waimate's financial position presumably deteriorated further, eventually and allegedly improperly, Waimate started reselling the Ruby inventory without either swapping it for equivalent inventory or accounting to Ruby for the onsale proceeds and so the arrangement started to unravel. The ANZ bank appointed receivers to Waimate and the receivers applied for an injunction preventing Ruby from dissipating the proceeds of the Ruby inventory. The initial application for an interim injunction was dismissed.<sup>23</sup>

In the New Zealand Court of Appeal, counsel for the receivers argued that the arrangement between Waimate and Ruby gave rise to a security interest as

<sup>19</sup> *Tubbs v Ruby 2005 Ltd* [2010] NZCCLR 31.

<sup>20</sup> *Tubbs v Ruby 2005 Ltd* (2010) 12 TCLR 74.

<sup>21</sup> *Tubbs v Ruby 2005 Ltd* [2011] 3 NZLR 551.

<sup>22</sup> *Tubbs v Ruby (initial)* [2010] NZCCLR 31, [12] (French J).

<sup>23</sup> *Ibid* [66].

defined by the PPSA (NZ).<sup>24</sup> To be a security interest, Ruby's 'buyer' interest in the inventory would need to have secured performance of some obligation owed by Waimate, but the Court held that, as a matter of fact, Waimate owed no such obligation.<sup>25</sup> Had this finding followed a full hearing, it may well have been justified but, in the author's respectful submission, it was inappropriate for the interlocutory application before the Court. To succeed on the interim application for an injunction, all the receivers had to show was that it was seriously arguable that Waimate owed an obligation to Ruby. Ruby's only practicable means of realising the inventory acquired from Waimate was either to sell the inventory back to Waimate, to enter into a swap arrangement with Waimate, or to sell it to Waimate's customers by effectively diverting orders received by Waimate to Ruby. This had been the invariable practice during the relationship, which may well be indicative of an obligation and so should have satisfied the 'seriously arguable' threshold. The Court of Appeal itself said that the High Court of New Zealand had previously analysed the relationship between Waimate and Ruby as 'arguable',<sup>26</sup> indicating there was no conclusive analysis of the terms of the arrangement. Had counsel for the receivers been given the opportunity to cross-examine Ruby's deponents, it may well have been possible to tease out the details that would have elevated an invariable practice into an obligation and hence turned Ruby from a buyer into a secured creditor.<sup>27</sup>

It is only if a 'buyer' is truly a buyer, and not a disguised secured creditor, that the buyer protection rules apply, including the rule protecting buyers in the ordinary course of business.

There is also an important issue as to exactly when a person becomes a 'buyer' for the purposes of the Australasian PPSAs. If a secured party has enforced its security interest and seized the collateral before a person has acquired the status of 'buyer', the putative buyer cannot rely on the protection of the 'ordinary course of business' provisions. This question may be determinative, for example, where a person has agreed to buy goods and paid a deposit but the specific goods being bought have not been identified by the time the secured party enforces its security interest. The failure to identify the specific goods may have come about perhaps because the goods were not in existence at the time that the contract of sale was entered into, or the seller did

<sup>24</sup> *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746, 751 [26] (Baragwanath J).

<sup>25</sup> *Ibid* 752 [29].

<sup>26</sup> *Ibid* 748 [7].

<sup>27</sup> The *Tubbs v Ruby* litigation, including the outcome of the appeal and the subsequent decision in the High Court, is further analysed in Parts VIII and IX below.

not then own them, or they had not by then been separated from a larger number of identical items and the specific goods were not subsequently identified prior to the secured party's enforcement action. Although it is not necessary that the person has paid for, or taken possession of, the goods, it must be possible to identify the particular goods 'bought', failing which the 'buyer' will be only an unsecured creditor for the deposit paid.<sup>28</sup>

#### IV THE ROLE OF ORDINARY COURSE TRANSACTIONS

If you buy an appliance from Harvey Norman, you do not expect to run the risk that Harvey Norman's secured creditors may be entitled to take the appliance from you. Buyers, whether domestic or commercial, reasonably expect that when they buy goods on usual terms from a dealer in such goods, they will acquire the goods free of any security interests given by the dealer. Secured credit is supposed to facilitate commerce, not hinder it, and it would be inconvenient and obstructive of commerce if buyers in a market commonly needed to check whether the goods being acquired were subject to a prior security interest and, if they were, to obtain a discharge of the security interest.

Before the enactment of the Australasian PPSAs, floating charge jurisprudence, supported by other law, allowed goods that were subject to a floating charge, as inventory commonly was, to be sold to buyers free of the charge. If a secured creditor did not want the debtor to be able to sell the collateral free of the secured creditor's security interest, it was generally necessary to take a fixed charge over the collateral, as was commonly done with plant and machinery.

The Australasian PPSAs have made the floating charge largely irrelevant, and done away with the distinction between fixed and floating charges, but still allow secured creditors to take security over assets that the secured creditor expects the debtor to sell. Buyers from dealers still expect to acquire clear title to the goods they buy and so it is necessary to replace the old floating charge jurisprudence (and other relevant law) with statutory provisions designed to achieve commercially acceptable results. The 'ordinary course of business' provisions — s 46 of the *PPSA* (Aus) and s 52 of the

<sup>28</sup> Whether this identification issue requires formal appropriation under sale of goods law, or even passing of title, is often debated: compare the discussion in Michael Gedye, Ronald C C Cumming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 228–9 [53.5], with Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis, 2012) 209–11 [10.36]–[10.40].

*PPSA* (NZ) — are a key part of the statutory structure that supersedes the old floating charge and supporting law. Often, these will be the only provisions that allow a buyer to resist a secured party's claim for the return of goods sold to the buyer by the debtor and so will be a central feature of the proper functioning of the PPS regime.<sup>29</sup>

Although the secured party's security interest in the original collateral may be cut off by the 'ordinary course of business' provisions, the security interest is potentially and appropriately replaced by a security interest in the proceeds of the original collateral.<sup>30</sup> As the New Zealand Court of Appeal recently noted:

In most situations in which [the ordinary course of business provision] applies, the arrangement involves a sale by a trader of inventory in a manner that is contemplated and permitted by the security agreement between the trader and its financier. In those circumstances the proceeds of the sale, whether cash, an account receivable, a trade-in or a financing agreement (chattel paper) (or a combination of these) become subject to the security interest of the trader's financier, and may then be used to purchase further inventory. This just reflects the circulating nature of the assets of trading enterprises and the nature of trade financing. In such cases the expectations of the trader, the trader's financier and the trader's customer are aligned.<sup>31</sup>

## V THE BUYER'S SELLER RULE

The 'ordinary course of business' provisions only protect a buyer in the ordinary course of business from security interests given by the buyer's seller. That is, if a security interest has been given by someone other than the person from whom the buyer acquired the property, such as an earlier owner, the buyer is not directly protected by the ordinary course provisions.<sup>32</sup> For

<sup>29</sup> There are, of course, various other provisions that can have this effect in particular circumstances. For example, s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ) provide in essence, amongst other things, that a security interest will be cut off where a secured party authorises a sale. The relationship between these provisions and the 'ordinary course of business' provisions is discussed in Part XI below.

<sup>30</sup> See *PPSA* (Aus) s 32(1)(b); *PPSA* (NZ) s 45(1)(b).

<sup>31</sup> *StockCo* [2012] NZCA 330 (26 July 2012) [46] (O'Regan P for O'Regan P, Randerson and Asher JJ).

<sup>32</sup> In the author's view, this is abundantly clear from the wording of *PPSA* (Aus) s 46 and *PPSA* (NZ) s 53. Both provisions expressly provide that ordinary course buyers take free of a security interest 'given by the seller'. In the face of these words, it is, in the author's opinion, not open to argue that the provisions also protect buyers from security interests given by the

example, if a consumer has given a security interest over his or her boat, and subsequently sells it to a boat dealer without paying off the secured creditor in circumstances where the security interest is not cut off by that transaction, a later buyer from the boat dealer in the ordinary course of business will not be protected by the ordinary course provisions. This is because it was not the boat dealer that created the security interest. Various commentators,<sup>33</sup> and even some courts,<sup>34</sup> have suggested that this is an anomaly or lacuna in the section, but it is a long-established and deliberate rule. While there is scope to debate the policy behind the rule, it can be viewed simply as a deliberate drawing of the line in favour of the secured creditor in that circumstance. One of two innocent parties (ie the secured party whose collateral has been improperly disposed of by the debtor and the end buyer) must lose and here the legislature has determined that the secured party should prevail.

Although the author believes that the buyer's seller rule is a deliberate element of the 'ordinary course of business' provisions, some cases appear to overlook the rule completely. In *Royal Bank v Bank of Nova Scotia*,<sup>35</sup> the Royal Bank's collateral was sold by a related company of the debtor, not the debtor itself. The Court looked at whether the sale from the related company to the buyer was in the ordinary course of the business of the related company without satisfactorily explaining how the related company came to be selling the collateral in the first place. If the related company had somehow acquired the collateral free of the Royal Bank's security interest (which, if the approach

seller's predecessors in title. Such security interests are not 'given by the seller'. Although the issue was of no relevance to the outcome in *StockCo* [2012] NZCA 330 (26 July 2012) the Court of Appeal briefly touched on it. The Court referred to the position advanced here by the author as the 'orthodox view': at [148] (O'Regan P for O'Regan P, Randerson and Asher JJ). But, because the matter was of no significance and had not been properly heard, the Court preferred to 'express no view' on the argument: at [153]. A buyer will, of course, be protected if the ordinary course rule has previously operated in favour of an earlier buyer. Once a buyer protection rule has operated to protect a buyer from a security interest, the security interest will be cut off so that any subsequent buyers are also protected. This is sometimes known as the doctrine of sheltering because the subsequent buyer is said to be sheltered by the earlier buyer's clear title. A recent case illustrating both the buyer's seller rule and the doctrine of sheltering, and how it is necessary to identify correctly which was the sale (in a chain of sales) that extinguished the relevant security interest, is *Wandering Creek Farms Ltd* (2010) 18 PPSAC (3d) 59.

<sup>33</sup> See, eg, James J White and Robert S Summers, *Uniform Commercial Code* (West Group, 5<sup>th</sup> ed, 2002) 316.

<sup>34</sup> See, eg, *Royal Bank v Wheaton Pontiac Buick Cadillac GMC Ltd* (1990) 1 PPSAC (2d) 131, 136, where Wedge J referred to this feature of the legislation as a 'legislative gap' and 'deficiency'.

<sup>35</sup> (1994) 6 PPSAC (2d) 250.

recommended by the author in Part II above were followed, requires a proper explanation) then there is no need to apply the 'ordinary course of business' test to the sale by the related company to the buyer — the Royal Bank's security interest would already have been cut off and the buyer would be sheltered by the related company's unencumbered title. If, on the other hand, the Royal Bank's security interest had not been cut off when the collateral was transferred from the debtor to the related company, the requirements of the buyer's seller rule would not have been met for the sale from the related company to the buyer and so the 'ordinary course of business' provision would not apply to protect the buyer from the Royal Bank's security interest, because that security interest had not been given by the seller.

#### VI AUSTRALASIAN DRAFTING DIFFERENCES IN THE ORDINARY COURSE PROVISIONS

Section 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) clearly share the same pedigree but there are some potentially significant differences. The New Zealand provision applies only to goods. The Australian provision is not so limited and potentially could protect buyers of other types of personal property. It is difficult to assess the importance in practice of this difference but its relevance is somewhat lessened by s 49 of the *PPSA* (Aus), which further protects buyers of investment instruments and intermediated securities in the ordinary course of trading on a 'prescribed financial market'<sup>36</sup> so that such buyers would not need to rely on s 46. Nevertheless, it seems s 46 could potentially apply to the sale of investment instruments not traded on a prescribed financial market and to other intangible property such as intellectual property rights.

On the other hand, the class of buyer within the ambit of Australia's s 46 is more limited than that under New Zealand's s 53. Section 46(2) excludes from the protection of the section persons who are buying serial number property as inventory.<sup>37</sup> This sub-section did not appear in the 2008 draft Bill but had been inserted by the time the Bill was introduced in 2009.<sup>38</sup> The author has not been able to locate any official commentary on the rationale for this

<sup>36</sup> As defined in *Corporations Act 2001* (Cth) s 9.

<sup>37</sup> In Australia, serial number property includes aircraft, motor vehicles, watercraft and certain types of intangible property: *Personal Property Securities Regulations 2010* (Cth) sch 1 item 2.2.

<sup>38</sup> Consultation Draft, *Personal Property Securities Bill 2008* (Cth); *Personal Property Securities Bill 2009* (Cth) cl 46(2)(a).

amendment,<sup>39</sup> but it has been suggested elsewhere (in relation to this and the other buyer protection provisions containing a similar limitation) that:

The drafters of the *PPSA* may have taken the view that a person who buys or leases property as inventory is likely to be a large and sophisticated institution that is able to identify and deal with existing security interests without needing to rely on the extinguishment rules. In practice, however, the non-availability of these extinguishment rules may be a significant impediment even for large and sophisticated institutions, as it could greatly complicate the processes by which buyers and lessees acquire their inventory, resulting in longer transaction times and greater transaction cost. This situation is exacerbated even further by the fact that the term 'inventory' has a very broad meaning, as this in turn broadens the range of circumstances in which these extinguishment rules will not be available.<sup>40</sup>

It may be added that, in relation to ordinary course sales of inventory, the exclusion of any particular class of buyer from the ambit of the section may generally be of little moment. Even if excluded buyers do not take alternative steps to protect themselves,<sup>41</sup> they will in any event often be able to rely on the general law principle that an inventory financier usually expects the debtor to sell the collateral. Therefore, the financier can be taken to have impliedly authorised the sale so that the buyer will take the inventory free of the security interest under s 32(1)(a)(i) of the *PPSA* (Aus) and s 45(1)(a) of the *PPSA* (NZ).<sup>42</sup> Excluding certain inventory buyers from s 46 of the *PPSA* (Aus) simply gives s 32 greater relevance in this context than it should be given.<sup>43</sup>

But the most intriguing potential difference between the Australian and New Zealand ordinary course provisions is in the types of transaction to which the provisions apply. The concept of 'ordinary course of business' transactions was relevant for a long time under the Australasian law relating to voidable transactions in corporate insolvency, but it was eventually dropped in that context because of ongoing uncertainty over its meaning and

<sup>39</sup> See Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 33 [2.91], where it was noted but not explained.

<sup>40</sup> Craig Wappett, Bruce Whittaker and Steve Edwards, LexisNexis, *Personal Property Securities in Australia* (at Service 10) [4.1.4700].

<sup>41</sup> That is, the alternative steps seemingly intended by the provision.

<sup>42</sup> These provisions are discussed further in Part XI below.

<sup>43</sup> The interplay between ss 32 and 46 of the *PPSA* (Aus) (and between ss 45 and 53 of the *PPSA* (NZ)) is discussed further in Part XI below.

application.<sup>44</sup> In respect of voidable transactions, it was accepted that, in the main, the notion of the 'ordinary course of business' referred to the manner in which business was conducted generally rather than the manner in which any particular business was carried on. Thus, it was said in one case:

the phrase 'ordinary course of business' impute[s] an objective view of the course of business rather than a subjective one such as the way in which particular parties carry on their business.<sup>45</sup>

Similarly, it was suggested in that context that the phrase referred to business as a general conception rather than to the conduct of any particular industry,<sup>46</sup> but despite such dicta, it was wrong to ignore entirely industry customs and individual practices. As one Judge noted:

It would be unrealistic to suggest that there is a single course of business within the commercial community against which the conduct of each and every business, and each and every business transaction can be objectively measured.<sup>47</sup>

One case attempted to reconcile this apparent tension between an objective (or global) and a subjective (or individual) analysis of the 'ordinary course of business' in the following fashion:

- the principle criterion is practice in the commercial world in general;
- nevertheless, the company's own past practices and dealings with the creditor are relevant; and
- the transaction should generally fall within the ordinary operational activities of a business as a going concern and not be a response to abnormal financial difficulties or consequent on winding down the business.<sup>48</sup>

It was perhaps partly in response to the obvious difficulties the courts had historically faced in determining the ordinary course of business, and the baggage that came with the phrase in the context of voidable transactions law, that the drafters of the *PPSA* (Aus) attempted to give further guidance on the scope of the phrase. It had already been clarified by the Uniform Canadian Acts (ie the provincial Canadian Personal Property Security Acts other than

<sup>44</sup> The 'ordinary course of business' defence to the recovery of preferential payments remains relevant to Australian personal insolvency law: *Bankruptcy Act 1966* (Cth) s 122.

<sup>45</sup> *James Hardie Building Products Ltd v Meltzer* [1996] 2 NZLR 506, 510 (Barker J).

<sup>46</sup> See, eg, *Re K & R Fabrications (Qld) Pty Ltd (in liq)* (1980) 32 ALR 183, 184 (Connolly J).

<sup>47</sup> *Re Inspiration Homes Ltd (in liq)* [1997] 3 NZLR 169, 174 (Potter J).

<sup>48</sup> *Re Modern Terrazzo Ltd (in liq)* [1998] 1 NZLR 160, 182 (Fisher J).

the *Ontario Personal Property Securities Act* ('Ontario PPSA')<sup>49</sup> and the New Zealand Act that in those jurisdictions the test did refer to the ordinary course of business of the particular debtor, rather than of the commercial world in general, and the Australian Act has also adopted this approach. Thus, the Australasian PPSAs both refer to the 'ordinary course of business' of the seller.<sup>50</sup> But the Australian Act has gone further and provides that the section applies only to sales in the ordinary course of the seller's *business of selling personal property of that kind*.<sup>51</sup> Case law has established that while the New Zealand and uniform Canadian provisions will often apply to the sale of inventory, they are not limited solely to the sale of inventory.<sup>52</sup> This may not be the position in Australia. On one interpretation, the effect of the additional words in the Australian Act may be either or both of the following:

- to limit the application of s 46 to inventory of the debtor; and
- even then, only to inventory held for sale.<sup>53</sup>

If this is so, sales of, say, obsolete or surplus equipment would never be covered by s 46 of the *PPSA* (Aus), even where commonly transacted by a debtor, and sales of inventory held for lease rather than sale would also be excluded.<sup>54</sup> This is one possible interpretation of the closing words of s 46(1) and appears to be consistent with the Replacement Explanatory Memorandum ('Replacement EM').<sup>55</sup> The Replacement EM does not expressly state that s 46 is intended to apply only to inventory held for resale, but the first of the two hypothetical examples given suggests this.<sup>56</sup> The examples given appear to be based on two Canadian cases, with the first example departing from the Canadian law and the second one following what the Australian drafter apparently assumed to be the Canadian position.

<sup>49</sup> RSO 1990, c P-10.

<sup>50</sup> *PPSA* (Aus) s 46; *PPSA* (NZ) s 53.

<sup>51</sup> *PPSA* (Aus) s 46(1).

<sup>52</sup> *Camco Inc v Frances Olson Realty (1979) Ltd* [1986] 6 WWR 258, 272 (Tallis JA for Tallis, Cameron and Gerwing JJA).

<sup>53</sup> *PPSA* (Aus) s 46.

<sup>54</sup> As noted above, inventory is broadly defined and includes property held for leasing out: *PPSA* (Aus) s 10.

<sup>55</sup> Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) (presented to the Australian Senate), replacing the Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) (presented to the House of Representatives). Note there is not much difference between the two Explanatory Memoranda.

<sup>56</sup> Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 33 [2.92].

The first example given is that of a debtor primarily in the business of leasing, repairing and rebuilding cranes but whose practice was to sell a crane once it became obsolete or difficult to lease.<sup>57</sup> This hypothetical example mirrors the facts of *Alberta Pacific Leasing Inc v Petro Equipment Sales Ltd* ('*Alberta Pacific*').<sup>58</sup> In *Alberta Pacific*, the sale of a crane in these circumstances was held to be in the ordinary course of business even though there were only one or two sales made by the debtor that year. Under the Alberta equivalent of s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ), the buyer, Petro Equipment, accordingly took the crane free of Alberta Pacific's perfected security interest. But the hypothetical example in the Australian Replacement EM provides otherwise. Although the example acknowledges that the sale would be in the ordinary course of the debtor's business, it goes on to say that the sale would not be in the ordinary course of the debtor's "business of dealing with property of that kind",<sup>59</sup> paraphrasing the concluding words of s 46(1) of the *PPSA* (Aus). Because of the broad definition of inventory, the cranes held for lease would be inventory of the debtor but because the debtor was primarily in the business of leasing and not selling, the example in the Replacement EM states that s 46 would not apply.

If, however, one ignores the first example given in the Replacement EM, it is plausible to argue that the additional words of s 46 of the *PPSA* (Aus) do not require a different interpretation to the New Zealand or Uniform Canadian Acts. In the Canadian case of *Camco Inc v Frances Olson Realty (1979) Ltd* ('*Camco*'),<sup>60</sup> it was held that when interpreting the wording of s 30(1) of the Saskatchewan *Personal Property Security Act* ('*Saskatchewan PPSA*'),<sup>61</sup> which refers only to the ordinary course of business of the seller (without expressly stating that the business must be selling goods of that kind):

the trier of fact should consider whether the person was a person in the business of selling goods *of that kind* and whether the transaction(s) took place in the ordinary course of that business.<sup>62</sup>

<sup>57</sup> *Ibid.*

<sup>58</sup> [1996] 1 WWR 552.

<sup>59</sup> Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 33 [2.92].

<sup>60</sup> [1986] 6 WWR 258.

<sup>61</sup> SS 1993, c P-6.2.

<sup>62</sup> *Camco* [1986] 6 WWR 258, 276 (Tallis JA for Tallis, Cameron and Gerwing JJA) (emphasis added).

Although even absent the Australian statutory direction, *Camco* holds that the seller's business must be selling goods 'of that kind', the case also states that this is not limited to inventory held for resale.<sup>63</sup> While the author has been unable to determine the origin of the Australian wording, it is possible that it was derived from *Camco* — in which case, despite the first example given in the Replacement EM, there may be no significant difference between the Australian and New Zealand formulations of the ordinary course test.

On the other hand, given the first example in the Replacement EM, it seems more likely that the Australian wording was derived directly from § 1-201 of the United States' *Uniform Commercial Code*. Section 1-201(b)(9) defines ordinary course buyers for the purpose of Article 9, from which ultimately the Australasian PPSAs are derived. Like s 46 of the *PPSA* (Aus), § 1-201(b)(9) requires the seller to be 'in the business of selling goods of that kind'.<sup>64</sup> The Official Comment to § 9-320 (the equivalent of s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ)) states that the section 'applies primarily to inventory collateral',<sup>65</sup> implying that it will occasionally apply to non-inventory items. On the face of it, this is arguably little different to the Canadian or New Zealand position but case law suggests otherwise. United States' cases have generally found that the sale of obsolete equipment or rental inventory is not in the ordinary course of business of selling goods of that kind.<sup>66</sup>

Having regard to the position in the United States, and (given the first example in the Replacement EM) the possibility that the Australian legislation was modelled on the US test, the conservative view is that the ordinary course test in Australia is essentially limited to the sale of inventory held for resale and is accordingly more restrictive than the applicable test in New Zealand and Canada. Nevertheless, this possible narrowing of the meaning of 'ordinary course of business' should not make much difference in commercial practice. In New Zealand, prudence already dictates that a buyer intending to purchase goods that are not primarily held for sale by the seller should obtain

<sup>63</sup> Ibid 272.

<sup>64</sup> *Uniform Commercial Code*, UCC § 1-201(b)(9) (2012).

<sup>65</sup> Ibid § 9-320 cmt 3.

<sup>66</sup> See, eg, *Wells Fargo Bank Northwest v RPK Capital XVI LLC*, Tex App Ct Briefs 565 (Ct App, 2010) and the cases cited therein. One case even held that the sale of ex-rental cars by a rental car company that sold 4000 cars a year, generating more than 60 per cent of its gross revenue, was not in the business of selling cars: *Union Planters Bank NA v Peninsula Bank*, 897 So 2d 499 (Fla Ct App, 2005).

the agreement of any secured creditors to the sale to ensure clear title. The Australian wording simply makes this practice even more desirable.

The second example given in the Australian Replacement EM mirrors the facts of *Saskatchewan Wheat Pool v Smith* ('*Saskatchewan Wheat Pool*'),<sup>67</sup> and states that the regular exchange of cattle for cattle food by a cattle farmer whose primary business was *dealing* in cattle (perhaps suggesting that the drafter of the example did not regard an exchange as a dealing) would nevertheless be sales in the ordinary course of business.<sup>68</sup> There is little doubt that the exchange of cattle for cattle food would still constitute *dealing* with the cattle, so presumably the example refers to the mode of dealing and was intended to contrast the primary business of selling on a recognised market with other modes of disposal.

The *Saskatchewan Wheat Pool* decision is widely considered to have held that, in these circumstances, the particular exchange of cattle for cattle food was in the farmer's ordinary course of business. However, although this is stated in the headnote, it is not made clear anywhere in the judgment. Ultimately, the buyer lost out to the secured creditors because the purchase price for the cattle was set off against a pre-existing liability.<sup>69</sup> While the Australian example indicates that a secondary mode of selling inventory (where the bulk of sales are conducted in some other way) can still be in the ordinary course of business if the secondary mode is regularly engaged in, the example should not be taken as suggesting that property transferred in settlement of an existing debt will necessarily constitute a sale in the ordinary course of business.

Although the second Australian explanatory example does not necessitate any difference in approach between Australia and New Zealand, care should be taken not to emphasise unduly the example's reference to the debtor's

<sup>67</sup> (1996) 11 PPSAC (2d) 209 (Saskatchewan Court of Queen's Bench), affd in *Saskatchewan Wheat Pool v Smith* (1997) 152 Sask R 79 (Saskatchewan Court of Appeal).

<sup>68</sup> Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 33 [2.92].

<sup>69</sup> The case did state, in obiter, that private sales between farmers were in the ordinary course of their businesses, even though the primary method of sale was at public market. This was because the private sales were routine and a normal and an ongoing aspect of the farmers' businesses. But, in the end, the Court seems to have held that the particular transaction in issue was not even prima facie a sale because the cattle were simply delivered to satisfy a past liability: *Saskatchewan Wheat Pool* (1996) 11 PPSAC (2d) 209, 225 [41] (Wright J). This authority is of limited relevance in Australasia because the *Saskatchewan PPSA*, unlike those of Australia and New Zealand, expressly provides that a transfer in total or partial satisfaction of an existing debt is not a sale in the ordinary course of business: *Saskatchewan PPSA* s 30(8).

primary business. There should be no implication taken that only sales in the course of the debtor's primary business can be ordinary. Again, the analysis in the leading Canadian decision of *Camco*<sup>70</sup> should apply with equal force in Australia (as it does in New Zealand). In *Camco*, the seller was a property developer who developed and sold residential apartments. The purchase price for the apartments included an appliance package. At issue was whether the appliances were sold in the ordinary course of business of the property developer for the purposes of the *Saskatchewan PPSA*. The Saskatchewan Court of Appeal concluded that the sale of the appliances was in the ordinary course of business and noted that:

The mere fact that the seller was engaged in the selling of appliances as an incident to his primary business of selling condominium units does not preclude the operation of [the ordinary course provision].<sup>71</sup>

There is no requirement that sales be part of the primary line of business of the seller — what is required is merely that they are in the ordinary course of that business, or, in Australia, in the ordinary course of the business of selling that kind of property.

*Camco* also usefully confirms that the relevant test is the particular seller's way of doing business, not that of the particular industry or commerce generally. The Court of Appeal approved of the trial judge's view that although property developers may not ordinarily equip units with appliances, the relevant section 'is not concerned with the ordinary course of business of developers generally but with the ordinary course of business of [the particular developer]'.<sup>72</sup>

## VII GENERAL PRINCIPLES

Because the test requires that the seller be in business, the 'ordinary course of business' sections will not apply to private sales.<sup>73</sup> For simplicity of analysis, this leads to a two-stage test that traditionally could have been broadly stated

<sup>70</sup> [1986] 6 WWR 258.

<sup>71</sup> Ibid 277 (Tallis JA for Tallis, Cameron and Gerwing JJA).

<sup>72</sup> Ibid 269, quoting *Camco Inc v Frances Olson Realty (1979) Ltd* [1985] 42 Sask R 168, 169 (Maurice J).

<sup>73</sup> See, eg, *Royal Bank of Canada v 216200 Alberta Ltd* (1986) 33 DLR (4<sup>th</sup>) 80, 87 (Vancise JA for Vancise and Gerwing JJA).

as: first, what is the nature of the seller's business, and secondly, was the sale in issue in the ordinary course of that business?<sup>74</sup>

Recently, though, in the *StockCo* case, the New Zealand Court of Appeal proposed modifying the first stage of the test to 'a step identifying the ordinary course of the business of the seller'.<sup>75</sup> This could seem to mean that the full two-stage test would become: first, what is the ordinary course of the business of the seller, and secondly, was the sale made in the ordinary course of that business.<sup>76</sup> Although the Court of Appeal agreed that a two-stage process was appropriate, by referring to 'ordinary course' in both stages of the test, there is perhaps a danger with this formulation that the inquiry could become too narrow at the first stage and that it could lead to the useful two-stage test being conflated into a single stage. The Court of Appeal did not intend this outcome. Rather, in the author's respectful opinion, the Court intended to emphasise, by referring to 'course' in the first stage of the test, that an examination of the nature of the business looks at the business' 'flow or continual operation',<sup>77</sup> which will involve 'some anticipated repetition of business activities'.<sup>78</sup>

*StockCo* involved a dairy farming corporate group that expanded rapidly by acquiring and developing new farms. On one view, the debtor was evolving from a dairy farmer into a dairy farm property developer and holding company. As part of its expansion strategy, it entered into a number of sharemilking agreements whereby it provided the farm land and infrastructure, and an unrelated sharemilker provided and milked the dairy herd. And when the debtor's bankers became reluctant to provide additional funds, the debtor sold some of its own cows to free up cash for further acquisitions. The Court of Appeal held that the sale of the cows in issue was not in the ordinary course of business. The Court readily accepted that the nature of a business is not static and can change, so that it is necessary to determine the nature of the business being carried on at the time of the disputed sale rather than at some

<sup>74</sup> This two-stage approach was adopted in *ORIX New Zealand Ltd v Milne* [2007] 3 NZLR 637, 649 [66] (Rodney Hansen J) ('*ORIX*'). See also the test set out in Part VI above taken from *Camco* [1986] 6 WWR 258, 276 (Tallis JA for Tallis, Cameron and Gerwing JJA).

<sup>75</sup> *StockCo* [2012] NZCA 330 (26 July 2012) [51] (O'Regan P for O'Regan P, Randerson and Asher JJ).

<sup>76</sup> This is the combination of the modified first step advocated in *StockCo* and the second step previously set out in *ORIX*.

<sup>77</sup> *StockCo* [2012] NZCA 330 (26 July 2012) [51] (O'Regan P for O'Regan P, Randerson and Asher JJ).

<sup>78</sup> *Ibid* [67].

earlier time such as the date the security agreement was entered into.<sup>79</sup> But the Court rejected the argument that a debtor could engage in a sudden change of strategy and thereby expand the number of sales coming within the ordinary course provisions.<sup>80</sup> As the Court put it: 'We see such a sudden change as contrary to the concept of the "course" of business'.<sup>81</sup>

Furthermore, the Court made clear that it is unlikely that the nature of a business can be described as simply being to engage in any profitable transaction so that any one-off transaction is within the scope of the business.<sup>82</sup> This description would not demonstrate the required degree of repetition to sustain, in the Court of Appeal's formulation of the first step, an ordinary course. Because of counsel's argument that the debtor had morphed from a dairy farmer to a dairy farming entrepreneur and developer, the Court was required to spend some time analysing the first step in the two-stage test. In the normal run of cases, the nature of the business will be quickly determined and the emphasis will be on whether the particular sale in issue was in the ordinary course of that business.

A sale of an unexceptional quantity of inventory held for resale for a fair price to a customer of the debtor of the usual type and on normal terms will be the most common example of a sale in the ordinary course of business. Section 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) will operate as intended to give the buyer title clear of any security interests given by the seller and the seller's secured creditors would not expect otherwise. But in other cases, a closer examination of the meaning of the 'ordinary course of business' will be required.

Although the 'ordinary course of business' test is utilised in many statutory and common law contexts across Australasia, there is limited utility in examining the meaning ascribed in these different settings. This caution has previously been voiced in the context of voidable transactions law, in reference to which Fisher J stated:

I cannot help wondering whether some of the difficulties in this area may be due to the attempt to transplant ordinary course of business tests drawn from

<sup>79</sup> Ibid [57].

<sup>80</sup> Ibid [69]. Thus, the Court rejected the argument that the nature or course of the business in issue (or under the Court's formulation of the first stage of the two-stage test, the ordinary course of the business) that was being carried on had changed from being a dairy farmer whose main business was milking cows to a dairy farm entrepreneur whose business was to engage in any profitable transaction related to dairying and dairy farm development.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid [67].

other contexts where the phrase has had to serve a very different function or, even more dubiously, where the words themselves were different.<sup>83</sup>

In particular, the meaning of the phrase for the purposes of voidable transactions law (the very context with which Fisher J was concerned) and floating charge law should be treated with caution when applied to PPS legislation. Analyses in the context of voidable transactions law are of limited value because there the phrase essentially refers to the way commerce is conducted generally, rather than the particular seller's *modus operandi*. It is also because the policy underpinning voidable transactions law, which serves to uphold the *pari passu* principle of insolvency law by setting aside certain pre-insolvency transactions, favours a stricter interpretation of the phrase than is called for in the context of secured transactions law where a broader interpretation of the phrase better serves the consumer protection function appropriate in that context. Prior analysis of the phrase in the context of floating charge jurisprudence is also of limited value, both because the 'ordinary course of business' was never the universally accepted test in that context,<sup>84</sup> and because under PPS legislation security interests can cover both circulating and non-circulating assets, whereas the floating charge generally applied only to circulating assets.

This is not to say that prior Australasian precedents should be ignored entirely. For example, the traditional suspicion with which Australasian courts have regarded transactions with associated persons remains relevant in the context of the Australasian PPSAs,<sup>85</sup> and generic formulations of ordinariness can also inform the concept for the purposes of the PPSAs.<sup>86</sup> But primarily,

<sup>83</sup> *Re Modern Terrazzo Ltd (in liq)* [1998] 1 NZLR 160, 177.

<sup>84</sup> While some floating charge cases held that the grantor of a floating charge could only dispose of assets free of the floating charge in the ordinary course of business (implying a qualitative limitation), others referred simply to the course of business (implying only a temporal limitation so that virtually any dealing was authorised while the business continued to trade). For example, Glass JA in *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 8 ACLR 422, 424 opined that '[t]he only question for consideration is whether the transaction was undertaken by [the grantor of the charge] in the course of maintaining its business as a going concern'. See also *Re Old Bushmills Distillery Co; Ex parte Brett* [1897] 1 IR 488 where a sale by a financially distressed company of a large quantity of its inventory to a syndicate of its creditors was held to be in the course of its business and hence passed free of the charge, an outcome that almost certainly would not follow under the Australasian PPSAs.

<sup>85</sup> See, eg, *Torzillu Pty Ltd v Brynac Pty Ltd* (1983) 8 ACLR 52, 60 (Helsham CJ in Eq).

<sup>86</sup> Indeed, one Canadian case considering the concept for the purpose of PPS legislation referred to a New Zealand decision that discussed the phrase in the context of voidable transactions law: *369413 Alberta Ltd v Pocklington* [2001] 4 WWR 423 ('369413 Alberta'), applying the New Zealand Privy Council decision in *Countrywide Banking Corporation Ltd v*

the Australasian courts should look for guidance to North American precedents where the phrase has been used in the context of PPS legislation. A comment made elsewhere by the author to this effect was approved in the case of *ORIX New Zealand Ltd v Milne*.<sup>87</sup>

Because it is necessary to consider the circumstances of each case, it is neither possible nor wise to formulate a universally applicable definition of 'ordinary course of business' for the purposes of s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ).<sup>88</sup> This is so even in Ontario, where the different statutory formulation means that the test is the less subjective ordinary course of commercial practice generally, rather than the more subjective particular seller's ordinary course of business that applies in Australasia. In the leading Ontario decision of *Fairline Boats Ltd v Leger* ('*Fairline Boats*'), the Court suggested:

in deciding whether a transaction is in the ordinary course of business, the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact.<sup>89</sup>

The New Zealand Court of Appeal said much the same thing when it held that 'what is required is an objective factual assessment based on all the circumstances of the particular case'.<sup>90</sup> But while the particular facts might be said to determine the answer, such a question will never be purely a question of fact. It will be a mixed question of fact and law and it is possible to state some broad general legal principles that will help to resolve the issue.

Generic business ordinariness has often been expressed broadly, both in non-PPS and PPS contexts as 'part of the undistinguished common flow of business ... carried on, calling for no remark and arising out of no special or

*Dean* [1998] AC 338. Similarly, the Canadian PPS legislation case of *Roynat Inc v Ron Clark Motors Ltd* (1991) 1 PPSAC (2d) 191, 197 (Herold J) followed the old Australian decision of *Re Bradford Roofing Industries Pty Ltd (in liq)* [1966] 1 NSW 674, where the concept had been considered in the context of insolvency provisions.

<sup>87</sup> [2007] 3 NZLR 637, 648 [62] (Rodney Hansen J).

<sup>88</sup> See, eg, *Camco* [1986] 6 WWR 258, 276 where Tallis JA (for Tallis, Cameron and Gerwing JJA) opined: 'Since the question whether a buyer is a buyer under s 30(1) [ie *PPSA* (Aus) s 46; *PPSA* (NZ) s 53] is a question of fact, I would not attempt to articulate an all inclusive definition.'

<sup>89</sup> (1980) 1 PPSAC 218, 222 (Linden J).

<sup>90</sup> *StockCo* [2012] NZCA 330 (26 July 2012) [42] (O'Regan P for O'Regan P, Randerson and Asher JJ).

particular situation'.<sup>91</sup> Provided the caveat concerning the danger of adopting such a test from a non-PPS context is kept in mind, such a formulation can be helpful in setting the parameters for the factual inquiry required. One can then apply the various factors more directly relevant to determining whether a particular sale is in the ordinary course of a particular seller's business. *Fairline Boats* listed the following as specific examples of relevant, though not definitive, factors in the context of sales under PPS legislation:<sup>92</sup>

- 1 Where the agreement is made — sales made at the seller's premises are more likely to be ordinary course than sales made away from the seller's premises.
- 2 The type of buyer — a sale to an everyday consumer buyer is more likely to be ordinary course than a sale to a dealer or financial institution. However, dealers must buy their inventory from somewhere and the Court did go on to say that in proper circumstances, a dealer would be protected by the ordinary course provision. Also, the statement that sales to consumers are more likely to be ordinary course was made in the context of a retailer's sales; it would not apply to sales at other levels in the supply chain such as those by a manufacturer or wholesaler.
- 3 The quantity of goods sold — a sale of one or a few items is more likely to be ordinary course than a bulk sale of a large proportion of the seller's inventory. Again, this comment was made in the context of a retailer's sales and is more likely to be relevant in that environment.
- 4 The sale price — a sale at or near market price is more likely to be ordinary course than a sale well below market price.

But '[t]his list is not intended to be exhaustive and other criteria may also be useful'.<sup>93</sup> Also, although *Fairline Boats* and other Ontario decisions have

<sup>91</sup> *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)* (1948) 76 CLR 463, 477 (Rich J) (voidable transactions context), quoted in *Julius Harper Ltd v F W Hagedorn Sons Ltd* [1991] 1 NZLR 530, 543 (Somers J for Somers, Casey and Hardie Boys JJ) (floating charge context). See also *Aubrett Holdings Ltd v R* [1998] GSTC 17, [17] (McArthur TCJ) (PPS context); *369413 Alberta* [2001] 4 WWR 423, 432 [22] (Fruman J) (PPS context).

<sup>92</sup> *Fairline Boats* (1980) 1 PPSAC 218, 222 (Linden J). The High Court in *Tubbs v Ruby (initial)* [2010] NZCCLR 31, while purporting to adopt the *Fairline Boats* formulation, in fact adopted the expanded list of factors from *Alberta Pacific* [1996] 1 WWR 552, 555 [11] (Master Quinn).

<sup>93</sup> *Alberta Pacific* [1996] 1 WWR 552, 555 [12] (Master Quinn).

provided helpful guidance in defining the 'ordinary course of business,' when looking at Ontario case law it must always be remembered that:

authorities from Ontario, while helpful, must be read with caution. The Ontario provision is materially different from the Saskatchewan one [and from the New Zealand and Australian provisions] because of the addition in the Saskatchewan [and New Zealand and Australian] provision of the words 'of the seller.' ... [T]he trial court ... must consider the business of the particular seller rather than limit the inquiry to the ordinary course of business in the trade or industry as a whole.<sup>94</sup>

Provided one is cognisant of this warning, dicta from Ontario cases remain useful in illustrating those factors that can be relevant to determining whether a sale is ordinary course. The *Fairline Boats* factors relevant to the ordinary course of business will still generally be relevant to the ordinary course of business of a particular seller, but in addition so will details of how the particular seller usually conducted its business.

As anticipated in *Fairline Boats*, other cases have added further criteria to the list of relevant factors,<sup>95</sup> such as:

- 1 Advertising — if the seller advertises that it sells such goods, a sale is more likely to be ordinary course.
- 2 The nature and significance of the transaction — it ought to be a transaction that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders.
- 3 The transaction ought not to resemble a liquidation of assets.
- 4 The reason for the transaction — it ought not to have occurred as a response to financial difficulties or in suspicious circumstances.<sup>96</sup>

<sup>94</sup> *Camco* [1986] 6 WWR 258, 276 (Tallis JA for Tallis, Cameron and Gerwing JJA).

<sup>95</sup> See, eg, *Alberta Pacific* [1996] 1 WWR 552; *369413 Alberta* [2001] 4 WWR 423. The New Zealand Court of Appeal in *StockCo* [2012] NZCA 330 (26 July 2012) [77]–[78] (O'Regan P for O'Regan P, Randerson and Asher JJ) started with the factors identified as potentially relevant in *Fairline Boats* and then applied the additional factors identified in *369413 Alberta*.

<sup>96</sup> This factor is singled out in the Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 33 [2.92], where it is said that 'a person would not take free in the ordinary course of the seller's business if the sale is made at a time of financial stress and the sale would not have been made but for the seller's financial stress'.

- 5 The intent of the transaction — neither its intent nor its effect should have been to undermine a security interest.
- 6 The frequency of the type of transaction — an unusual or isolated transaction might be viewed differently from a routine one. On the other hand, mere repetition does not make an otherwise extraordinary transaction ordinary.<sup>97</sup>
- 7 The arm's length nature of the transaction — a transaction between a company and a party with whom it is related should receive careful scrutiny.<sup>98</sup>

Given the variety of factors that have now been held to be relevant, and that could be applicable in any particular case, it will not be uncommon for different factors to point in opposing directions. For example, inventory items that the debtor holds for sale (suggesting ordinariness) may be sold at market price (further suggesting ordinariness) in unusual quantities (suggesting extraordinariness) to a related party in circumstances where the collateral is not replaced by proceeds of an equivalent realisable value (further suggesting extraordinariness). Such cases may then require a balance sheet approach to be taken, with those factors suggesting that the sale was within the ordinary course weighed against those that may take the particular sale outside of the ordinary course. This approach requires a differential weighting to be applied to the various factors, rather than simply counting those for and against ordinariness.

<sup>97</sup> See, eg, *Union Planters Bank NA v Peninsula Bank*, 897 So 2d 499 (Fla Ct App, 2005); *Wells Fargo Bank Northwest NA v RPK Capital XVI LLC*, Tex App Ct Briefs 565 (Ct App, 2010).

<sup>98</sup> However, Kós J suggested that although a related party transaction called for inquiry as to value and payment, it was otherwise 'a neutral consideration': *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806, 832 [110]. In the author's respectful opinion, the limited inquiry proposed by this comment does not go far enough. Australasian courts have always been rightly suspicious of related party transactions and should be even more so in light of the many instances of serious harm caused by related party transactions that have become apparent on both sides of the Tasman since the Global Financial Crisis. Even sales at full value can prejudice a security interest and where a sale is made to a related party, all aspects of it should be closely scrutinised. It can even be argued that a 'but for' test is more appropriate, whereby any sale that would not have been made but for the relationship would be found to be outside of the ordinary course of business. On the other hand, some Canadian cases have been unconcerned by related party transactions. An extreme example is *Misener Financial Corporation v General Home Systems Ltd* (1984) 27 BLR 247, where a sale to a financier and a lease back to the principal of the debtor, where there was no change in possession, was nonetheless held to be in the ordinary course of business of the debtor.

In any such analysis, the factors pointing to extraordinariness are likely to be given greater weight than those that raise no concerns. A single non-ordinary factor may be sufficient to carry the day. For example, the fact that a sale is made only for the purpose of setting off the price against an existing liability, with the consequence that an unsecured creditor is paid ahead of the secured creditor, thereby undermining the security agreement, will alone often be sufficient to take the sale outside of the ordinary course.<sup>99</sup> A single factor, however, will not always be determinative. North American case law provides some guidance on the emphasis to be given to the various factors, and one can expect locally that the appropriate weightings will become more predictable and transparent as the Australasian case law evolves.<sup>100</sup> It is already clear from the New Zealand cases to date that the court will pay close attention to the price paid.<sup>101</sup>

<sup>99</sup> Some of the Canadian PPS legislation makes clear that a transfer in total or partial satisfaction of an existing liability does not constitute a sale in the ordinary course of business: see, eg, *Saskatchewan PPSA* s 30(8). It has been suggested that this is designed to prevent a situation in which an unsecured creditor 'bootstraps' into priority over a secured party: Ronald C C Cuming and Roderick J Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Thomson, 1994) 239. While there is no equivalent express provision in the Australasian PPSAs, set off against an existing liability is still a relevant factor.

In Ontario, which similarly does not expressly provide that transfers in settlement of an existing liability are not ordinary course, it has been suggested in Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act Commentary and Analysis* (2<sup>nd</sup> ed, Butterworths, 2000) 232 that:

The test, in our view, should be whether the sale would have taken place but for the antecedent debt. If the answer is no the sale should be treated as falling outside [the ordinary course]. If the answer is yes, it should not be an objection that payment was made by a set-off of debts between the parties since that is a common practice among merchants extending credit in their dealings with each other.

See also Michael Gedy, Ronald C C Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomas Brookers, 2002) [53.6].

<sup>100</sup> A similar evolution took place in New Zealand when the courts considered the meaning of the 'ordinary course of business' in the context of voidable transactions law under s 292 of the *Companies Act 1993* (NZ). Initially this was one of the most litigated issues under the *Companies Act*, however, it eventually evolved into a reasonably predictable test. Ironically, after it had settled down, the law was changed to do away with the test because of the initial uncertainty.

<sup>101</sup> See, eg, *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806; *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746.

## VIII HOW RELEVANT IS PRICE?

While price is indubitably relevant when deciding whether a particular sale is in the ordinary course, it is only one of the factors that must be taken into account, albeit an important one. Although cases such as *Fairline Boats* have benchmarked against market price, market price is itself an elusive concept. For example, a sale at a properly advertised public auction could, as a consequence of the auction process, be said to achieve market price on the day but it may nevertheless be an inappropriate price when it comes to determining whether the sale was ordinary course. In many cases, a better benchmark may be the price at which the particular seller usually sells, with due allowance for promotional prices and discounting for obsolete or depreciated goods. A discounted price, even to below cost, will still be regular where it is part of an advertised customary promotion, such as a Boxing Day sale, or the customary disposal of obsolete inventory. In other cases, a heavily discounted price, particularly where it is below the seller's cost price, will indicate a non-ordinary course transaction. But because price is only one of the relevant criteria, this factor alone will not necessarily be conclusive, just as the converse, a fully priced sale, will not invariably be ordinary course.

In the author's opinion, the New Zealand courts were initially at risk of placing an undue emphasis on price, to the exclusion of other relevant criteria, when deciding whether a sale was ordinary course. Until the Court of Appeal's decision in *StockCo* (discussed further below),<sup>102</sup> there appeared to be developing in New Zealand a presumption that a sale of inventory would be outside of the ordinary course if it were below market value,<sup>103</sup> and, of greater concern, that a sale would be ordinary course if it were made at a proper price, regardless of any factors that might point the other way.<sup>104</sup> In *Tubbs v Ruby (appeal)*,<sup>105</sup> the Court of Appeal was apparently influenced by its belief that because the sale in issue was for cash at market value, the secured creditor had not been harmed by the sale, noting that 'the transactions removed Waimate's [the debtor's] inventory from the reach of the Bank's

<sup>102</sup> *StockCo* [2012] NZCA 330 (26 July 2012). The facts of *StockCo* are set out in Part VII above.

<sup>103</sup> In *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746, 753 [37], Baragwanath J said: "Market value" would naturally include such usual activities as sales promotions at a reduced price; it is difficult to see how a sale even below such a market value could be in the ordinary course of business."

<sup>104</sup> See, eg, *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746. Significant emphasis was also placed on price in *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806.

<sup>105</sup> (2010) 12 TCLR 746. See Part III above for the facts of *Tubbs v Ruby*.

security, but replaced that inventory with cash,<sup>106</sup> and later going on to say 'there was no need to protect the Bank: the transactions did not diminish, and quite possibly enhanced, the value of its security by less liquid stock being converted into cash'.<sup>107</sup>

In the author's respectful submission, there are two flaws in this analysis. First, it ignores the scheme of the Act, which expressly allows the secured creditor to claim both original collateral and proceeds, as long as there is no element of double dipping,<sup>108</sup> and, secondly, it assumes that the secured creditor got the full benefit of the proceeds. Given that the Court acknowledged that the sales were for the express purpose of assisting the seller's cash flow,<sup>109</sup> the likelihood is that the proceeds were dissipated paying unsecured creditors of the seller, even if they briefly passed through the seller's bank account, and did not stay with the bank.

Furthermore, since it appears that all of the sales were later effectively cancelled out by subsequently diverting to the putative buyer (Ruby) genuine arms-length orders received by the seller/debtor (Waimate) from its customers, the net economic effect of the transactions was artificially to accelerate, or over-report, sales by Waimate, which may well have deceived the bank to its detriment. With respect, the Court of Appeal was right to regard the price, payment mechanism, and nature of the goods (the full market price, paid in cash for inventory that the seller was in the business of selling) as factors evidencing ordinariness, but in the author's submission it gave insufficient weight to countervailing criteria.

On the other side of the ledger, the fact that the sales were made to a related party, for the purpose of assisting with the seller's cash flow at a time when the seller was financially distressed and without delivery of the goods, to a buyer who had no use for the goods as well as no business, no staff or premises and no means of disposing of the goods other than giving them back to the seller or filling orders received from the seller's customers, clearly demonstrates that the sales were quite extraordinary. This aspect of the Court's decision is even more remarkable when one remembers that all that the receivers had to establish was the low threshold of a seriously arguable question as to whether the sales were outside the ordinary course.<sup>110</sup>

<sup>106</sup> *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746, 753 [36] (Baragwanath J).

<sup>107</sup> *Ibid* 754 [38].

<sup>108</sup> See *PPSA* (Aus) s 32; *PPSA* (NZ) s 45.

<sup>109</sup> *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746, 751 [24] (Baragwanath J).

<sup>110</sup> The author has commented elsewhere on another unsatisfactory consequence of the Court's decision. The priority Ruby gained (improperly, in the author's view) as a buyer could easily

But in the final event, the Court of Appeal granted the receivers the interim injunction they sought. The Court's analysis described above applied to the bulk of the transactions (which the author will refer to as the 'initial transactions') but the nature of the transactions altered shortly before the appointment of the receivers. It seems that as the debtor Waimate's financial distress grew, Waimate's manager used for Waimate's own purposes the inventory that it had previously 'sold' to Ruby, without either swapping it for goods of equivalent value or diverting cash from Waimate's customers to pay for it, as had previously been done. Whether authorised or not, this process left Ruby with an unsecured claim against Waimate in place of the inventory that Ruby had previously 'bought'. When the common directors of Waimate and Ruby discovered that the inventory Ruby had purchased had been depleted in this fashion, they set about replenishing it from Waimate's stock (which the author will refer to as the 'replenishment transactions'). The Court held that arguably the replenishment transactions were either not sales or were outside the ordinary course because they were in satisfaction of an existing obligation and not for cash. This was sufficient for the receivers to succeed at the interlocutory level.<sup>111</sup>

The concern that in New Zealand price alone was developing as the dominant determinant of whether a sale was in the ordinary course has been lessened somewhat by the most recent decision of the Court of Appeal in *StockCo*.<sup>112</sup> There, a sale that the Court was prepared to accept was at fair market price and for cash was nonetheless held (quite rightly, in the author's respectful opinion) to be outside of the ordinary course of business because of the countervailing extraordinary aspects to the sale. While proceeding on the basis that the price was fair, the Court held that this was a 'neutral' factor.<sup>113</sup>

have been legitimately gained by using a purchase money finance device. But in order to do so, Ruby would have been required to register a financing statement in a timely manner. By characterising Ruby as an ordinary course buyer, whose interest accordingly did not require registration, the Court arguably undermined the registration and publicity objectives of the regime: Mike Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence' (2011) 34 *University of New South Wales Law Journal* 696, 729.

<sup>111</sup> Ultimately, however, in what the author regards as a deeply flawed analysis, the New Zealand High Court, in giving the substantive judgment, ruled that these replenishment sales were also in the ordinary course of business (which could be considered to be something of an unusual case of a puisne judge effectively overturning an appellate court): *Tubbs v Ruby (substantive)* [2011] 3 NZLR 551, 562 [61]–[62] (Chisholm J). The substantive decision is further analysed by the author in Mike Gedye, 'Financing Transactions Structured as Sales of Goods' (2013) 25 *New Zealand Universities Law Review* (forthcoming).

<sup>112</sup> *StockCo* [2012] NZCA 330 (26 July 2012). See also Parts VII and VIII above.

<sup>113</sup> *Ibid* [77] (O'Regan P for O'Regan P, Randerson and Asher JJ).

IX *TUBBS V RUBY* REVISITED:  
DRAFTING STRATEGIES TO PROTECT THE SECURED PARTY

Putting it bluntly, the author regards all three of the *Tubbs v Ruby* decisions<sup>114</sup> as flawed. But unless and until other courts decline to apply them, there remains the prospect that they will be followed and that legitimate security interests will continue to be undermined by secretive related party transactions. Fortunately, there is a simple drafting solution that goes a long way towards protecting secured parties from inappropriate related party dealings with the collateral. Security agreements should contain clauses both prohibiting related party sales (unless expressly authorised at the time of sale), and declaring them to be outside of the ordinary course of business. Where a sale contravenes the terms of a security agreement, the buyer is only protected under the ordinary course provisions if the buyer was unaware that the sale was prohibited. In cases such as the *Tubbs v Ruby* litigation, the common directorships and shareholdings between the seller and the buyer would likely lead to the finding that the buyer had knowledge of the prohibition and could not avail itself of the ordinary course protection.<sup>115</sup> This highlights another weakness in the *Tubbs v Ruby* cases: decisions that can so easily be circumvented by good drafting are unlikely to be enduring precedents.

X LIMITS TO THE SUBJECTIVE APPROACH

As discussed in Part VI above, the Australasian PPSAs, in common with the Uniform Canadian Acts, introduced what is sometimes referred to as a 'subjective' element into the ordinary course test by referring not to a generic 'ordinary course of business' but rather to the 'ordinary course of business' of the seller.<sup>116</sup> On the other hand, the *Ontario PPSA* adopted the more universal standard of the 'ordinary course of business' generally.<sup>117</sup> Although the Australasian formulation is sometimes referred to as a subjective test because it is limited to the particular seller's ordinary course of business, this in itself

<sup>114</sup> *Tubbs v Ruby (initial)* [2010] NZCCLR 31 (High Court); *Tubbs v Ruby (appeal)* (2010) 12 TCLR 746 (Court of Appeal); *Tubbs v Ruby (substantive)* [2011] 3 NZLR 551 (High Court).

<sup>115</sup> See *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806, [110] (Kós J). In Australia, the general law position on the common knowledge of related companies is strengthened by *PPSA (Aus)* s 299. Section 299 expressly provides that where a sale contravened the terms of a security agreement, certain related party buyers will be presumed to have knowledge of that fact unless the buyer proves the contrary beyond reasonable doubt.

<sup>116</sup> *PPSA (Aus)* s 46.

<sup>117</sup> *Ontario PPSA* s 28.

does not tell us whether this question is to be answered subjectively (ie from the facts known to the particular seller) or objectively (ie from the facts known or reasonably knowable by the buyer). Indeed, here 'objective' and 'subjective' are not particularly helpful labels. Put differently, the issue is simply whether facts unknown and not knowable by the buyer can be relevant to determining the seller's ordinary course of business.

In applying the generic Ontario test, it has been held that:

Whether a transaction is in the ordinary course of business ... is a question of fact to be objectively assessed, taking into account all circumstances which were known, or ought reasonably to have been known, to the purchaser. ... It follows that a transaction apparently in the ordinary course of business is within [the section] notwithstanding that circumstances not known or not reasonably within the knowledge of the purchaser at the time of the transaction establish that the dealing was not in the ordinary course of business. In considering whether [the section] applies ... I therefore need not inquire whether these transactions were fraudulent. I need only ask: were they in the ordinary course of business? It also follows that the parties to a security agreement cannot define by their agreement the meaning to be attributed to the words 'in the ordinary course of business' for the purposes of [the section].<sup>118</sup>

This passage was taken up in another Ontario decision that noted: 'Whether the sale is in the ordinary course of business is determined from the buyer's perspective'.<sup>119</sup> But while these sentiments may be consistent with the generic Ontario test, it is necessary to consider whether they can also be applied to the more particular 'business of the seller' test found in the Australasian PPSAs and the Uniform Canadian Acts.

Although at first sight it may appear that the best person to know what is the seller's business and *modus operandi* will be the seller itself, so that the test would be wholly subjective, regard must be had to the policy behind the test. The rationale for s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) is to facilitate trade by allowing certain buyers (ie ordinary course buyers) to buy goods without having to ensure the goods are unencumbered. There are

<sup>118</sup> *Ford Motor Credit Co of Canada v Centre Motors of Brampton Ltd* (1982) 38 OR (2d) 516, 526 (Potts J).

<sup>119</sup> *Agricultural Commodity Corp v Schaus Feedlots Inc* (2001) 2 PPSAC (3d) 270, 276 [16] (Donnelly J). See also *Royal Bank of Canada v Bank of Nova Scotia* (1994) 6 PPSAC (2d) 250, 254 [15] (Haley J) (criticised on other grounds in Part V above), where it was stated that 'irregularities ... not known to the buyer are irrelevant for determining whether or not the sale was made in the ordinary course'.

aspects of both 'justice and commercial utility'<sup>120</sup> about this, so it is not surprising that even under the more subjective formulation of the test it has been held by a Saskatchewan Court that 'one can discern a public policy consideration in the legislation which favours the safeguarding of sales transactions over the safeguarding of secured transactions in such a case'.<sup>121</sup>

The Court also held that

a generally liberal interpretation to the phrase 'buyer ... of goods sold ... in the ordinary course of business of the seller' ... [should be given] to protect the buying public ... where ... goods ... are sold to the public ... [and] comports with the underlying philosophy of the provision to protect the security interest so long as it does not interfere with the normal flow of commerce.<sup>122</sup>

These dicta indicate that the objective Ontario factual analysis may also be applied in those jurisdictions such as Australia and New Zealand that have adopted the more subjective test. If this is so, although Australia and New Zealand have adopted the 'ordinary course of business of the seller' test, the seller's ordinary course of business would be objectively determined from the buyer's perspective so that unusual circumstances of which the buyer was not put on notice would not take the sale outside of the ordinary course. The provisions themselves provide some support for this approach. Both s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) provide that if a sale is in breach of the security agreement, a buyer is still protected unless the buyer has knowledge of the breach.<sup>123</sup> It is thus evident from the structure of the sections that sales in breach of a security agreement can still be in the ordinary course of business. If it were otherwise, there would be no need for the sections expressly to exclude buyers with knowledge of a breach.

Nevertheless, there is surprisingly little case authority on this issue from the jurisdictions that have adopted the more subjective test. Fraud provides a stark illustration of the choice that must be made. Intuitively, it is difficult to see fraudulent transactions as ever being in the ordinary course of business. Older cases in a different context lend some support for the view that fraudu-

<sup>120</sup> *Camco* [1986] 6 WWR 258, 271 (Tallis JA for Tallis, Cameron and Gerwing JJA), considering the Saskatchewan test of ordinary course of business of the seller.

<sup>121</sup> *Ibid* 272.

<sup>122</sup> *Ibid* 276.

<sup>123</sup> There is a slight difference in the way the Australian and New Zealand provisions are structured here, but they are to like effect.

lent or illegal transactions cannot be ordinary,<sup>124</sup> but the Ontario decisions quoted above clearly state that in the *Ontario PPSA* context, fraud would only impeach an otherwise ordinary sale where the buyer had cause to suspect it.

If this objective, buyer-centric approach to analysis of the circumstances surrounding a sale also applies in Australasia, it would render irrelevant provisions in a security agreement that purport to define the seller's ordinary course of business, unless the buyer was aware of them. There has been some inconclusive discussion of this issue in New Zealand in both the High Court and Court of Appeal judgments in the *StockCo* litigation.<sup>125</sup> In a passing comment, White J in the High Court stated that 'covenants in the security documentation served to limit the authorised scope of [the debtor's] ordinary course of business'.<sup>126</sup> On the other hand, the Court of Appeal seemed inclined against this approach, stating:

we agree that the objective assessment of the ordinary course of the seller's business is unlikely to be assisted by reference to the secured parties' security agreement ... [I]f [the debtor] had changed the ordinary course of its business in breach of the ... security agreement, that would not have altered the fact that [the debtor's] business was a new business it had undertaken, rather than the business operation permitted by the security agreement.<sup>127</sup>

But unless and until the Australasian courts rule definitively against the efficacy of contractual provisions describing or limiting the debtor's ordinary course of business, such clauses can do no harm and may bolster the secured party's position. To help protect secured creditors from inappropriate dispositions of the collateral, security agreements should define and describe the debtor's ordinary course of business in terms appropriate to the circumstances (for example, '[t]he retail sale of inventory within the debtor's usual range of prices to buyers unrelated to the debtor'), as well as expressly provide that any other dispositions are a breach of the security agreement, and list such prohibited transactions. Even if such drafting ultimately proves to be ineffective against unsuspecting buyers, it will still assist where the buyer has cause

<sup>124</sup> See, eg, *Mutual Mortgage Corporation Ltd v Bank of Montreal* (1965) 53 WWR 724, 732–3 (Sheppard JA).

<sup>125</sup> *Gibson v Stockco Ltd* [2011] NZCCLR 29 (High Court); *StockCo* [2012] NZCA 330 (26 July 2012) (Court of Appeal). The facts of *StockCo* are set out in Part VII above.

<sup>126</sup> *Gibson v StockCo Ltd* [2011] NZCCLR 29, [150] (White J).

<sup>127</sup> *StockCo* [2012] NZCA 330 (26 July 2012) [57] (O'Regan P for O'Regan P, Randerson and Asher JJ).

to suspect the seller was acting outside the terms of the security agreement, such as where the buyer is a related party.

It is worth pointing out that White J's comment in the High Court, suggesting that the terms of the security agreement might be relevant to whether a sale was within the ordinary course, refers to the 'authorised scope' of the ordinary course of business. Section 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) deal with what is in fact in the seller's ordinary course of business, not with what the secured party authorises. The latter is governed by the provisions discussed in the next Part.

#### XI SALES AUTHORISED BY THE SECURED PARTY

Sales or other dealings with the collateral that the secured party authorises, either expressly or impliedly and either in or outside the security agreement, can extinguish the security interest independently of any other buyer protection provision.<sup>128</sup> This is the effect of s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ). Where collateral is sold in the ordinary course of the seller's business, the operation of these sections can overlap with s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) (the sales in the 'ordinary course of business' provisions). There are various ways of tackling the intersection of these provisions, but the different approaches should all lead to the same result.

Where a buyer has any doubt about whether a sale is in the ordinary course of the seller's business, it is prudent to obtain the consent of any secured parties. In this way, the buyer can be assured of acquiring the purchased property free of any security interests held by creditors from whom consent was obtained. The buyer will then obtain unencumbered title by virtue of s 32 of the *PPSA* (Aus) or s 45 of the *PPSA* (NZ), regardless of whether or not the sale was in the ordinary course. The most common instance of this will be when a debtor disposes of surplus equipment and the buyer insists on obtaining a release from any secured creditors. But s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ) can also operate when inventory is sold. Inventory financiers generally expect the debtor to sell the inventory and

<sup>128</sup> The burden of proving that the secured party authorised the transaction falls on the buyer: *Northwest Equipment Inc v Daewoo Heavy Industries America Corp* [2002] 6 WWR 444, 452 [22] (Fruman JA). The security interest will not be extinguished where the parties intend that the transferee takes subject to the security interest, perhaps, for example, where the transfer is part of a corporate restructuring and the collateral is transferred to an associate of the debtor who expects to take the collateral subject to the security interest.

use the sale proceeds to repay the financier. The security agreement may contain express terms authorising such sales, but even in the absence of any express authorisation, the authority will generally be implied. It is well established that it is appropriate to imply into a security agreement covering inventory a term that the debtor is authorised to sell the inventory in the ordinary course of its business.<sup>129</sup> Being contractual in origin, the parties are free either to expand or to restrict the scope of this authority to dispose of the collateral free of the security interest. If the security agreement (or indeed, any subsequent side agreement) gives the debtor a broad authority to deal with the collateral, this contractual authority may operate to give a buyer unencumbered title in circumstances when the statutory ordinary course provisions would not.

On the other hand, when the contractual authority is expressly restricted (so that it is narrower than the statutory ordinary course provisions), the issues discussed in Part X above will arise. Although appropriate express restrictions incorporated into the security agreement would clearly prevent a buyer from arguing that it was protected by s 32 of the *PPSA* (Aus) or s 45 of the *PPSA* (NZ) (namely, that the debtor had express or implied authority to dispose of the collateral free of the security interest), as noted in Part X, such sales may nonetheless be in the 'ordinary course of business' for the purposes of s 46 of the *PPSA* (Aus) or s 53 of the *PPSA* (NZ) if this question is determined from the buyer's perspective.

But often, the security agreement will make no mention at all of the debtor's power to dispose of the collateral. It is the author's opinion that in such cases any implied authority to deal with the collateral should be limited to sales in the ordinary course of the seller's business and, furthermore, that this authority will potentially apply to fewer sales than the statutory ordinary course test. It will potentially apply to fewer sales because a debtor would never have implied contractual authority to act fraudulently or illegally,<sup>130</sup> whereas the Ontario view of the statutory test, discussed in the previous Part, is that fraudulent sales may be ordinary course for the purposes of the *Ontario PPSA*, provided the buyer had no cause to know of the fraud. The implied authority should be limited to sales in the 'ordinary course of business' because this is all that is required to give the contract business efficacy.<sup>131</sup> The secured party cannot prevent the operation of the statutory provision govern-

<sup>129</sup> See, eg, *Insurance and Discount Corporation Ltd v Motorville Car Sales* [1953] OR 16, 22–3 (McRuer CJHC), and the authorities referred to therein.

<sup>130</sup> *Ibid* 30–1.

<sup>131</sup> See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

ing sales in the ordinary course (ie either s 46 of the *PPSA* (Aus) or s 53 of the *PPSA* (NZ)), but would have no reason to extend it.<sup>132</sup> However, expressly spelling out in the security agreement the scope of the debtor's right to sell the collateral will put the limits of the contractual authority beyond doubt, and is another good reason to include such a provision in the security agreement, regardless of doubts about its impact on the statutory ordinary course test.

Since any implied contractual term authorising the debtor to deal with the collateral should generally be limited to sales in the 'ordinary course of business' (because there is no good reason or need to imply a more extensive authority), the overlap between the contractual authority to deal under s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ), and the statutory protection for buyers under s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) for sales in the ordinary course, will be most obvious either when the security agreement is silent about the debtor's authority to dispose of the collateral or the security agreement expressly authorises ordinary course sales without further defining or limiting that concept. There will then be two separate provisions in the legislation, each engaging an 'ordinary course of business' test of potentially different scope to the other, under which a buyer may claim unencumbered title.

To simplify the analysis in these circumstances, once it has been established that any express provisions approving the sale of the collateral, given either in the security agreement or subsequently, are no broader than an ordinary course test, s 32 of the *PPSA* (Aus) and s 45 of the *PPSA* (NZ) can be largely ignored. The focus should then be on the statutory 'ordinary course of business' test under s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) because the contractual authority will be no wider, and may be more restrictive, than the statutory 'ordinary course of business test' and so would never operate to give the buyer greater protection than s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ).

<sup>132</sup> The troubling New Zealand decision of *Motorworld Ltd (in liq) v Turners Auctions Ltd* [2010] NZCCLR 30 contains conflicting dicta on this point. While the judgment records 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', Lang J then held on the facts that the debtor was not subject to any limitation at all in the way it dealt with the inventory collateral: at [37]. It is respectfully suggested that this decision should be restricted to its unusual facts. See also the analysis in Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence', above n 110, 725-7. The author discloses that he advised the unsuccessful secured party in this case.

## XII THE AUSTRALIAN TWIST

In the absence of any other applicable buyer protection provision, it is generally assumed that the scheme of the legislation is to give buyers in the ordinary course of business title free of security interests *given by the seller*,<sup>133</sup> while other buyers and sub-buyers take subject to perfected security interests. However, depending on the proper interpretation of s 165 of the *PPSA* (Aus), some seemingly disparate provisions of the Australian Act may, perhaps unintentionally, lead to a different result in Australia. Section 165 describes some of the defects that can invalidate a registration, potentially rendering a security interest unperfected. New Zealand has an equivalent provision (s 150) but, unlike New Zealand's, the Australian provision refers to defects existing 'at a particular time'. These words suggest that an initially valid registration may become ineffective sometime later through changed circumstances.

This interpretation is consistent with s 166 of the *PPSA* (Aus), which provides in certain cases for temporary effectiveness of a registration where there is a subsequently arising defect. For example, where the secured party has correctly recorded the debtor's name but the debtor subsequently changes its name, the name change would seem to invalidate the registration under ss 164(1)(b) and 165(b). But s 166 would then give temporary effectiveness until the end of five business days after the secured party became aware of the name change, with a backstop of no more than 60 months temporary effectiveness. This effectively imposes an obligation on the secured party to update its registration when it becomes aware of a change of name of the debtor. This is entirely reasonable and is achieved in New Zealand via a different mechanism.<sup>134</sup> However, temporary effectiveness does not apply where the operative defect results 'from a change of the grantor'.<sup>135</sup> While it is not entirely clear, it appears that a transfer of the collateral would result in a change of the grantor and would invalidate the registration under ss 164(1)(b) and 165(b), but that there is no temporary effectiveness under s 166 for this particular defect.

The next step in the analysis then seems to go all the way back to s 34. This provides a period of up to 24 months *temporary perfection* in the case of a transfer of the collateral in lieu of the 60 months *temporary effectiveness* under s 166 that applies in the case of a change of name by the debtor. But it seems that temporary perfection is not quite as good as temporary effectiveness

<sup>133</sup> See Part V above for a discussion of the meaning of this phrase.

<sup>134</sup> *PPSA* (NZ) s 90(1)(b).

<sup>135</sup> *PPSA* (Aus) s 166(1)(a)(ii).

because buyers take free of temporarily perfected security interests under s 52 of the *PPSA* (Aus).

If the author's analysis is correct, the consequence is that in Australia, good faith sub-buyers would defeat security interests that initially were validly perfected by registration but that became unperfected as a consequence of the sale of the collateral, whether authorised or not. Take the following hypothetical example:

Secured Party registers and perfects against Debtor. Unknown to Secured Party, Debtor sells the collateral to Buyer outside of the ordinary course of Debtor's business in circumstances when no other buyer protection provision applies. Buyer accordingly holds the collateral subject to Secured Party's security interest but, by virtue of ss 164 and 165, as a result of the unauthorised sale, Secured Party's registration has become defective and is only temporarily perfected under s 34. Buyer resells the collateral to Sub-buyer. Sub-buyer takes the collateral free of Secured Party's security interest under s 52, even during the s 34 period of temporary perfection and whether or not the sale to Sub-buyer is in the ordinary course of business.

This result would not follow in New Zealand while the secured party remained ignorant of the transfer of the collateral from Debtor to Buyer. If the result is correct, the controversial buyer's seller rule discussed in Part V above effectively will not apply in Australia. Of course, if this is so, one wonders why s 46 of the *PPSA* (Aus) includes the buyer's seller rule in the first place.

### XIII THE IMPACT OF SUBVERSIVE CORPORATE STRUCTURES

Another case where the different structure of the Australian and New Zealand Acts may lead to different outcomes when a debtor disposes of collateral arises from the contrasting scope of the statutory obligation of good faith and commercial reasonableness imposed under the two Acts.

The author has, in practice, come across deliberate attempts by debtor companies to utilise a corporate structure that is intended to allow the debtor group to offer the same collateral to two unsuspecting secured parties. It is possible to envisage many variations on this theme but the scam may work something like this:

One of two related companies purports to carry on business as a wholesaler while the other purports to carry on business as a retailer. The 'wholesaler' acquires inventory subject to a purchase money security interest in favour of Financier 1 (F1) but immediately sells all of the inventory on unsecured credit terms to the 'retailer'. F1 is unaware of the existence of the 'retailer' and there

may be no outward manifestation, such as a physical change of possession of the inventory, evidencing the related company transaction. The 'retailer' then grants a security interest to another financier (F2), who similarly is not aware of what is going on.

F1 will of course have a proceeds security interest in the unsecured debt due from the 'retailer' to the 'wholesaler',<sup>136</sup> but in the usual case where both of the related companies are hopelessly insolvent, this proceeds security interest will be worthless. So when F1 eventually seeks to enforce its security interest against the original inventory collateral, the real conflict will be between it and F2. F2 will argue that F1 no longer has any claim to the inventory collateral because either F1 expressly or impliedly authorised the 'wholesaler' to sell the inventory, or the inventory was sold in the ordinary course of the 'wholesaler's' business and so the 'retailer' acquired the collateral free of F1's security interest.

F2 may support its arguments by alleging, among other things, that the collateral was inventory so F1 must be taken to have authorised its disposition; that the 'wholesaler's' business was wholesaling; that it had always carried on business in this manner; that it had previously sold to the 'retailer'; and that the sale was at market value. F2 may be able to point to documents that support its argument. F1 will respond that it had not authorised the relevant transaction and that the sale was not in the ordinary course of the 'wholesaler's' business because it was to a related party and was intended to undermine, or had the effect of undermining, F1's security interest. F1 may also query the volume sold, the unsecured payment mechanism, and the fact that the 'wholesaler' appeared to retain possession.

The analysis in Part XII above will be relevant to the allegation that F1 had authorised the sale. In respect of the ordinary course arguments, the court will weigh up the countervailing factors in the manner outlined in Part VII above. If, as the author has suggested, the factors pointing to extraordinariness are given greater weight, particularly the relationship between the parties, the court may conclude that the sale was not in the ordinary course of business and so F1's security interest was not cut off.<sup>137</sup> However, the matter may be put

<sup>136</sup> *PPSA* (Aus) s 32(1)(b); *PPSA* (NZ) s 45(1)(b).

<sup>137</sup> As discussed in Part II above, it is important that the court focuses on the proper transaction and relationship. Once the starting point, that F1's security interest is effective unless subordinated or cut off by the Act, is recognised, the court needs to identify the particular transaction by which this allegedly occurred, which in this case is the sale between the related companies. The provisions directly governing the respective priorities of F1 and F2 in these circumstances are those regulating the priority of competing security interests in transferred

beyond doubt if F1 has ensured that such sales are prohibited by the express terms of its security agreement. Any such express term would counter the argument that F1 had authorised the sale and would prevent the 'retailer' from relying on the ordinary course provisions,<sup>138</sup> (and hence prevent F2 from being sheltered by the 'retailer's' clear title). This again emphasises the value of such covenants, whether or not they are directly relevant to determining the seller's ordinary course of business.

But even if the terms of F1's security agreement did not expressly prohibit the sale, and the court, having weighed the relevant factors, is minded to hold that the sale was in the ordinary course of the seller's business, there is another argument that F1 can mount in New Zealand that is not available in Australia. Section 25 of the *PPSA* (NZ) imposes a general standard of conduct required from persons seeking to exercise a right under the Act. The required standard is to act in good faith and in accordance with reasonable standards of commercial practice. F1 could argue that the 'retailer' buyer was, in the circumstances, not acting in accordance with the required standard and so was not entitled to rely on the ordinary course provision, regardless of any finding that the sale was in the ordinary course of the seller's business.<sup>139</sup> This argument is not available in Australia because the similarly worded standard found in s 111 of the *PPSA* (Aus) applies only to the procedural enforcement rights and obligations arising under ch 4 of the Australian Act and not to substantive priority rights arising elsewhere. Unlike New Zealand's Act, there is no general standard of conduct imposed by the *PPSA* (Aus).

collateral (*PPSA* (Aus) ss 34, 67, 68; *PPSA* (NZ) s 88), and first require an assessment of whether or not the 'retailer' has acquired the collateral free of the F1's security interest. In applying the various provisions, the court should not be distracted by the innocence of F2.

<sup>138</sup> This is because it is likely that the 'retailer' would, by virtue of the relationship with the 'wholesaler', have notice that the sales were prohibited and hence outside s 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ).

<sup>139</sup> This could lead to an interesting argument as to whether F2 is affected by any bad faith or commercial unreasonableness on the part of the 'retailer'. On the one hand, it can be argued that F2 cannot be sheltered by the 'retailer's' clear title where the 'retailer' has not acquired clear title as a consequence of bad faith or commercial unreasonableness. On the other hand, it can be argued that F2 is innocent and has not contravened the s 25 standard, and that it is F2's rights that are now in issue, not those of the 'retailer'. In the author's opinion, the wording of the provision that, on these facts, actually determines the priority of the competing secured parties (*PPSA* (NZ) s 88) favours the former analysis.

## XIV CONCLUSION

The Australian and New Zealand *PPSAs*, which confirm the efficacy of secured credit and facilitate and regulate its provision, are based on the same basic principles and broadly call for the same approach to interpretation (with due allowance for some potentially significant drafting differences). As regimes regulating secured transactions, the Acts must deal with the conflicts that can arise between two or more security interests in the same collateral, and between security interests and other types of interests. Under both Acts, a useful starting point for any analysis of competing claims is to recognise that an effective security interest has priority over subsequently arising interests in the collateral, unless the legislation provides otherwise.

Because secured financiers generally, and inventory financiers in particular, anticipate that there will be occasions when the debtor should be able to dispose of the collateral free of the secured party's interest, the Acts specify when this occurs. Section 46 of the *PPSA* (Aus) and s 53 of the *PPSA* (NZ) describe one type of transaction that has this effect: a sale of the collateral in the ordinary course of the debtor's business (such as can occur daily when a debtor sells inventory). The debtor, the debtor's inventory financier, and the debtor's customer may all expect the customer to acquire the inventory free of the financier's security interest. Section 46 of the Australian Act and s 53 of the New Zealand Act facilitate this expectation. But unlike some of the other sections, these particular provisions defeat only security interests created by the seller. In cases where collateral has been sold and then resold, perhaps several times, it is necessary to ensure that the provisions are applied to the correct sale. It is also necessary to restrict the application of these sections to true sales: a financing transaction that is disguised as a sale should be regulated as a secured transaction and not as a sale, if the interest created by the transaction falls within the statutory definition of security interest.

Although there are some differences in the wording of the Australian and New Zealand ordinary course provisions, the practice in both countries is likely to be similar. In both Australia and New Zealand, the provisions will apply primarily to goods that the seller holds as inventory for resale. In both jurisdictions, the analysis that is required to determine whether a sale was in the ordinary course of a seller's business requires first identifying the nature of the particular seller's business and then considering whether the sale in issue was within the ordinary course of that business. This determination requires the application of general legal principles, developed by the courts in this context, to a factual inquiry into the particular seller's business and *modus operandi*. Local and North American decisions decided under PPS legislation provide the best precedents, with due caution applied to Ontario decisions

because the legislative test in that jurisdiction is not tied to the particular seller's *modus operandi*.

Court decisions have generated a long list of factors potentially relevant to whether a sale is within or outside the 'ordinary course of business'. Where different factors point in different directions, it will be necessary to balance the competing factors against each other, with those suggesting extraordinariness likely to be given more weight. The author has suggested that related party transactions and sales where the purchase price is set off against an existing debt should excite the court's suspicion and, unless adequately explained away, should weigh heavily against ordinariness.

Another relevant factor will be price. An inexplicably low price will indicate that the sale is not ordinary. On the other hand, a sale at market price, which can point to the sale being within the ordinary course, may be neutralised by countervailing extraordinary factors.

A number of these factors came together in the *Tubbs v Ruby* litigation. The two High Court decisions and the Court of Appeal decision in that litigation all upheld sales as being in the ordinary course of business, despite what the author regards as overwhelming evidence of extraordinariness. The Courts were heavily influenced by the market price paid by the related party buyer. But subsequently, the soundly reasoned Court of Appeal decision in *StockCo* fully analysed all of the conflicting indicia in that case and the Court relegated the market price paid to a neutral consideration, before finding that the sales in issue were not in the ordinary course of business.

Moreover, what the author regards as the unsatisfactory outcome in the *Tubbs v Ruby* litigation could have been easily avoided by the secured creditor if it had insisted on appropriate covenants in the security agreement. Covenants prohibiting related party transactions are likely to be effective where the relationship is sufficiently close to ascribe knowledge of the covenants to the buyer. However, more general attempts to define contractually the scope of the debtor's ordinary course of business are of doubtful efficacy for the purpose of the statutory ordinary course provisions. While the matter has not been finally settled, the prevailing practice of determining the scope of the seller's ordinary course of business from the buyer's perspective is against the effectiveness of contractual provisions of which the buyer is unaware. Similarly, irregularities not known or knowable to the buyer, and of which the buyer was not put on notice, are unlikely to be weighed in the mix when deciding whether or not a sale was in the ordinary course of business of the seller for the purpose of Australia's s 46 and New Zealand's s 53.

A buyer will also take free of a security interest where the sale was authorised by the secured party.<sup>140</sup> Such authority is contractual in nature and may be found within or outside the security agreement. The authority may be express or implied. It is here that contractual covenants restricting the debtor's right to dispose of collateral will be effective and will define the scope of the contractual authority. Absent a finding of variation or waiver, a court could not imply contractual authority to dispose of the collateral in the face of an express prohibition. If a security agreement over inventory is silent about the debtor's right to deal with the collateral, it is likely that the court will imply an authority to sell the collateral in the ordinary course of business, and will then apply the same considerations as are relevant to the statutory ordinary course test.

Although the Australian and New Zealand tests for the 'ordinary course of business' are likely to be very similar, because of drafting and structural variations between the respective Acts there are cases where the ultimate outcomes might be quite different. Most significantly, this appears to be the case where collateral is sold outside of the ordinary course of business by the debtor and is subsequently resold by the buyer within the ordinary course of its business. In New Zealand, the perfected status of a secured party is unaffected by the first sale until the secured party has notice of it. The secured creditor can consequently recover the collateral from the sub-buyer.<sup>141</sup> In Australia, it appears that the secured party is reduced to temporary perfection by the first sale and that the sub-buyer would take free of the by then temporarily perfected security interest. If this is correct, it greatly reduces the relevance of the buyer's seller rule in Australia and may have been an unintended consequence of the way in which defective registrations are dealt with under the Australian Act. In contrast to the New Zealand approach, under ss 165 and 166 of the *PPSA* (Aus) it appears that an initially valid registration can later become defective as a result of an event of which the secured party is ignorant.

It is clear that the codified rules that determine which one of two or more competing interests in the same personal property prevails are one of the most important products of the Australasian *PPSAs* and that clarity in the application of these rules is desirable. This article has focused on the rules regulating one type of competition: the competition that can arise between a secured

<sup>140</sup> This is not so where the parties expected that the transferee would take subject to the security interest, such as where collateral is transferred as part of a corporate restructuring and it is not intended that the secured party be repaid following the transfer.

<sup>141</sup> Assuming no other buyer protection rule applies, and subject to *PPSA* (NZ) ss 88–90.

party and a buyer who claims to have bought the collateral in the ordinary course of business. In many, perhaps most, cases where a debtor sells the secured party's collateral, there will be no dispute. The secured party will have expected the debtor to sell the collateral free of the security interest and, perhaps, account to the secured party for the proceeds. In such cases, the interests of the secured party, the debtor and the buyer will be congruent. It is only where entitlement to the collateral is disputed that the provisions of the Australasian PPSAs must provide a clear answer. While the issues discussed in this article show that difficult questions can sometimes arise when the outcome depends on whether or not a sale took place in the ordinary course of business of the seller, it should not be forgotten that in the vast majority of cases, the answer will be readily apparent and the rules will simply function as intended, largely unnoticed, and unquestioned.