

Faculty of Law
University of New Brunswick



Commercial Law
Law 2223

Commercial Law
Professor N. Siebrasse

13 December 2006
1:00 - 4:00 p.m.

INSTRUCTIONS

1. This examination is 5 pages long (including this page). Please check that you have all 5 pages.
2. This examination is 3 hours long.
3. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or any other materials or devices prohibited by university or law faculty rules or regulations.
4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.
6. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective be sure to address both advantages and disadvantages of the rule and the relevant options.
5. Assume all transactions occur in New Brunswick unless otherwise specified.
7. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B-grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.
8. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

Question 1 – 22 marks/minutes

Denise Deborah Dutt purchased an orange Honda Element automobile for use in her business from Fredericton Motors. The purchase was financed by a loan from Fredericton Motors Finance (FMF). FMF registered a financing statement in the PPR in respect of the transaction, describing itself as the secured party, Denise as the debtor and the orange Element as collateral. It also described the Element by serial number in the serial number field of the online registration form. All of the information provided was correct, *except* for the serial number, which had two numbers reversed. As a result, a search by “Denise Deborah Dutt” would return the financing statement registration as an exact match, but a search by the correct serial number would not return the registration at all.

Denise defaulted on the loan when she missed a payment on the first day of the month. FMF immediately seized the car, without providing any notice to Denise, who was away for a few days on a business trip. FMF advertised the car widely through a variety of channels and ultimately sold it to Paul Patel for \$25,000. FMF then sued Denise for the deficiency, which amounted to \$2,000.

Denise comes to you for advice. Advise specifically (a) whether she gets the car back from Paul; and (b) whether she has a defence to the deficiency action. In each case explain whether the rule is sound as a matter of policy. Would the answer to either question be different if the car had been purchased for personal use? Explain whether any difference between the rules with respect to personal and business use is justified.

Question 2 – 18 marks/minutes

Two of the remedies available under the PPSA to a secured party upon default by the debtor are: (A) to sell the collateral and apply the sale price to the debt; (B) to retain the collateral in satisfaction of the debt.

(6 marks) (i) If the collateral is worth less than the amount of the debt, sale or retention of the collateral will not fully satisfy the debt. Does the secured party have the right to pursue the debtor for the deficiency? Answer with reference to each of the remedies mentioned.

(12 marks) (ii) If the collateral is worth more than the amount of the debt and the secured party is allowed to retain the full value of the collateral, the secured party will reap a windfall to the detriment of the debtor. How, if at all, is the debtor protected from this possibility? Answer with reference to each of the remedies mentioned.

Question 3 – 47 marks/minutes

Daniel Vernon Schwarzkopf is a farmer who inherited his farm from his parents. He needed financing to mechanize the farm and expand into egg production. He first approached his neighbour, Marie Daigle, a successful and established apple farmer, for a \$5000 loan. Marie agreed to lend Dan the money and they entered into a security agreement specifying that “all present and after-acquired personal property” belonging to Dan was collateral. Marie registered a financing statement in the personal property registry (PPR) specifying herself as the secured party, “Daniel Schwarzkopf” as the debtor, and “all present and after-acquired property” as the collateral.

Dan then approached the Bank of Fredericton to negotiate a secured line of credit. During the initial conversation Dan mentioned “I have another loan outstanding.” The loan officer replied “We’ll look into it,” and nothing more was said about the matter. After the initial meeting the Bank searched the debtor name “Daniel Vernon Schwarzkopf” in the PPR. No matches at all were returned, either close or exact. The Bank then registered a financing statement in the PPR describing itself as the secured party, “Daniel Vernon Schwarzkopf” as the debtor and “all present and after-acquired property” as the collateral. Dan then went back for a second discussion, at which time the Bank entered into an agreement providing Dan with a secured line of credit using his personal property as collateral. However, Dan had insisted that his grandfather’s comic book collection be excluded. He provided an itemized list to the Bank. Accordingly, the security agreement provided that the collateral was “all presented and after-acquired personal property excluding the comic book collection as specified herein [with the itemized list correctly included].” The Bank did not amend its financing statement. Dan immediately wrote a cheque on his line of credit for \$3,000, which he used to buy chicken feed.

Dan then approached Wilmot Feed Supplies to purchase a mechanical chicken feeder. The price of the feeder was \$20,000. Wilmot Feeds agreed to sell Dan the feeder subject to a conditional sales agreement, under which Dan would make quarterly payments and title would remain with Wilmot Feeds until Dan paid for the feeder in full. Before actually entering into the agreement Wilmot Feeds searched the PPR and discovered the Bank of Fredericton’s financing statement. Dan explained that only \$3,000 was owing to the Bank. To reassure Wilmot Feeds, he sent a request to the Bank under s.18(1) of the PPSA, requiring it to send a statement of his indebtedness to Wilmot Feeds. The Bank did so, and the statement confirmed that only \$5,000 was owing. Wilmot Feeds then entered into the conditional sales agreement and delivered the feeder to Dan. One week later Wilmot Feeds registered a financing statement describing itself as the secured party, “Daniel Vernon Schwarzkopf” as the debtor and the feeder as collateral. There was no error in any of those descriptions.

Dan then cashed a second cheque on his line of credit for \$2,000, which he used to buy farm supplies.

Some time before, Dan had harvested timber at the edge of his property. Dan had thought that the timber was on his property, but his neighbour June Chen insisted that it belonged to her. A

court sided with June, and she has just obtained a judgment against Dan in the amount of \$4,000. She registered a notice of judgment in the PPR, specifying “Daniel Vernon Schwarzkopf” as the debtor.

Dan then cashed a third cheque on his line of credit for \$4,000.

June discovered from a PPR search that the Bank of Fredericton had registered a financing statement with Dan as the debtor. She sent a notice to the Bank of Fredericton notifying it that she had registered a judgment against Dan.

Dan then cashed a fourth cheque on his line of credit for \$5,000.

What are the priority positions of all the parties, including Dan, in respect of the comic books, the feeder and the remainder of Dan’s property? Explain. Assume that no payments have been made on any of the debts. You do not need to specify how the money would be distributed in the event of a default. You do not need to consider whether the policy underlying any rule you apply is sound.

Question 4 – 40 marks/minutes

In *Rabi v Ruso* a fraudster had become the registered owner of land under the Ontario Land Titles Act by registering a forged conveyance from the true owner to the fraudster. The fraudster then obtained a mortgage from a bank and absconded with the funds. The court held that under the Ontario Land Titles Act the bank’s mortgage was invalid. Is the result in *Rabi v Ruso* sound as a matter of policy? Explain, with reference to alternative rules within the context of a land titles system. You do not need to consider registry systems such as the NB Registry Act as alternatives.

Question 5 – 15 marks/minutes **Should have been worth more. Not clear compared to what. Should have made is clear that m’ee could buy in under option 1.

A law reform project is currently being undertaken in New Brunswick to reform the law related to mortgages of land. Two approaches are being considered with respect to the mortgagee’s (secured party’s) duty on realization by the sale of land. Under Option 1 the mortgagee would have a duty to take reasonable steps to secure a fair market price and would be liable in damages for failure to meet that duty. Under Option 2 the mortgagee would not have any duty to take reasonable steps to secure fair market price, but the mortgagee would not be permitted to buy in at the sale for its own benefit. Compare the advantages and disadvantages of these approaches.

Question 6 – 12 marks/minutes

Owen hired George's Construction, which was owned and operated by George, to completely renovate his bathroom. The contract price was \$10,000. The work was finished satisfactorily on March 1 and Owen paid George the full \$10,000. On March 15 Pam's Plumbing, owned and operated by Pam, notified Owen that she had acted as a subcontractor for George on the renovation and had done all the plumbing work, and that she was owed \$3,000 by George which had not been paid. Pam told Owen that George had left the province and was nowhere to be found, and that she would be "coming after" Owen for the \$3,000 that she was owed for the plumbing work on Owen's house. Owen comes to you for advice. Assuming the facts related by Pam to Owen are correct, can Pam "go after" Owen for the \$3,000 and if so, what ****if anything**** should Owen have done to protect himself?

Question 7 – 16 marks/minutes

The effect of Ontario law relating to personal property security is that a third party who purchases the goods of the debtor without actual knowledge of a pre-existing writ of execution takes clear of the interest of the judgment creditor unless the goods have actually been seized by the sheriff. In short we may say the goods are bound by seizure. Under New Brunswick law the goods of the debtor are bound by the registration of a notice of judgment in the Personal Property Registry. Thus we may say the goods are bound by registration of a notice of judgment. Compare the two rules, explaining the advantages and disadvantages of each.

***** THE END *****