

1. Explain the difference between and where appropriate give examples of the following:

- Security and quasi security
- Possessory and non-possessory security
- Attachment and Perfection
- A pledge and a lien
- A mortgage and a charge
- A fixed charge and a floating charge

- Taking security involves the acquiring of rights by a creditor in respect of property, title to which is in the debtor before the security arises in order to provide a recourse, in addition to the debtor's personal covenant to pay. Quasi security results in a similar financial effect to the taking of security but there are no requirements to perfect quasi security, for example by registration or by retaining possession. The difference is that in quasi security, title to the property is in the creditor before the quasi security rights arise. For example, if S sells goods to B on credit and takes a charge over them until payment, this is a security and will require registration if the borrower is a company. But if S agrees to sell goods to B but retains title to them pending payment, this is quasi security with no requirement for its validity.
- A possessory security is one which depends for its existence on the creditor having possession, whether physical or constructive of the secured property, for example a pledge or contractual lien. A non-possessory security like a mortgage or charge does not depend on possession. In a mortgage, the mortgagee has title to the property and in a charge the chargee has the proprietary right to sell the property and repay himself from the proceeds.
- A security interest attaches to the secured property once each of the following conditions has been met, namely; it has been validly created, the property to which it relates is identifiable, and there is a debt which it is to secure. Once attached, the security is enforceable between creditor and debtor, but in order to bind third parties it must normally be perfected. In the case of possessory security, perfection is effected by possession Non-possessory securities normally require registration, while perfection of security over things in possession is by notice to the obligor underlying debt obligation.
- A pledge is a security granted by the owner of goods effected by granting possession of them to the debtor. A good example is pawning property where the pawnbroker lends money on the security of goods which are bailed to him and is entitled to retain possession of them until he is repaid. A lien arises where goods are bailed to a person other than as security but where the lienee may retain the goods until his charges are met. The right of a warehouseman to detain goods he is storing until his charges are paid is a good example of a lien.

- A mortgage is a non-possessory security where the owner transfers title to the property to the mortgagee as security for a debt. The mortgagor retains the right to recover title to the property on repayment of the debt until the court grants the mortgagee an order of foreclosure. The mortgagee has a range of powers, including sale, in order to realise his security in the event of default. A charge is a non-possessory security, whereby the chargee has powers over the property of the chargor including the power of sale, but has no title to the property itself.
- A fixed charge is a charge over property in respect of which the chargor has only limited powers of disposition – normally the chargee’s consent will be necessary for any act which takes the property beyond the scope of the charge. Thus, for example, a person who charges his factory to a lender as security for the purchase price cannot sell it without the lender’s consent. In a floating charge, until certain specified events occur (called ‘crystallisation’), the borrower is free to deal with the property in the ordinary course of his business.

2. Do you agree that 'the English law of security is unsatisfactory since it has grown up in a piecemeal fashion and lacks a logical structure'?

Introduction

- Whenever you see questions like this, which uses words like 'appropriate' or 'unsatisfactory', you need to recognise that they are about evaluating something and in order to evaluate you need to establish criteria against which to measure the thing. The question suggests one such criterion, the lack of a logical structure, and consequently you must use that criterion in your answer. But you might suggest another or more than one other criterion and evaluate against that or them as well. As an example, this outline answer uses commercial effectiveness/comprehensiveness but the main focus is on the criterion the question has suggested we use.
- Although part of your introduction, an important thing to establish is the function of taking of security before you go on to discuss the range of security interests and how they are created. You would then look at perfection before assessing whether the assertion in the question is accurate or not. At this point you could introduce the fact that you are also going to effect an assessment from a different perspective.

Is there a logical structure to security law?

- In fact, the security interests fit quite neatly into a structure of possessory and non-possessory interests, though there are some statutory lines which span both categories. So there is some logic to the system

Is the law logical in the way it determines whether security interests bind third parties?

- Having explained what 'perfection' is in this context, you could explain that possessory interests are typically perfected through possession while non-possessory interests are perfected by registration. However, there are interests which do not require perfection, and interests where possession is only constructive, so that the person in physical possession appears to have an unencumbered right to deal in it. These exceptions do mar the logical structure of the law and pose a commercial risk.
- There is also a lack of logic, primarily because of the focus on the form rather than the substance of bills of sale, and this too should be explored.
- Priorities in relation to charges over things in action, for example charges over book debts, depend on the date of notice given to the debtor. *Commercial Law* refers to the problems with this approach on pages 720-722 but, if you have not covered receivables financing, you can still point out that this adds an additional complication to the structure, providing a third mechanism for effecting perfection.

- It should be noted that there is no one registered where registrable interests are to be found and that some securities will require registering in more than one place.

Is the law logical in the way it treats transactions with similar economic effects?

- Finally there is the issue of quasi security. There is a strong argument in favour of equal treatment for transactions with a similar economic effect. Take, for example, a situation where X Ltd owns machinery and grants a charge over it to Y. This requires registration warning for any person seeking to buy or lend money against the security of the asset that there is a security interest over it which will bind them. However, if X sells the goods to Y, who then leases them to X, then there is no security interest to register. Title retention, too, is a form of credit support, but without the taking of security as such.
- That said, commercially, English security law is very effective in that any asset can be the subject of security and the courts are careful to protect the rights of the takers of security. While the existence of pledges through possession of documents of title is not only commercially useful, it also provides an ingenious solution to problems which arise, especially in cases of international sales of goods.

Conclusion

- Unquestionably, the English law of security can be improved. An approach based more on economic substance than legal form would be an obvious place to start along with a revision of the law of perfection, perhaps by requiring all security/quasi security not protected by possession to be registrable. A good place to look at the issues though is the Law Commission Report, *Registration of Security Interests: Company Charges and Property Other than Land*.

3. Security+ Ltd holds a portfolio of investments in shares and bonds. It has granted a mortgage over the securities in favour of the bank, so that Security+ cannot deal with the investments without the consent of the bank. Each year, the issuers of the securities pay the interest and dividends into a special investment account Security+ has with the bank. Security+ has granted a charge over that account in favour of the bank. The bank wants to know the legal effect of this arrangement.

Security+ Ltd is being pressed for payment by a trade creditor. Security+'s managing director says to the creditor, 'Look, you know we are about to get planning permission to redevelop our office site as high-quality apartments and we've got a buyer lined up—you'll get paid out of that deal.' The trade creditor extends even more credit on the strength of this assurance. Might Security+ have created a charge over the land?

Security+ recently lent some money to one of its employees, Reg, who gave it the keys to his lock-up garage where a car he was restoring was stored, saying that Security+ should have the car as security for the debt. Reg signs a document which records all of this and states that he holds the car to Security+'s order. Reg leases the garage from a company and to get to it you have to drive over the landlord's land. Reg has since sold the car to Percy. Security+ wants to know if they have to allow Percy to take the car away.

Security+ agreed that it would transfer the contents of its office building to Credito, to which it owes a lot of money, if Credito wanted it as security for the debt. Credito never asked for a transfer, but became anxious, and seeing the building was unlocked one morning, removed all of the PCs and office furniture and sold it all. Security+ wants to know whether Credito is entitled to do this.

Introduction

- Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.
- The problem breaks into 4 parts and it is obvious that you will need to deal with each in order. The first part concerning the bank account raises issues over the nature of the charge – whether it is fixed or floating and secondly whether a charge over a debt can be created in favour of the creditor. The second regarding the office development concerns the creation of charges and requires you to know a little Land Law too! The third involving the car concerns the creation and perfection of pledges, while the fourth concerns the creation of a chattel mortgage and the remedies of a mortgagee.

Bank Account - Fixed or floating charge?

- After identifying the issue, it is worthwhile very briefly explaining that a charge is a security interest over property in order to secure a debt, which gives the chargee the right to sell the property and apply the proceeds of sale in satisfaction of the debt. It is also worth spending some time explaining why the distinction is so important, especially as here the chargor is a company. For example, some fixed charges do not require registration under s860 Companies Act 2006, though that is not the case here.
- Our problem seems to involve an apparently slight variation on *Re Spectrum Plus*. To deal with the question it is important to examine how the courts differentiate between fixed and floating charges and this in turn will require you to explain both *Re Yorkshire Woolcombers* and *Agnew* before turning to *Re Spectrum Plus* itself. The key issue appears to be whether the borrower is 'free to deal with the charged assets and withdraw them from the security without the consent of the holder of the charge' and using this as our guidance we can see that there are distinctions between the problem and the facts of *Re Spectrum Plus*.
- There is no issue with the shares themselves, as this is a mortgage – the shares will have been assigned to the bank, the bank has the ability to sell and thus realise its security and the debtor has no control over the assets.
- Dealing with the bank account is more difficult. Look at Romer LJ's characteristics in *Re Yorkshire Woolcombers* - if we applied these characteristics alone, does this look like a fixed or a floating charge? If we compare the facts with *Re Spectrum Plus* there are distinctions – in *Spectrum Plus* the debtor had to collect the proceeds and had discretion how to do this; here they do not, and payments are automatically received and in *Spectrum Plus* it seems that the inability of the bank to exercise control over the asset until it took steps to crystallise the charge was the real problem. It may be, therefore, that this is a fixed charge over the uncollected debts themselves (they are an asset like the book debts in *Spectrum Plus* - but what about the proceeds when they are paid into the charged account? The key issue here is the degree of control the debtor has over the account – and the question does not tell us.
- Finally, the bank is claiming a charge over a customer's account with itself. Is this conceptually impossible? *Commercial Law* deals with this issue in page 706. The theoretical objection to such a context is substantial, as was recognised in *Re Charge Card Services Ltd*, but it would seem that the commercial utility of such a charge may be sufficient to overcome the injury to strict legal logic.

Has the company created a charge over land?

- In theory yes - subject to statute! In *Swiss Bank*, Buckley LJ recognises that an understanding that a creditor can look to a particular fund (and if a fund why not any other asset?) for payment can operate as an agreement to create a mortgage and by virtue of the equitable maxim equity looks on as done those things that ought to be done will create an equitable charge. (Nb in fact, all charges are equitable except creatures of statute like the charge by way of legal mortgage). The question is 'was this statement such an agreement or create such an understanding?' It is certainly ambiguous; however, if that is the correct construction, it is still necessary for the creditor to advance money on the strength of it. That appears to have happened here. The fact that Security+ has not registered the charge does not avoid it as against the company only as against third parties.
- However, as you are probably only too aware, the way English Law deals with land differs from the way it deals with personal property, and there are often formal requirements which need to be borne in mind when dealing with land. There is one such formality which means that this cannot be a charge - s2 LPA (Miscellaneous Provisions) Act 1989, which requires any agreement for the disposition of an interest in land to be in signed writing.

Has Reg created a security interest over the car?

- The issue is whether symbolic delivery of possession of the car is sufficient to create a pledge. You would need to explain how a pledge works and that at its heart is the issue of granting possession in particular control over the asset. It is, for example, worth considering whether it would matter if Reg had other keys. Interestingly, the act of symbolic delivery for cars is often delivery of the car keys. The question is: are the garage keys enough? Then there is the issue of whether the landlord has given permission to Security+ to cross his land, as without such permission it is difficult to see how Security+ has control over the car until Reg gives possession through the document. However, until then, if Security+ has the only keys to the garage, then we might ask who has possession of the car?
- If the pledge has been created through symbolic delivery, it is also perfected by creation and so will bind Percy. But what would the effect be if the car has not been symbolically delivered to Security+. The document certainly amounts to constructive delivery but would seem to require registration under the Bills of Sale Acts and will be void, not only as against Percy but against Reg too.

Has Security+ created a mortgage over the goods and if so can Credito seize them?

- Firstly, this is an agreement for a mortgage over chattels, but the equitable maxim of equity looking as done that which ought to have been done will not apply, since the agreement is to secure an existing debt. This is therefore not a mortgage or charge – only if Security+

actually transferred the goods would the security interest arise. Even if it were an agreement for a mortgage (for example, Security+ may have a running account with Credito, so that as it pays money into its account with Credito and then borrows more, the payments in repay the debt at the time of the agreement and subsequent debt thus becomes new money so the mortgage can attach), then it is doubtful whether an equitable mortgagee has a right of sale without a court order and certainly the s101 Law of Property Act 1925 power of sale will not apply since the agreement is not by deed.