LEGAL PROBLEMS OF CREDIT AND SECURITY

THIRD EDITION

ROY GOODE

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Roy Goode

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PREFACE

To my astonishment it is now 15 years since the appearance of the second edition of this little book. In that time much has happened. There have been a great many decisions on security interests, from the High Court to the House of Lords. Issues of characterisation, to which much space was devoted in the previous editions, have continued to feature prominently as courts wrestle with the question whether the contractual arrangements have created a security interest and, if so, whether it is in the nature of a fixed charge or a floating charge. An illuminating example is the series of decisions in the *Cosslett* case culminating in *Smith (Administrator of Cosslett (Contractors) Ltd.) v Bridgend County Borough Council* [2002] 1 A.C. 336. Happily the clarity of *Re Brightlife* [1987] Ch. 200, temporarily blurred by decisions such as *Re New Bullas Trading Ltd.* [1993] B.C.L.C. 1389, has been restored by the decision of the Privy Council in *Agnew v Commissioners of Inland Revenue* [2001] 2 A.C. 710. Priority issues also remain a regular feature of case law, throwing up a division of judicial opinion as to whether a negative pledge clause in a charge affects subsequent incumbrancers or is purely contractual in effect and continuing debate as to the resolution of the circularity problem which arises where a company that has given a fixed charge expressed to be subordinate to a floating charge goes into liquidation owing preferential debts. There have also been some significant cases on the effect of an assignment in breach of a no-assignment clause, in particular the decision of the House of Lords in *Linden Gardens Trust Ltd. v Lenesta Sludge(Disposals) Ltd.* [1994] 1 A.C. 85.

The legislature has not been idle either, with further restrictions on the enforcement of security given by a small company where the directors obtain an automatic moratorium under the Insolvency Act 2000 by filing prescribed documents with the court and, more dramatically, the almost total abolition of the institution of administration receivership, as well as the elimination of what remained of Crown preference, by the Enterprise Act 2002, though both of these sets of provisions are more relevant to the companion volume in this series, *Principles of Corporate Insolvency Law* (2nd ed.), than to the present volume.

This shift in the balance of power from secured creditors to general creditors and the potential beneficiaries of reorganisations of insolvent companies appears to represent a belated reflection of the sympathies of the incomparable Ambrose Bierce, whose *Enlarged Devil's Dictionary* defines a (secured?) creditor as:

> "One of a tribe of savages dwelling beyond the Financial Straights and dreaded for their desolating incursions",

while "debtor" receives the beneficent definition of:

> "A worthy person, in whose interest the national debt should be so managed as to depreciate the national currency."

This seems particularly appropriate for inclusion in a preface written on Budget day!

A subject that has assumed enormous importance in recent years is the taking of security and quasi-security interests in corporate investment securities. The move from paper-based to electronic issue and transfer systems (*e.g.* CREST) and, even more significantly, from directly held investment securities to securities held through accounts with intermediaries, has thrown up a complex of problems which in the United States have been largely resolved in the revised Article 8 of the Uniform Commercial Code but with which English law has yet to grapple, including such basic questions as the nature of an account holder's rights in securities credited to his account and whether an account holder can look through his own intermediary to assert claims against higher-tier intermediaries. Of great significance also is the warmly welcomed 2002 EC Directive on Financial Collateral Arrangements, which is designed to protect financial collateral against various possible grounds of avoidance under insolvency law. Finally, in December 2002 there was concluded the Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary, addressing an important conflict of laws question, yet one on which there has hitherto been no reported English case. These developments have led me to provide a substantial new chapter on security interests in investment corporate securities, which I hope will shed some light on dark places. In addition to the above matters I have taken the opportunity to examine the characterisation of transactions such as repos and sell/buy-backs and stock loans.

Apart from these developments, the interval since the second edition has given me time for further reflection on a number of issues, leading to a substantial revision and expansion of the text, including a treatment of security interests by attornment and novation and a rewriting of the chapters on set-off and guarantees. And in relation to charge-backs, the hare which I started in the first edition has now run its course and I have felt compelled to accept that conceptual purity must give way to commercial needs and practices! But my modest suggestion way back in 1982 that charge-backs were conceptually impossible has at least served to stimulate jurisprudential debate, engaging the attention of numerous academic and practising specialists here and abroad and leading to the decision of a High Court judge (now in the Lords), who adopted the suggestion, *obiter dicta* by judges in two Court of Appeal cases (in one of which serious doubt was expressed as to the earlier ruling while the other, which supported the ruling, was on behalf of a court which included the quondam High Court judge himself) and an *obiter dictum* of the

House of Lords disapproving of the *obiter dictum* of the second Court of Appeal! How the doctrine of *stare decisis* is to be applied in this situation remains unclear!

I have benefited over the years from many helpful discussions with fellow academics, practitioners and students. I am indebted in particular to a number of friends and colleagues mentioned below for their assistance. The new chapter on security interests in investment securities was considerably improved as the result of comments by Philip Wood, Catherine Beahan and Nick Segal of Allen and Overy, Guy Morton of Freshfields, Professor Dan Prentice of Pembroke College, Oxford, Professor Jim Rogers of Boston College, Jack Wiener, managing director and deputy general counsel of The Depository Trust and Clearing Corporation, Kristen Geyer, managing director and general counsel, and Diego Devos, director and deputy general counsel, of Euroclear. Robert Stevens of Lady Margaret Hall, Oxford, and Richard Hooley, currently at Fitzwilliam College, Cambridge, but shortly to take up his appointment to a chair at King's College, London, were kind enough to read through the proofs and saved me from a number of errors and omissions. I should also like to express my thanks to my former research assistants, Rafal Zakrzewski and Bushra Razaq, for their help with literature searches. My last but not least expression of appreciation is to Kate Hayes, Senior Publishing Editor, and Melanie Pepper, Senior Project Editor, of Sweet & Maxwell, for all their expertise and support in the production of this new edition, which I hope will be found of assistance both to practising lawyers and to students.

Roy Goode
Oxford
April 9, 2003

PREFACE TO THE SECOND EDITION

This book began as a series of public lectures delivered at the Centre for Commercial Law Studies, Queen Mary College, in 1982, the purpose of which was to explore a range of fundamental legal concepts relating to security and quasi-security interests, with particular reference to security in personal property. The large attendance at those lectures and the kind welcome given both by academic and by practising lawyers to the first edition of this book revealed a widespread recognition of the practical value of a conceptual approach in this complex field, and an awareness of the problems that can result from a purely mechanical application of a set of detailed rules.

This new edition is not merely a technical update but is in many respects a new book. I have now devoted two distinct chapters to the nature and forms of consensual security and concepts of attachment and perfection. The treatment of negative pledges has been substantially expanded, an analysis offered of the legal nature of sub-participations in loan agreements and the chapter on priorities has been enlarged to include an examination of twelve typical priority problems and their solution. I have elaborated the discussion of the vexed question whether a bank can take a charge over its own customer's credit balance, reinforcing the negative view expressed in the first edition which received judicial vindication in *Re Charge Card Services Ltd.* [1986] 3 All E.R. 289. The chapter on set-off has been totally rewritten and substantially extended. Dr. Rory Derham's excellent new book *Set off*, which I had the pleasure of evaluating as an external examiner when it was presented in its earlier form as a doctoral thesis at Cambridge University, reached me too late to be reflected in the above chapter except by way of footnote reference. It is the first modern monograph on the subject and is required reading for anyone interested in set-off.

By concentrating on fundamentals rather than on the minutiae of English law I have sought to provide a text which will be of assistance to lawyers throughout the Commonwealth. In this new edition I have drawn on many Commonwealth decisions, particularly those from courts in Australia, Canada and New Zealand, which have shed light on a number of complex issues and which will, I believe, be as helpful to judges in this country as their own decisions are to courts elsewhere in the Commonwealth.

I am indebted to all those who over the past few years have helped to clarify my thinking or have drawn my attention to cases and problems of which I might otherwise have remained unaware. They are too numerous to mention by name but include my academic colleagues, my students and

friends in the practising profession. I owe a particular debt to Philip Wood of Allen and Overy, who has allowed me freely to draw on his encyclopaedic knowledge of finance and security in general and of set-off in particular; to David Weed of Victor Mishcon & Co., who helped me with a practical point on searches in the Companies Registry; and to the various banks and firms of City solicitors who invited me to present in-house seminars on *Charge Card* and related problems and helped me to sharpen the argument, even at the expense to them of an inconvenient conclusion! I should also like to express my thanks to the editorial team at Sweet & Maxwell, and to Sheila Aked for preparing the index. Finally, I am indebted to Queen Mary College for granting me sabbatical leave to complete a new edition of this and other works.

The law is stated on the basis of the materials available to me at February 1, 1988.

Centre for Commercial Law Studies,
Queen Mary College,
London.
February 17, 1988

R. M. Goode

PREFACE TO THE FIRST EDITION

My purpose in delivering the lectures reproduced in this book has been to explore some of the fundamental legal conceptions underlying the more important types of commercial security and to suggest that a number of conventional propositions relied on in everyday practice are conceptually unsound. In some cases the analysis leads to the conclusion that a particular form of security is less effective than previously supposed. Examples are the provision for equal and rateable security in negative pledge clauses; agreements purporting to create a charge in favour of a bank over its customer's credit balance; the registration of details of restrictions in a floating charge; and the use of automatic crystallisation clauses on the mistaken assumption that crystallisation necessarily establishes priority over a subsequent security interest. In other cases, my task has been the more agreeable one of seeking to show that apparent weaknesses in a creditor's security do not in fact exist—for example, the so-called "flawed" asset created when restrictions are imposed on the withdrawal of a deposit; the use of a provision in a guarantee which, far from prohibiting the surety from proving in competition with the creditor, requires him to do so and to hold any dividends on trust for the creditor.

That the practitioner is keenly interested in legal theory, however abstract, affecting commercial transactions was amply demonstrated by the large number of lawyers, bankers and businessmen who attended these lectures. I am indebted to my audience for several thought-provoking questions and illuminating comments, and in preparing the written text I have revised and slightly expanded the material to take account of some of the more important points made. I have also taken the opportunity to update the treatment of the law, which is believed to be correctly stated as at September 14, 1982.

Centre for Commercial Law Studies,
Queen Mary College,
London.
1982.

R. M. Goode

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