The Role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons

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Abstract: This paper considers the lack of protection granted to purchasers of goods encumbered with retention of title clauses. In chains of transactions, disponees are only able to acquire such title that their immediate disponor had. The difficulties involved in determining the extent to which the title is encumbered is magnified as chains of transactions extend. English law fails to acknowledge the vital role of authorization in cases involving pre-existing but unknowable encumbrances. The failures of English law can be usefully contrasted with the situation in the USA. Under Article 9 of the Uniform Commercial Code, a security interest can pass with the goods upon disposition, yet if the disposition is authorized, the security interest will merely attach to the proceeds of the disposition. The final purchaser will be able to retain the goods. Although *prima facie* similar to English law, the American case law demonstrates that authorization plays a substantially more influential role, and reduces the risk to purchasers in comparison with English law.

Keywords: retention of title clauses, sales, authorization, security interests, Uniform Commercial Code.

I. Introduction

Following a disposition of goods by a non-owner or a disponee with a limited title, a conflict will exist between the true owner or the holder of a security interest and the third party purchaser, due to the operation of the rule *nemo dat quod non habet*.[1] Locating the true ownership of goods can be a challenge, particularly if

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1 Crystallized in the Sale of Goods Act 1979, s. 21(1) and the Uniform Commercial Code §2-403(1). See also below n. 75.

there is a long chain of transactions.[2] This challenge is exacerbated by the use of retention of title clauses,[3] and the lack of clarity in English law as to the impact of such clauses on *nemo dat* conflicts. In English law retention of title clauses are not security interests,[4] even if at a functional level 'the seller retains his title in his goods, for the purpose of providing himself with security'.[5] For de Lacy the security interest expressed in a retention of title clause is in 'abeyance' up until the buyer (for example) becomes insolvent and the seller holding the retention of title clause wishes to protect their interest.[6] Consequently it could be argued that the buyer could rely on 'waiver' on the part of the seller,[7] in the context of sub-sales where 'the seller does not complain if the buyer does not in fact account to him for that dealing'.[8] It is this possibility which is tested in this paper.[9] Arguably the American law on security interests, under the Uniform Commercial Code ('UCC') Article 9, provides a clearer and more coherent system for dealing with retention of title and *nemo dat* conflicts. This suggestion rests on the distinction

2 Chains of transactions can involve over one hundred parties: B. Davenport, 'Reform to Bill of Lading Law—Some Implications for Banks' [1992] *Journal of International Banking and Financial Law* 205 at 208.

3 Retention of title clauses derive validity from the Sale of Goods Act 1979, s. 19(1) (allowing the seller to reserve rights in the goods prior to a particular condition being fulfilled). See generally *Aluminium Industrie Vaassen BV* v *Romalpa Aluminium Ltd* [1976] 1 WLR 676; *Re Bond Worth* [1980] 1 Ch 228; *Clough Mill Ltd* v *Martin* [1985] 1 WLR 111; *Armour* v *Thyssen Edelstahlwerke AG* [1991] 2 AC 339. See further S. Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press: Oxford, 1996); G. McCormack, *Reservation of Title*, 2nd edn (Sweet & Maxwell: London, 1995); J. de Lacy, 'Romalpa Theory and Practice under Retention of Title in the Sale of Goods' (1995) 24 *Anglo-American L Rev* 327; S. Wheeler, *Reservation of Title Clauses* (Oxford University Press: Oxford, 1991); I. Davies, *Effective Retention of Title* (Fourmat: London, 1991); J.R. Bradgate, 'Reservation of Title Ten Years On' [1987] *Conv* 434.

4 *Clough Mill Ltd* v *Martin* [1985] 1 WLR 111.

5 *Ibid*. at 121 (Robert Goff LJ). See also I. Davies, 'The Reform of English Personal Property Security Law: Functionalism and Article 9 of the Uniform Commercial Code' (2004) 24 *LS* 295 at 312. Davies then notes that the real problem faced in such situation is the location of the right to the surplus value. See also G. McCormack, *Secured Credit under English and American Law* (Cambridge University Press: Cambridge, 2004) 165–6 (it is undoubtable that the principal reason for the use of a retention of title clause is to provide security).

6 See de Lacy, above n. 3 at 336–7.

7 *Ibid*. at 337.

8 *Ibid*. at 338.

9 Loi has recently published a very clear analysis of the impact of the *nemo dat* rule in corporate insolvency: K.C.F. Loi, '*Quistclose* Trusts and *Romalpa* Clauses: Substance and *Nemo Dat* in Corporate Insolvency' (2012) 128 *LQR* 412. Whilst the arguments herein cross over with the issues of corporate insolvency, the focus on authorization here is considered more broadly (in terms of providing a comparison between English and American law on the matter) as well as specifically dealing with the problems arising due to the decisions in *Highway Foods* and *Fairfax* (which Loi does not consider in his article).

between English and American law as to the role and importance of authorization of sub-sales, combined with explicit policy choices favouring the innocent purchaser and the free flow of goods.

II. The Buyer in Possession under English Law

The Factors Act 1889 ('FA'), s. 9 provides that where a middleman buys goods and obtains possession, but with some condition to the transaction as yet unfulfilled, the middleman is still able to pass good title to an innocent purchaser.[10] The provision is replicated in the Sale of Goods Act 1979 ('SGA'), s. 25(1), which reads as follows:

> Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, [or under any agreement for sale, pledge, or other disposition thereof,] to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The words in square brackets are absent from the SGA. This distinction, 'one of the oddities of the [SGA]',[11] was at the root of the conflict in *Re Highway Foods International Ltd, Mills* v *Harris (Wholesale Meat Ltd)* (hereafter '*Highway Foods*').[12] *Highway Foods* was a decision of Edward Nugee QC (sitting as a deputy

10 For buyer in possession, see generally M.G. Bridge (ed.), *Benjamin's Sale of Goods*, 8th edn (Sweet & Maxwell: London, 2010) paras. 7-069–7-086; J. Ulph, 'Conflicts of Title and the Obligations of the Seller' in E. McKendrick (ed.), *Sale of Goods* (LLP: London, 2000) paras. 5-076–5-093. See also L. Merrett, 'The Importance of Delivery and Possession in the Passing of Title' [2008] 67 *CLJ* 376.

11 J.N. Adams and H. MacQueen, *Atiyah's Sale of Goods*, 12th edn (Pearson: Harlow, 2010) 384 fn. 125. Cf Bridge, above n. 10 at para. 7-069: the SGA 're-enacts in substance' the provisions of the FA. The reason for this distinction is unclear. It appears to possibly have been a temporary measure to enable further consultation between the drafters of the Sale of Goods Act 1893 and the FA: M. Chalmers, *The Sale of Goods Act 1893*, 4th edn (Butterworths: London, 1899) 135 and 6th edn (Butterworths: London, 1905) 143. However, the seventh edition suggests that the FA was retained in order to provide additional protection (over that of the Sale of Goods Act 1893 itself): M. Chalmers, *The Sale of Goods Act 1893*, 7th edn (Butterworths: London, 1910) 164 (this explanation was retained in the editions following Chalmers' death: R. Sutton and N.P. Shannon, *Chalmers' Sale of Goods Act 1893*, 12th edn (Butterworths: London, 1945) 192). Chalmers noted that the missing words were removed from the Sale of Goods Bill during the Committee stage in the House of Lords: Chalmers, *ibid.*, 4th edn, 59 fn. 2 and 7th edn, 78 fn. (h). The members of this committee were Lords Herschell, Halsbury, Bramwell and Watson: Chalmers, *ibid.*, 4th edn, viii.

12 [1995] 1 BCLC 209, [1995] BCC 271.

judge of the High Court). In *Highway Foods*, the owner (Harris) sold a large quantity of meat to the middleman (Highway) under a retention of title clause whereby title would only pass on payment. Highway then sold the goods on to the purchaser (Kingfry), also under a retention of title clause. In neither sale did payment pass, but the meat was delivered, first to Highway then to Kingfry. Upon inspection of the goods, Kingfry found a metal tag. Rather than complaining to Highway, Kingfry complained directly to Harris. Because neither Kingfry nor Highway had actually yet paid for the goods, Kingfry and Harris agreed that Harris would repossess that portion of the goods that had not already been processed. This was justified on the basis of the retention of title clause between Harris and Highway: 'The Seller reserves the right to enter and collect from any premises goods in their original or altered form where monies are overdue'.[13] It was also agreed that the goods would remain with Kingfry during this trade—the 'repossession' was merely a fiction. The plan was that Harris would inspect the meat, and Kingfry would then pay Harris directly for the meat following a satisfactory inspection, at the same price that Highway was charged (thus representing a valuable discount for Kingfry). Highway was essentially cut out of the deal. Highway entered receivership, and the receiver argued that Kingfry had obtained good title via the FA, s. 9, on the grounds that Highway had been a buyer in possession, and that there had been a delivery to Kingfry under an agreement for sale. This argument, if valid, would have the effect of preventing Harris from repossessing the goods from Highway, because the goods were already (by virtue of s. 9) Kingfry's goods, and (importantly for the receiver) Kingfry would be obliged to pay Highway. It is clear why this analysis was attractive to the receiver, and it is easy to see why Harris and Kingfry rejected this approach.

The problem facing Edward Nugee QC was deceptively straightforward: did the extra words in the FA, s. 9 cover this case? Highway's transaction with Kingfry had been a mere agreement to sell the goods, under a condition of payment. However, the buyer in possession exception in the SGA does not cover agreements to sell, whereas the FA version does. Edward Nugee QC concluded that the answer to the problem in *Highway Foods* lay in the final words of FA, s. 9, where the reference to mercantile agency meant that reference to FA, s. 2(1) (the mercantile agency exception) was

13 [1995] BCC 271 at 272.

required.[14] It might be that the reference back to the mercantile agency exception of FA, s. 2(1), which is restricted to sales, pledges or other dispositions (and does not extend to agreements to sell, pledge or otherwise dispose), necessarily limits the effect of FA, s. 9 to sales.[15] However, '[t]he exact effect of this argument is not entirely clear',[16] and the wording used by Edward Nugee QC indicates that his connecting of FA, ss 2(1) and 9 was in order to underscore the need for authorization:

> the effect of s. 2(1) is only to render the buyer's agreement for sale as valid as if it had been expressly authorised by the seller; and this is not enough to get the sub-purchaser home if the conditions for the passing of title under the buyer's agreement for sale to the sub-purchaser have not been satisfied.[17]

Insofar as there was any authorization by Harris at the time that Highway made the disposition to Kingfry, it was limited by the retention of title clause still covering the goods. The purchaser only had, until he had paid the price to the middleman, a mere agreement to buy to set up against the owner. Thus, as *Benjamin's Sale of Goods* puts it (citing *Highway Foods*): 'No title will … pass

14 This connection between buyer in possession and mercantile agency is highly problematic. The source of the confusion over the meaning of 'as if the [middleman] … were a mercantile agent in possession of the goods … with the consent of the owner' is the decision in *Newtons of Wembley* v *Williams* [1965] 1 QB 560. There the owner sold a car to the middleman, under an agreement that property would not pass until payment had been received. The middleman obtained possession of the car, and then disposed of it to a third party; eventually it was bought by the purchaser (the defendant). The purchaser claimed the protection of the buyer in possession exception. The court held that the middleman had to have been acting like a mercantile agent acting in the ordinary course of business. The primary justification for this rule seemed to be the difference between the statutory provisions on seller in possession (where there is no such requirement) and buyer in possession ([1965] 1 QB 560 at 574 (Sellers LJ), at 578 (Pearson LJ). Such were the facts of the case—there was an established street market for cash dealing in cars—that this requirement was easily met. Although 'it may well be that substantial justice was done' in *Newtons of Wembley* (Adams and MacQueen, above n. 11 at 397), there has been considerable judicial and academic opposition to the conjoining of these two different provisions. See e.g. *Jeffcott* v *Andrew Motors Ltd* [1960] NZLR 721 at 729; *Gamer's Motor Centre (Newcastle) Pty Ltd* v *Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236; *Forsythe International (UK) Ltd* v *Silver Shipping Co Ltd and Petroglobe International Ltd (The Saetta)* [1993] 2 Lloyd's Rep 268 at 280; Ontario Law Reform Commission, *Report on Sale of Goods* (1979) vol. II at 291; Law Reform Committee, *Twelfth Report: Transfer of Title to Chattels*, Cmnd 2958 (1966) para. 23; A.P. Bell, *Modern Law of Property in England and Ireland* (Butterworths: London, 1989) 510–11; Bridge, above n. 10 at para. 7-081; Ulph, above n. 10 at para. 5-088; Adams and MacQueen, above n. 11 at 395; E. McKendrick, *Goode on Commercial Law*, 4th edn (Penguin: London, 2010) 472.

15 See e.g. Adams and MacQueen, above n. 11 at 394.

16 H. Beale, M. Bridge, L. Gullifer and E. Lomnicka, *The Law of Security and Title-Based Financing*, 2nd edn (Oxford University Press: Oxford, 2012) para. 14.26.

17 [1995] BCC 271 at 275.

under an agreement for a sale.'[18] Ulph concludes that 'it is difficult to see how, after *Highway Foods*, the additional words contained in s. 9 can be seen as having any meaningful role whatsoever'.[19] Ulph's conclusion has been reinforced by the approval and application of *Highway Foods* in *P4 Limited* v *Unite Integrated Solutions*,[20] where Ramsey J said that the protection available for the purchaser in cases involving a retention of title clause is limited to protection against a conversion claim by the owner.[21]

The widespread use of retention of title clauses means that the *Highway Foods* approach creates a substantial level of risk for a potentially large number of purchasers,[22] who are only protected against a conversion claim. While this provides some protection for purchasers which would be otherwise absent if there had been a crude application of the *nemo dat* rule, if the purchaser had already paid part of the price to the middleman, the purchaser might be required to pay more than he bargained for in order to obtain the goods. There has been, in essence, a judicial constriction of the statutory protection for purchasers,[23] and 'it has become extraordinarily difficult for any innocent party to bring himself within its provisions'.[24] The limited discussion of the role of authorization in *Highway Foods* is remedied somewhat though by the recent decision

18 Bridge, above n. 10 at para. 7-084. This alters the previous position, where it had been suggested that the effect of FA, s. 9 would be to allow title to pass: see e.g. Adams and MacQueen, above n. 11 at 394 fn. 199 citing A.G. Guest (ed.), *Benjamin's Sale of Goods*, 4th edn (Sweet & Maxwell: London, 1992) para. 5-128.

19 Ulph, above n. 10 at para. 5-085.

20 (4 November 2005) 2005 WL 4029872; [2006] BLR 150.

21 *Ibid*. at para. 24. See further Bridge, above n. 10 at para. 7-065, noting that 'this is by no means explicit in the wording of the statute' (in the context of the FA, s. 8). At para. 7-084, discussing the position under the FA, s. 9, *Shenstone & Co* v *Hilton* [1894] 2 QB 452 is cited to support the contention. In that case the auctioneer was protected by against a conversion claim made by the owner of goods.

22 See e.g. J. Spencer, 'The Commercial Realities of Reservation of Title Clauses' [1989] JBL 220 at 221 (59 per cent (n=35) of materials suppliers said they used retention of title clauses); Wheeler, above n. 5 at 5 (92 per cent (n=15) suppliers used retention of title clauses); de Lacy, above n. 3 at 329 fn. 14 (noting that in *Lipe Ltd* v *Leyland Daf Ltd* [1993] BCC 385, around 400 retention of title claims were made against just one company). In the 20-plus years since these studies, it is only likely that retention of title clauses are more common.

23 The story of all the previous Factors Acts (in 1823, 1825, 1842, 1877) is one of judicial restriction of the legislative will, with the classic example being the expansion in 1877 following *Johnson* v *Credit Lyonnais* (1876–77) LR 2 CPD 224. However, it must be noted that the judiciary often welcomes legislative expansion following judicial restriction; see e.g. *Johnson* v *Credit Lyonnais* (1877–78) LR 3 CPD 32 at 36 (Cockburn CJ).

24 McKendrick, above n. 14 at 469.

of the Court of Appeal, *Fairfax Gerrard Holdings Ltd* v *Capital Bank Plc* (hereafter '*Fairfax*').[25]

In *Fairfax*, Dimond was in the business of acquiring printing machines and sub-selling them for profit. Dimond accepted an order by Carrprint for goods, following which Dimond ordered the goods from its supplier. The claimants enabled Dimond's acquisition of the goods by means of a finance agreement whereby the claimants purchased the goods and then sold them to Dimond under retention of title terms, whereby Dimond could sell the goods in the ordinary course of business subject to the proceeds being held on trust for the claimants.[26] Dimond sub-sold the goods to a sub-purchaser who had acquired finance from the defendant bank (also under retention of title terms). Dimond went into liquidation without paying off the claimants. The claimants argued that the defendants could not demonstrate that they had acted without notice of the claimants' interest in the goods, and as such they were not protected by claiming that Dimond had ostensible authority to pass title to them.[27] The Court of Appeal thus had to decide whether Dimond had any express or implied actual authority or consent from the claimants to pass title to the defendants.[28]

It was held that Dimond did have implied actual authority to pass title. This was based on the particular facts;[29] here the combination of a trust receipt (purporting to impose a trust over monies received by Dimond) and the finance agreement was sufficient to demonstrate the necessary authority (while also being insufficient to demonstrate an obligation on Dimond to precisely identify its

25 [2007] EWCA Civ 1226; [2008] 1 All ER (Comm) 632; [2008] 1 Lloyd's Rep 297. For an excellent case commentary, see K.C.F. Loi, 'Retention of Title and Implied Authority to Pass Title to Sub-buyers' [2008] LMCLQ 427. The first instance decision of HHJ Mackie QC is reported at [2007] 1 Lloyd's Rep 171.

26 *Ibid*. at para. 21.

27 At first instance (*ibid*. at paras. 31 and 33) it was held that the defendants could not rely on the FA, s. 2(1) as Dimond was not a mercantile agent. It was also held that the defendants could not rely on the buyer in possession exception under the SGA, s. 25, as the defendants could not show they purchased the machine without notice of the claimants' rights. These findings were not subject to appeal.

28 [2008] 1 Lloyd's Rep 297 at 302.

29 The court noted (*ibid*. at 301) that it had been held in *Aluminium Industrie Vaassen BV* v *Romalpa Aluminium* [1976] 1 WLR 676 and *Four Point Garage Ltd* v *Carter* [1985] 3 All ER 12 that there was implicit authority on buyers to pass title to sub-purchasers regardless of the seller's retention of title clause—this was a commercial necessity—but that this was not a rule of law but an implication from the facts.

sub-purchasers).[30] In *Atiyah's Sale of Goods* the decision in *Fairfax* is construed as demonstrating that:

> [a] reservation of title clause will not usually restrict the buyer's right to resell the goods in the course of his business, *because that is not the purpose behind the clause* … [thus] even in the absence of an express authority to resell, such an authority will often be readily implied from the very nature of the transaction as a whole.[31]

Loi has criticized the reasoning of the Court of Appeal, as it appeared to let an implied term trump other express terms of the relevant agreements.[32] For Loi, a more appropriate scenario would have been the utilization by the claimants of a retention of title clause like that used to cover the sub-sale in *Highway Foods*,[33] whereby the sub-sale could have been allowed without any accompanying authorization to pass title prior to full payment.[34] While this author struggles to quite see the distinction between the retention of title clauses used in *Highway Foods* and *Fairfax*, Loi is quite correct in seeing it as unfortunate that *Highway Foods* was not cited in *Fairfax*.[35] For Loi, the most appropriate mechanism would have been to give effect to the retention of title provision, such that the claimants retain title to the goods until full payment, and any payment by sub-buyers direct to the claimants or into a trust fund (like that envisaged by the trust receipt in *Fairfax*) would merely reduce the middleman's debt *pro tanto*: 'In light of the efficacy of such alternative arrangements, it is difficult to see why it was necessary to imply into para 6 of the finance agreement any authority on Dimond's part to pass title to the defendants.'[36] The Court's implication of authority 'flatly contradicts the express terms of the contract', and in light of this '*and* [the fact] that the defendants were *aware of the finance agreement* when they entered into the sub-sale agreement', the Court's conclusion 'becomes less plausible'.[37] The strength of this argument would

30 Cf Loi, above n. 25 at 429–30: 'Curiously, the claimant did not press the argument that, regardless of whether Dimond had signed the second trust receipt, the finance agreement together with either or both trust receipts never contemplated Dimond's sub-selling to *the defendants*. If it had been successful, this argument would have stripped Dimond of actual authority to transfer title to the defendants, thereby eviscerating the defendants' defence against the claimants' action in conversion. As the argument remains untested, the authoritative value of *Fairfax* is limited.'
31 Adams and MacQueen, above n. 11 at 468–9 (emphasis added).
32 Loi, above n. 25 at 430–1.
33 [1995] BCC 271 at 273.
34 Loi, above n. 25 at 431.
35 *Ibid*. It may well be that *Highway Foods* was not discussed due to the inapplicability of the statutory *nemo dat* exceptions in *Fairfax*.
36 *Ibid*.
37 *Ibid*. at 431–2.

appear to derive from the focus on notice in *Clough Mill Ltd* v *Martin*,[38] and, consequently, *Highway Foods*.[39]

Two criticisms of Loi's argument can be raised. First, it does not necessarily follow that a sub-purchaser's awareness of the *existence* of a finance agreement is sufficient to prove either that there was knowledge of a breach of that agreement, nor that such a sub-sale is necessarily a breach in itself of that agreement. The Court of Appeal in *Fairfax* was quite correct to note that the presence of retention of title clauses must be read in light of commercial reality, and in particular that commerce would be overly restricted were retention of title clauses to automatically override sub-sales of goods covered by such clauses. Consequently, it would be unreal to automatically assume that knowledge of the existence of the commercially reasonable situation of a retention of title clause suffices to show knowledge of the terms of that clause. Secondly, Loi appears to be viewing the chain of transactions from the perspective of the financier, and in light of a notion that financiers should be able to substantially control the downward chain of transactions. The suggestion Loi puts forward, as a more effective way of dealing with the risk inherent in the sort of transaction in *Fairfax*, appears to necessitate the withdrawal from the middleman of any control of the financial aspect of the transaction. This is not intrinsically wrong, but it is for the financier to negotiate with the middleman in such a way that the financier is clearly in control; this, of course, was not the case in *Fairfax*, where the financiers merely appeared to have failed to clearly set out the limits of Dimond's authority. Had the Court of Appeal held in favour of the claimants, then they would have had a windfall on the basis of their initially poor contracting.[40]

The combined effect of *Highway Foods* and *Fairfax* illustrates the unsatisfactory nature of English law where one party (the final purchaser) has relied on another's behaviour, specifically those situations where another party (the secured party) has allowed that reliance to occur by failing (whether through choice or incompetence) to maintain control over goods. Where a chain of transactions increases, and when different parties in the chain introduce retention of title clauses, parties at the end of the chain have a drastically lower capacity to know about or control the content and effect of such clauses. It is thus unrealistic to rely on

38 [1985] 1 WLR 111.

39 [1995] BCC 271 at 276–7, referring to *W Hanson (Harrow) Ltd* v *Rapid Civil Engineering Ltd* (1987) 38 Build LR 106, a case similar to *Highway Foods* where the purchaser's claim failed for notice.

40 In this sense, the Court of Appeal is to be applauded, and their position must be contrasted with that of the House of Lords in *Shogun Finance Ltd* v *Hudson* [2004] 1 AC 919, which protected the financier from the effects of their own poor practices.

notice as a means of solving such problems: the fact that a party has notice (or knowledge) of a retention of title clause cannot, without more, justify imposing the risk of loss on such a party. These complications are magnified because it is rarely (if ever) the point of a retention of title clause to prevent the disposition of goods. It is consequently unsatisfactory to state, as in *Atiyah's Sale of Goods*, that retention of title clauses are not too problematic because (a) authority to resell 'will often be readily implied', and (b) situations involving re-sales will be adequately covered by the buyer in possession exceptions of SGA, s. 25(1) and FA, s. 9. Because dispositions under retention of title clauses are technically agreements to sell, and are thus outside SGA, s. 25(1), as a consequence of *Highway Foods* a purchaser of goods cannot be secure in his acquisition. Similarly, any claim as to the obviousness that dispositions made with the authority of the party retaining title enable the passage of relatively good title to the purchaser—the suggestion in *Fairfax*—must be subject to criticism for over-simplification, as well as possibly failing to recognize the true impact of *Highway Foods*.[41] A comparison with the UCC demonstrates that the problems evidenced by the decisions in *Highway Foods* and *Fairfax* can be eradicated by a broader (yet commercially realistic and jurisprudentially acceptable) understanding of the role of authorization in chains of sales involving retention of title clauses. Such a comparison will illustrate the value in having a specific legal rule concerning authorization, as opposed to the English approach of resting everything on the particular facts of the case at hand.

III. The Uniform Commercial Code

The starting point for any assessment of the UCC is §1-103(a), which states that the UCC:

> must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

In light of these purposes of the UCC, more specific policies concerning *nemo dat* conflicts can be deduced from various academic and judicial comments. Estoppel, often phrased in terms

41 It is tentatively suggested that this is a problem with the treatment of this issue in Beale *et al.*, above n. 16 at paras. 7.11, 15.01 and 15.17–15.18.

of apparent ownership,[42] gives effect to the policy that when the middleman has possession, the purchaser should be protected.[43] However, while important early cases in the development of judicial understanding of the UCC's *nemo dat* law suggested that the *nemo dat* exceptions were founded on estoppel,[44] it is important to acknowledge that the UCC's *nemo dat* provisions should not be restricted by the limited nature of the estoppel doctrine.[45] The best approach is probably that the UCC is merely a modern expression of a broad general estoppel principle.[46] The importance of this approach should not be underestimated. English law has consistently failed to accept estoppel reasoning as a means of determining *nemo dat* conflicts,[47] which may explain the very limited impact of authorization as an explanatory or justificatory mechanism in the retention of title cases (i.e. *Highway Foods* and *Fairfax*). However, estoppel alone cannot provide a sufficient theoretical basis for the *nemo dat* provisions of the UCC.[48] Thus, building on this basic principle, the drafters of the UCC made a significant and blatant choice in favour of a purchaser as opposed to an owner in *nemo dat* disputes.[49] This choice can be justified as recognition of the 'commercial desirability of enhancing the marketability of

42 K.F. Jillson, 'UCC §2-403: A Reform in Need of a Reform' (1979) 20 *William & Mary L Rev* 513 at 537–9; note, 'The Good Faith Purchase of Goods and "Entrusting" to a Merchant under the Uniform Commercial Code: Section 2-403' (1963) 38 *Indiana LJ* 675 at 688–9; *Simson* v *Moon* 137 GaApp 82, 222 SE2d 873 at 875 (1975).

43 W.L. Tabac, 'Battle for the Bulge: The Reclaiming Seller vs. the Floating Lien Creditor' [2001] *Columbia Business L Rev* 509 at 519–20.

44 *Atlas Auto Rental Corp* v *Weisberg* 54 Misc2d 168, 281 NYS2d 400 at 404 (NY City Civ Ct 1967).

45 R.H. Skilton, 'Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (And Related Matters)' [1974] *Wisconsin L Rev* 1 at 37–8.

46 *Heinrich* v *Titus-Will Sales* 73 WashApp 147, 868 P2d 169 at 552 (1971).

47 *Farquharson Bros* v *King* [1902] AC 325; *Central Newbury Car Auctions* v *Unity Finance* [1957] 1 QB 371; *Moorgate Mercantile Ltd* v *Twitchings* [1977] AC 890.

48 In this author's opinion, it could. But this article does not require such an argument.

49 According to Llewellyn, this was a hard but necessary choice: New York Law Revision Commission, *Report of the Law Revision Commission for 1954 and Record of Hearings on the Uniform Commercial Code* (1954) vol. I at 123. See further R.W. Duesenberg, 'Title: Risk of Loss and Third Parties' (1965) 30 *Missouri L Rev* 191 at 208; Jillson, above n. 42 at 554; *Correria* v *Orlando Bank & Trust Co* 235 So2d 20 at 22 (FlaApp 1970); *Martin* v *Nager* 192 NJSuper 189, 469 A2d 519 at 523, 526 (1983).

goods'.[50] Furthermore, as the New York Law Revision Commission said, 'special inquiry as to the title or actual authority of the seller is both unusual in practice and would, if required as a general practice, hinder the conduct of business'.[51] The protection and enhancement of the free flow of commerce is supported by an express policy of placing the risk of loss onto the person best placed to bear the loss, i.e. the owner.[52] The UCC takes a probability-based approach to *nemo dat* conflicts, and there is a greater likelihood that the owner will be 'the most efficient loss bearer'.[53] It is easier for the owner to take extra measures (e.g. insurance) to prevent losses than for the purchaser to fully ascertain the clarity of the title to the goods.[54] The UCC *nemo dat* law has a firm theoretical foundation, where the policies and purposes that inform it are clear and understood, as well as being broadly supported, by courts and commentators. The general policy of simplification, clarification and modernization of commercial law dovetails neatly with the policies of protecting purchasers and reducing the burden of risk of loss to form a meta-policy of preventing delays, and thus costs, in transactions.[55] The effect of this can be seen in the substantive doctrine of the UCC.

50 F.H. Miller (ed.), *2 Hawkland's Uniform Commercial Code Series* (Thomson Reuters: New York, 2006) at para. 2-403:7. See also W.D. Hawkland, 'Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code' (1962) 46 *Minnesota L Rev* 697 at 721; W.D. Hawkland, *New Jersey Commission to Study and Report upon the Uniform Commercial Code* (1966) at 115; Duesenberg, above n. 49 at 207–8; Jillson, above n. 42 at 554; R.H. Nowka, 'Section 9-320(a) of Revised Article 9 and Buyer in Ordinary Course of Pre-Encumbered Goods: Something Old and Something New' (1999–2000) 38 *Brandeis LJ* 9 at 33; *Mattek* v *Malofsky* 42 Wis2d 16, 165 NW2d 406 at 408 (1969); *Security Pacific National Bank* v *Goodman* 24 CalApp3d 131, 100 CalRptr 763 at 768 (1972); *Cugnini* v *Reynolds Cattle Co* 687 P2d 962 at 967 (Colo 1984); *Standard Leasing Corp* v *Missouri Rock* 693 SW2d 232 at 273 (ND 1987); *First National Bank* v *Carbajal* 132 Ariz 263, 645 P2d 778 at 781 (1982); *Welch* v *Cayton* 183 WVa 252, 395 SE2d 496 at 501 (1990); *Thorn* v *Adams* 125 OrApp 257, 865 P2d 417 at 420 (1993); *DeWeldon* v *McKean* 125 F3d 24 at 27 (USCA1 RI 1997); *In re Aquamarine USA* 319 BR 270 at 272 (USBC Fla 2004).

51 New York Law Revision Commission, *Report of the Law Revision Commission for 1955: Study of the Uniform Commercial Code* (1955) at 228.

52 *Heinrich* v *Titus-Will Sales*, above n. 46 (implying that this is merely a modern development of the equitable principle that where one of two innocent persons has enabled a third party to cause a loss, that person must bear the loss). See also *Apeco Corp* v *Bishop Mobile Homes* 506 SW2d 711 at 718–19 (TexCivApp 1974); *Sacks* v *State* 172 IndApp 185, 360 NE2d 21 at 28 (1977); *Porter* v *Wertz* 53 NY2d 696, 421 NE2d 500 at 500–1 (NY 1981).

53 D.M. Phillips, 'The Commercial Culpability Scale' (1982) 92 *Yale LJ* 228 at 232.

54 See e.g. Jillson, above n. 42 at 553–4; G. Gilmore, 'The Commercial Doctrine of Good Faith Purchase' (1954) 63 *Yale LJ* 1057; *Heinrich* v *Titus-Will Sales*, above n. 46 at 173. Cf 'The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code' (1963) 72 *Yale LJ* 1205 at 1223.

55 *Johnson & Johnson Products* v *Dal International Trading Co* 798 F2d 100 at 104 (USCA3 NJ 1986).

i. Uniform Commercial Code Article 9

Article 9 was the subject of two major revisions in 1972 and in 1998.[56] The 1998 version, Revised Article 9, is different in both substance and nomenclature,[57] and it is that version which is analysed herein.[58] While the drafters of the original Article 9 felt that they were merely collating and codifying pre-UCC law,[59] Article 9 has since been acclaimed as 'revolutionary';[60] the UCC's 'signal achievement'.[61] Prior to the UCC, the US law of credit and security was complex and incoherent.[62] The revolutionary element of Article 9 was the imposition of a single overarching concept of a 'security interest',[63] which focused on the substance of the interest, not its form: 'the label does not control the result'.[64] Thus Article 9 applies to 'a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract',[65] with 'security

56 The best historical introduction is G. Gilmore, *Security Interests in Personal Property* (Little Brown: Boston, 1965). More recently S.L. Harris and C.W. Mooney, *Security Interests in Personal Property: Cases, Problems and Materials*, 5th edn (Foundation Press: New York, 2011) provides a useful introduction. Both works benefit from being written by the Reporters (chief draftsmen) of Article 9 (Revised Article 9 in the case of Harris and Mooney).

57 See generally C. Cooper (ed.), *The New Article 9: Uniform Commercial Code*, 2nd edn (American Bar Association: Chicago, 2000); R.M. Lloyd, 'The New Article 9: Its Impact on Tennessee Law' (1999–2000) 67 *Tennessee L Rev* 125 and 329; B. Clark, 'Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default' (2000) 4 *North Carolina Banking Institute* 129; E.A. Welle, 'An Introduction to Revised Article 9 of the Uniform Commercial Code' (2001) 1 *Wyoming L Rev* 555. There is also a symposium on Revised Article 9 in the *Chicago-Kent Law Review*: see (1999) 74 *Chicago-Kent L Rev* 857.

58 It has been made available for enactment since 1999, and had the implementation date of 1 July 2001: §9-701. This study is not a comparison of the old and new provisions. The previous law will only be considered to the extent that it can explain the current law. Any references to provisions in previous versions will be prefaced with '(old)'.

59 See e.g. G. Gilmore, 'The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman' (1981) 15 *Georgia L Rev* 605 at 620.

60 Harris and Mooney, above n. 56 at 88.

61 C.A. Bane, 'From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law' (1983) 37 *University of Miami L Rev* 351 at 374. See also S.L. Harris and C.W. Mooney, 'A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously' (1994) 80 *Virginia L Rev* 2021 at 2012 ('[considered] the most successful commercial statute ever'); L. Ponoroff and F.S. Knippenberg, 'Having One's Property and Eating It Too: When the Article 9 Security Interest Becomes a Nuisance' (2006) 82 *Notre Dame L Rev* 373 at 373 (it is the 'crowning achievement' of the UCC).

62 See e.g. Harris and Mooney, above n. 56 at 88; K.N. Llewellyn, 'Problems of Codifying Security Law' (1948) 13 *Law and Contemporary Problems* 687; R.O. Everett, 'Securing Security' (1951) 16 *Law and Contemporary Problems* 49. However, cf Gilmore, above n. 59 at 620.

63 Harris and Mooney, above n. 56 at 88; Ponoroff and Knippenberg, above n. 61 at 373 fn. 2. This idea of a single overarching concept of a security interest was reached independently by Grant Gilmore, Allison Dunham and Karl Llewellyn (who all became drafters of the Code, and for Gilmore and Dunham, Article 9 in particular): Gilmore, above n. 56, vol. II, at 290 fn. 2.

64 Harris and Mooney, above n. 56 at 88.

65 §9-109(a)(1).

interest' defined as 'an interest in personal property … which secures payment or performance of an obligation'.[66] The breadth of the security interest concept means many different commercial transactions will give rise to a security interest, and for these purposes it is vital to accept that a retention of title clause is deemed to be a security interest by §1-201(b)(35): 'The retention or reservation of title by a seller of goods … is limited in effect to a reservation of a "security interest."'[67] These simple words clearly demonstrate that no matter what effort an original owner of goods may put into attempts to protect himself from the risk of non-payment by a purchaser, his retention of title will merely provide him with a security interest.[68]

Transposing the facts of *Highway Foods* to the context of Article 9, Harris and Highway would have both obtained a security interest (their respective retention of title clauses) following disposition of the goods (first to Highway, then to Kingfry). In both transactions, the retention of title clause operated as a means to secure payment. The level of protection for security interests under Article 9 depends on whether they are perfected.[69] Perfection can be (crudely) described as a formality process which essentially focuses on registration of the pertinent details of the security arrangement.[70] Generally, if a security interest is not perfected,[71] it will be ineffective as against a good faith purchaser for value without notice who obtains delivery of the goods prior to perfection.[72] Nevertheless, even perfected security interests can be defeated using the *nemo dat* exceptions set out in Article 9.[73] As will be shown, even if Harris and Highway had perfected their security interests, the facts of that case demonstrate that the UCC would have provided 'protection' for Kingfry otherwise unavailable under English law.

66 §1-201(b)(35). §9-102(a)(72): '"Secured party" means: (A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding'.

67 This provision is repeated in §2-401(1) (dealing with transfers of title from buyer to seller). See also D.E. Murray, 'The Unpaid Seller's Reservation of Title under the *Romalpa* Clause is Not Effective in America' [1981] *LMCLQ* 278.

68 See e.g. *Jernigan* v *Ham* 691 SW2d 553 at 556 (TennApp 1984); *Davis County Savings Bank* v *Production Credit Association of Midlands* 419 NW2d 384 at 386 (Iowa 1988).

69 See e.g. §9-308, Official Comment 2.

70 For reasons of economy, the process and effects of perfection will not be discussed further.

71 Failure to perfect typically arises due to inadvertence: R. Laurence, 'Some Practical Advice About Taking Security Interests in Gemstones, Accompanied by a Theoretical Discussion of the Negotiability of Goods, New and Used' [2004] *Arkansas Law Notes* 75 at 78.

72 §9-317(b) and Official Comment 6.

73 Such *nemo dat* exceptions also apply to unperfected security interests. §9-320, Official Comment 2: 'a buyer who takes free of a perfected security interest [by virtue of this *nemo dat* exception] takes free of an unperfected one'. See generally Gilmore, above n. 56, vol. I, at 436; Harris and Mooney, above n. 56 at 93.

For *Fairfax*, if the situation had arisen under Article 9 jurisdiction, then both claimant and defendant would have merely had a security interest. As with *Highway Foods*, the retention of title clauses introduced by claimant and defendant operated in order to secure payment. In *Fairfax*, the Court of Appeal held that the defendants obtained title free of the claimant's claims, because there had been an implied authority to pass title. Under the UCC, the same result would occur. For Loi, this is problematic as it prioritizes an implication as opposed to the express provisions of the agreements.[74] However, the UCC sets the authorization of such transactions in the context of *nemo dat* conflicts. Thus, as the following analysis will show, if English law adopted the UCC Article 9 provisions on retention of title clauses and authorization, the wrong decision in *Highway Foods* would be rectified and the correct, but poorly rationalized, decision in *Fairfax* would obtain a solid justificatory foundation.

ii. The Exceptions to Survival of Security Interests in Goods Sold: §9-315

Under Article 9, the general rule is that a security interest survives disposition of the collateral.[75] This functions as a *nemo dat* rule. However, a security interest will not survive a disposition if 'the secured party authorized the disposition free of the security interest'.[76] Authorization of the disposition would leave the authorizing party, who held the security interest (i.e. the retention of title clause), with only the right (under the retention of title clause) to claim the proceeds of the sale from the disposing party.[77]

74 See above n. 32 and accompanying text.

75 §9-315, Official Comment 2. See also §9-201(a): a security interest is 'effective according to its terms … against purchasers of the collateral'. See e.g. *In re Havens Steel* 317 BR 75 at 80 (USBC Mo 2004).

76 §9-315(a). Conversely, absence of evidence of authorization means that the security interest survives: *In re Montagne* 417 BR 214 at 224 (USBC Vt 2009). The wording of §9-315(a) indicates that there are actually three methods of cutting off a security interest. The other two are indicated by the starting words of this provision: 'Except as otherwise provided in this article and in Section 2-403(2)'; §2-403(2) is the general entrustment provision; the first exception mentioned is the buyer in ordinary course of business exception under §9-320(a).

77 See also §9-315, Official Comment 2. In addition, the secured party may waive their rights or they may be estopped from claiming their rights: §1-103(b) (continuing pre-Code law on estoppel and waiver). For waiver, see e.g. *Ace Equipment Sales* v *H.O. Penn Machinery* 88 ConnApp 687, 871 A2d 402 (2005); *American National Bank* v *Cloud* 201 CalApp3d 766 at 771 (1988). For estoppel, see e.g. *Muir* v *Jefferson Credit Corp* 108 NJSuper 586, 262 A2d 33 (1970); Nowka, above n. 50 at 30 *et seq*. For economy and clarity, this article will not consider estoppel and waiver. Furthermore, as noted in *Swift & Co* v *Jamestown National Bank* 426 F2d 1099 at 1103–4 (USCA8 ND 1970), the protection for authorized dispositions provided by §9-315(a) 'serves as codification of the common law of waiver'.

Although it appears from the wording of §9-315(a) that *nemo dat* conflicts involving security interests can be assessed under the provisions of §2-403(2) (the 'entrustment' provision), for reasons of economy this analysis will consider the position solely in the context of Article 9, which accords with the nature of the *Highway Foods* and *Fairfax* disputes as ones clearly concerning security interests (and their consequent rights and obligations). Although §9-320(a) is 'by far the most important' *nemo dat* exception in Article 9,[78] the fact that sub-sales had been authorized by the secured party in the course of the security agreement renders it unnecessary for purchasers to rely on §9-320(a).[79] There is no need to even assess whether the purchaser was a buyer in ordinary course of business (the fundamental requirement regarding the purchaser's status under the §9-320 provision) because under §9-315(a) it is the fact of authorization which is vital. Where authorization is involved, such transactions (like those in *Highway Foods* and *Fairfax*) 'are more properly governed by [§9-315(a)] rather than [§9-320(a)] because the transfers appear to have been authorized dispositions of collateral'.[80]

IV. Authorization under §9-315(a) as a *Nemo Dat* Exception

Under §9-315(a), if Harris had 'authorized the disposition free of the security interest' then Highway would have been able to dispose of the goods to Kingfry.[81] Harris's security interest (the retention of title clause) would continue not in the meat itself[82] but in the proceeds of the disposition that he had authorized.[83] This alteration of the security interest occurs 'not because of the meritorious character of the buyer but because the secured party has agreed that a buyer

78 Laurence, above n. 71 at 78.

79 *Bitzer-Croft Motors* v *Pioneer Bank & Trust Co* 82 IllApp3d 1, 401 NE2d 1340 at 1350 (1980).

80 *Massey-Ferguson* v *Helland* 105 IllApp3d 648, 434 NE2d 295 at 300 (1982). In that particular case, the purchaser did have to act in the ordinary course of business (cf *Bitzer-Croft Motors* v *Pioneer Bank & Trust Co*, above n. 79), though this was merely due to the wording of the authorization in the security agreement (the sub-sales were authorized if sold in the ordinary course of business). See also *Whirlpool Corp* v *Dailey Construction* 110 NCApp 468, 429 SE2d 748 (1993); *Matter of Special Abrasives* 26 BR 399 (USBC ED Mich 1983); *Re Frank Meador Leasing* 6 BR 910 (USBC WD Va 1980); *Crystal State Bank* v *Columbia Heights State Bank* 295 Minn 181, 203 NW2d 389 (1973).

81 See e.g. *Churchill Business Credit* v *Pacific Mutual Door Co* 49 F3d 1334 at 1336 (USCA8 Minn 1995); *Whirlpool Financial Corp* v *Mercantile Business Credit* 892 FSupp 1256 at 1264 (USDC ED Mo 1995); *Matter of Yealick's Estate* 69 IllApp3d 353, 387 NE2d 399 at 401 (1979); *Mammoth Cave Production Credit Association* v *Oldham* 569 SW2d 833 at 839–40 (TennApp 1977).

82 As it would were the disposition unauthorized: see e.g. *Farmer's State Bank of Delavan* v *Easton Farmers Elevator* 457 NW2d 763 at 766 (MinApp 1990).

83 See generally L. Lawrence, *Lawrence's Anderson on the Uniform Commercial Code*, 3rd edn (Thomson Reuters: St Paul, 2006) para. 9-306:8 'Effect of authorized sale'.

may acquire rights thereby'.[84] The same logical process would also apply in *Fairfax*. The policy behind this particular provision is an extension of the general policies of the UCC and the *nemo dat* provisions in particular, whereby authorization of a sub-sale means that the holder of the security interest has essentially abandoned any claim to the goods themselves,[85] and has in effect chosen to retain an interest merely in the proceeds. In conflicts between a secured party and a third-party purchaser, the secured party is the one that should bear the loss arising from his debtor's actions,[86] because the alternative essentially makes the purchaser an insurer of events beyond his knowledge and/or control (i.e. the remittance of the proceeds of the seller), which would be unacceptable in light of the general principles and policies of the UCC.[87] Most emphatic is the opinion of the US Bankruptcy Court in *In re Woods*:

> The secured party who knows of the debtor's delivery of the collateral to a merchant for sale cannot lie in wait until the merchant has misled some innocent buyer and then recover the collateral on the ground that it did not authorize the sale in writing. Whether viewed as a waiver of the writing requirement or an estoppel, the result is the same—authorization of the sale.[88]

i. The Retention of Title Clause in Highway Foods

The meaning of authorization is 'determined not only with reference to the facts surrounding the particular transfer at issue but also with reference to the provisions of the security agreement under which the authorization is supposed to have taken place'.[89] This analysis takes the same approach. Of prime importance is the security agreement between Harris and Highway, which will now be analysed in the context of the UCC's provisions. The retention of title clause read:

> The ownership of the goods in the original or any altered form will only be transferred to the buyer when he has paid all that is owing to the seller. On resale the buyer shall remain accountable to the seller for the whole of the proceeds of the sale(s) so long as any indebtedness whatever remains outstanding from the buyer to the seller. The seller reserves the right to enter and collect from any premises goods in their original or altered form where moneys are overdue, or

84 *Ibid*.
85 *Bitzer-Croft Motors* v *Pioneer Bank & Trust Co,* above n. 79 at 1348.
86 *Ibid*. at 1350.
87 *First National Bank & Trust Co of Oklahoma City* v *Iowa Beef Processors* 626 F2d 764 at 769 (USCA10 Okla 1980).
88 *In re Woods* 25 BR 924 at 930 (USBC ED Tenn 1982).
89 J. Fairchild, 'What Constitutes Secured Party's Authorization to Transfer Collateral Free of Lien under UCC §9-306(2)' (1985) 37 *American Law Reports 4th* 787 at para. 2 [a]. Cf *Wabasso State Bank* v *Caldwell Packing Co* 308 Minn 349, 251 NW2d 321 at 325 (1976) (no need for authorization to be included in the security agreement; authorization can be in any form).

> where bankruptcy/liquidation proceedings are pending/effective, or a receiver has been appointed.[90]

The first sentence may be interpreted as requiring Highway to pay just the cost of the goods (a straight retention of title) or it may be that Highway had to pay all of the debts owed to Harris (an expanded or 'all-monies' retention of title). The second sentence appears to create a mixed retention of title clause,[91] but this is not the same as saying that Highway is obliged to pay all the debts. The second sentence may also be interpreted as meaning that Harris allows sub-sales. This may at first seem uncontroversial, but further examination of the American case law demonstrates the complexity of assessing implied authorization. The third sentence implies that Harris recognized the possibility of a disposition of the goods by Highway, but it is arguable that this acknowledgement only extends as far as a disposition of the possession due to the omission of a specific reference to the sub-sale of the goods. It was this part of the clause that Harris was referring to when it wrote to Highway to say that it was exercising its right to possession following the expiry of the date upon which Highway had to pay for the meat.[92] In light of the provisions of Article 9 though, the key issue would be whether Harris had in fact already authorized the disposition free of the security interest prior to the repossession.

Although Harris clearly intended to retain title, there is no express prohibition against a sub-sale prior to the condition on payment being met. This raises the issue, fundamental to this analysis, of whether the particular nature of the retention of title clause would allow, under American law, for the disposition to Kingfry to be one that passed title irrespective of Harris's claim.[93]

90 *Highway Foods* [1995] BCC 271 at 272.

91 There are considerable problems with determining the effect of such an extended retention of title clause in English law, particularly whether such a clause merely creates a charge void for want of registration. See e.g. C. Kessel and M.J.E. Herington, 'Retention of Title in English Law' [1994] *International Company and Commercial L Rev* 335; M. Bridge, *The Sale of Goods*, 2nd edn (Oxford University Press: Oxford, 2009) at para. 3.84.

92 *Highway Foods* [1995] BCC 271 at 273.

93 Lawrence, above n. 83 at para. 9-306:9: 'The person seeking to show that the sale or disposition was authorized or consented to by the secured party, or that the secured party has waived his or her rights or is estopped from asserting them, has the burden of proving the existence of such facts as give rise to an authorization, consent, waiver or estoppel.' See e.g. *Lafayette Production Credit Association* v *Wilson Foods Corp* 687 FSupp 1267 at 1276 (USDC ND Ind 1987); *Christensen* v *Equity Cooperative Livestock Sale Association* 134 Wis2d 300, 396 NW2d 762 at 763 (WisCtApp 1986) (following *Montgomery* v *Fuquay-Mouser* 567 SW2d 268 at 270 (TexCivApp 1978)). In the context of *Highway Foods*, the party claiming that there was authorization would be Highway (as opposed to the usual claimant in such cases, the purchaser, i.e. Kingfry). This simply means that Highway (and not Kingfry) would have the burden of proving authorization.

ii. The Provisions of the UCC

UCC §9-315(a) reads as follows:

> Except as otherwise provided in this paper and in Section 2–403(2):
> (1) a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
> (2) a security interest attaches to any identifiable proceeds of collateral.

It is a revision of (old) §9-306(2), which provided that 'a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor'. Official Comment 2 for §9-315 provides the reasoning for the changes in the law:

> In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds. For example, the general rule does not apply, and a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement or otherwise. Subsection (a)(1) adopts the view of [Permanent Editorial Board] Commentary No. 3 and makes explicit that the authorized disposition to which it refers is an authorized disposition 'free of' the security interest or agricultural lien. The secured party's right to proceeds under this section or under the express terms of an agreement does not in itself constitute an authorization of disposition. The change in language from former Section 9–306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned upon the secured party's receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former Article 9.

Thus it is clear that whether the particular situation involved an authorized disposition would depend upon the particular facts of each case, to be determined by the courts. This factual determination needs to be made in the light of the Permanent Editorial Board's Commentary No. 3 on (old) §9-306(2), as referred to in the Official Comment cited above. The relevant part of that Commentary is set out here:

> The intent underlying this exception is to permit a disposition of the collateral free and clear of the security interest when the secured party has authorized the disposition free and clear of its security interest in the security agreement or otherwise. In the case of such an authorized disposition, the general rule of survivability of the security interest set forth in §9-306(2) will not apply and the security interest will terminate upon the disposition. However, this exception to the

> rule of survivability only applies if the secured party has authorized the disposition, by agreement or otherwise, *free and clear of the security interest*. The exception will not apply if the secured party did not authorize the disposition of the collateral or if the secured party authorized the disposition subject to its security interest. This authorization issue presents a factual question. The questions of what facts will constitute an effective express or implied authorization for purposes of this Section and what standard of proof is applicable to this determination are not addressed in the Code but are instead left to other law.

The following requirements can be drawn from this Commentary. There needs to be a disposition, and there must be an 'effective express or implied authorization', which occurred 'by agreement or otherwise'. The disposition of the collateral to the purchaser has to be a 'sale, lease, license, exchange, or other disposition'.[94] §2-106(1) states that a sale 'consists in the passing of title from the seller to the buyer for a price'.[95] §2-103(1)(a) defines a buyer as 'a person that buys or contracts to buy goods'.[96] This is not entirely helpful, but in *Gordon* v *Hamm* the Second District of the Court of Appeal of California considered this issue in the context of (old) §9-306, where the solution was found in the definition of 'buyer in ordinary course of business' in §1-201(b)(9), which states that 'a buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit'.[97] Although there is no buyer in ordinary course of business requirement in cases of authorization, this definition helpfully demonstrates that a purchaser can buy on secured credit, which was the situation between Highway and Kingfry.[98] §2-401(2) states that '[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods, despite any reservation of a security interest'. All Highway had was a security interest, therefore title had passed and the transaction between Highway and Kingfry was a sale. Again, the same logic applies to the facts in *Fairfax*. The important conclusion from this is that the problem highlighted in *Highway Foods*, that of the non-applicability of the FA, s. 9 provision covering agreements to sell, would not arise under the UCC because the location of title during the transaction is not determinative of the transaction's validity and capacity to pass title.

94 §9-315(a).
95 See also §2-401.
96 §2-103(1)(o) defines seller as 'a person that sells or contracts to sell goods'.
97 63 CalApp4th 1324, 74 CalRptr2d 631 at 634 (CalApp2d 1998).
98 See also *In re Hastie* 2 F3d 1042 at 1045 (USCA10 Okl 1993) adopting a dictionary definition of a sale, as a 'revenue transaction where goods or services are delivered to a customer in return for cash or a contractual obligation to pay' in the context of the provisions of (old) §9-306.

iii. Authorization

As the Permanent Editorial Board's Commentary makes clear, the authorized disposition must be made so that the disposition is 'free and clear of the security interest'. This requirement does not appear to carry a substantial weight though. Whether there is a disposition 'free and clear' depends on the nature of the authorization itself. If there is no authorization, then the disposition is not 'free and clear' of the security interest.[99] Conversely, if there is agreement that upon disposition the security interest will only attach to proceeds then there is no intention to attach to the collateral, and thus the authorization exception is irrelevant (in the sense that the disposition is implicitly authorized as being free and clear of security interest). As a limitation on the security interest could show an attempt to avoid the effects of the authorization provision, courts are obliged to decide whether the authorization in the particular case is sufficient to get around any such limitations rendering the disposition 'free and clear'.

The US courts have tended towards the position whereby an authorizing act can *of itself* demonstrate that the authorization was free and clear—it is the fact of authorization that matters. In effect the secured party is estopped from claiming the benefit of the express term of the security agreement.[100] For one, it seems that where there are sales of inventory, as opposed to equipment, then authorization free and clear will be more readily found.[101] Inventory is defined as 'goods, other than farm products, which: … (B) are held by a person for sale or lease or to be furnished under a contract of service … or (D) consist of raw materials, work in process, or materials used or consumed in a business'.[102] Equipment 'means goods other than inventory, farm products, or consumer goods'.[103] Thus it is clear that in *Highway Foods*, the relevant goods were inventory. The impact of this is discussed later in this analysis.[104] The position in *Fairfax*

99 See e.g. *Montgomery* v *Fuquay-Mouser*, above n. 93; *Bank of Virginia-Central* v *Taurus Construction Co* 30 NCApp 220, 226 SE2d 685 at 688 (1976). Absent authorization, the fact that the security interest remains in the goods means that the purchaser is liable in conversion: see e.g. *US* v *Winter Livestock Commission* 924 F2d 986 at 992–3 (USCA10 Colo 1991); *Wheeler* v *Valley Implement Co* 595 FSupp 691 at 693 (USDC Mont 1984).

100 *Finance America Commercial Corp* v *Econo Coach* 118 IllApp3d 385, 454 NE2d 1127 at 1129 (1983) (concluding that there was authorization and that the secured party was 'estopped from asserting a continuing security interest in the [goods]').

101 *In re Southern Properties* 44 BR 338 at 342 (USBC ED Va 1984); *Matter of Special Abrasives*, above n. 80 at 402–3.

102 §9-102(a)(48).

103 §9-102(a)(33). §9-102(a)(34) defines farm products, but it would not be relevant in *Highway Foods* because Highway would have to be in a 'farming operation', which is defined in §9-102(a)(35) as 'raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation'.

104 See below n. 163 and following text.

is somewhat different. The goods in *Fairfax* appear at first glance to be equipment. However, this would be to focus too much on the goods themselves as opposed to their nature in the context of the transaction. In the transaction concerned, the goods were clearly inventory: they were purchased in order to be sub-sold.

There is a considerable volume of case law, mainly arising under (old) §9-306(2), which provides evidence about the level of authorization necessary to demonstrate that the owner has authorized a disposition of goods free and clear of the security interest he had in the goods.[105] This jurisprudence will now be analysed. The first point to be covered will be the ineffectiveness of mere inaction by the secured party. Following this will be an outline of examples of express and unconditional authorizations which suffice to allow a disposition unencumbered by the security interest. Then express, but conditional, authorizations will be considered. Finally implied authorizations will be analysed.

a. Inaction

As the US District Court for Indiana has said: 'Mere silence, acquiescence or inactivity is not a waiver or authorization unless there was a duty to speak or act.'[106] This of course begs the question: what suffices to demonstrate authorization?

b. Express and Unconditional Authorization

In *Matter of Special Abrasives*, the US Bankruptcy Court in Michigan stated that 'it is basic hornbook law that an explicit authorization cuts off the secured creditor's security interest'.[107] An explicit authorization of sales of inventory, such as where the terms of the security agreement show that the sale of the collateral was authorized,[108] will mean that a sale of inventory will provide the purchaser with goods free and clear of the secured party's interest.[109] Thus unconditional authorization of sale of collateral relegates a security interest

105 See generally C. Gimeno (ed.), (2009) 79 *Corpus Juris Secundum*: *Secured Transactions* at para. 149: 'What constitutes authorization to dispose of collateral or waiver of security interest'.

106 *Lafayette Production Credit Association* v *Wilson Foods Corp*, above n. 93. See also *United States* v *Big Z Warehouse* 311 FSupp 283 at 287 (USDC SD Ga 1970); *Central California Equipment Co* v *Dolk Tractor Co* 144 CalRptr 367, 78 CalApp3d 855 at 862 (CalApp5Dist 1978); *J.I. Case Credit Corp* v *Crites* 851 F2d 309 at 314–16 (USCA10 Okla 1988); *R.F.C. Capital Corp* v *EarthLink* 55 UCC RepServ2d 617 at para. 40 (OhioCtApp10d 2004); *In re Jersey Tractor Trailer Training Inc* 580 F3d 147 at 155 (USCA3 NJ 2009).

107 26 BR 399 at 402 (USBC ED Mich 1983). See also *Swift & Co* v *Jamestown National Bank*, above n. 77.

108 *J.I. Case Co* v *Borg-Warner Acceptance Corp* 669 SW2d 543 at 545 (KyApp 1983).

109 *Homes Saving Association* v *General Electric Credit Corp* 101 Nev 595, 708 P2d 280 at 287–8 (1985).

to the proceeds.[110] This seems to make sense: it would be unjust for a party to authorize a disposition and then attempt to deny the meaning or value of that transaction at a later date, and as such where a secured party expressly authorizes a sale they are 'bound by these authorizations and cannot neglect that language of its own instrument'.[111] Furthermore, if the secured party expressly agrees that the disputed goods are for resale, such action may suffice to demonstrate authorization,[112] and it has been suggested that the fact that the debtor was a retailer meant it might be assumed that the secured party envisaged resales of the goods and thus authorized such dispositions.[113]

In *Fairfax*, the agreement allowed for a disposition in the ordinary course of business.[114] In itself this is not an explicit authorization; obviously the ordinary course of business requirement is some form of limitation on the powers to dispose, but for these purposes it needs to be acknowledged that the problems arising in *Fairfax* concerned the failure of the secured party to properly protect themselves by agreement. What is more interesting is the effect of the US approach on the agreement in *Highway Foods*. Harris and Highway appear to have acknowledged the possibility of a resale, but acknowledging such a possibility is not the same as acknowledging resale as a certainty.[115] Conversely, the absence of express authorization for the sub-sale does not inhibit the possibility of implied authorization. Implied authorization is considered later; first it is necessary to consider the impact of conditions on security agreements such as an obligation to pay the proceeds to the secured party to cover any debt.

c. Conditional Authorization

'There is nothing in the Code … to prevent a secured party from attaching conditions or limitations to its consent to sales of collateral by a debtor.'[116] One such condition may be an obligation on the debtor to obtain written consent prior to any disposition, the effect of failure to obtain such consent being that the sale is unauthorized and the security interest remains attached to the collateral.[117] There is jurisprudence indicating that such a condition takes precedence

110 *Anon* v *Farmers Production Credit Association of Scottsburg* 446 NE2d 656 at 659 (IndApp1Dist 1983).
111 *Bitzer-Croft Motors* v *Pioneer Bank & Trust Co,* above n. 79 at 1346–7.
112 *Bank of Beulah* v *Chase* 231 NW2d 738 at 744 (ND 1975).
113 *Matter of Darling's Homes* 46 BR 370 at 374 (USBC Del 1985).
114 See above n. 26 and accompanying text.
115 *Wollenberg* v *Phoenix Leasing* 182 Ariz 4, 893 P2d 4 at 9 (1994).
116 *Baker Production Credit Association* v *Long Creek Meat Co* 266 Or 643, 513 P2d 1129 at 1134 (1973).
117 *Southwest Washington Production Credit Association* v *Seattle-First National Bank* 92 Wash2d 30, 593 P2d 167 at 169 (1979); *Churchill Business Credit* v *Pacific Mutual Door Co,* above n. 81 at 1337–8.

over a possible contextual implication of authorization, such as that deriving from trade usage or course of dealing.[118] Thus express conditions that sub-purchasers take subject to the security interest will prevail absent contrary manifest intention.[119]

State and federal courts have wrestled with the problem of dispositions conditional upon the debtor remitting the proceeds of such dispositions.[120] On one hand it has been held that 'a sale by the debtor in violation of those conditions is an unauthorized sale and the security interest, under [§9-315], continues in the collateral'.[121] However, this appears to be a minority view. Thus the Supreme Court of Iowa has held that authorization was 'unaffected by a finding … that the authority to sell was conditioned upon the debtor's agreement to apply the proceeds to the debt'.[122] In 1980, in *First National Bank & Trust Co* v *Iowa Beef Processors*, the Tenth Circuit Court of Appeals held that the key determinant was that the sub-sale was authorized, and not that it was conditioned on the debtor remitting proceeds, on the grounds that if proceeds clauses had super-priority over sub-sales, then an innocent purchaser would be 'an insurer of acts beyond its control' and that the UCC's policy to 'promote ready exchange in the marketplace' necessitated the Court's conclusion.[123] Since then, similar approaches towards proceeds clauses have been taken by a variety of state and federal

118 *US* v *E.W. Savage & Son* 343 FSupp 123 at 126 (USDC SD 1972); *Swift County Bank* v *United Farmers Elevators* 366 NW2d 606 at 609 (MinnApp 1985); *First National Bank of LeCenter* v *Farmers Union Marketing and Processing Association* 371 NW2d 22 at 25 (MinnApp 1985).

119 *Central California Equipment Co* v *Dolk Tractor Co*, above n. 106 at 862; *In re Southern Properties*, above n. 101 at 843; *Rushmore State Bank* v *Kurylas* 424 NW2d 649 at 658 (SD 1988); *In re Cohutta Mills* 108 BR 815 at 818–19 (USDC ND Ga 1989).

120 Lawrence, above n. 83 at para. 9-306:12: 'A secured party may impose conditions on its consent to the sale of the collateral. Courts are not in agreement over whether a conditional consent by the secured party to the sale of the collateral is effective as a consent when the condition has not been satisfied. The majority view is that the consent is effective.' See also Gimeno, above n. 105 at para. 150: 'Conditions to Consent to Sale of Collateral'.

121 *Baker Production Credit Association* v *Long Creek Meat Co*, above n. 116. In *Matteson* v *Harper* 297 Or 113, 682 P2d 766 at 768–9 (1984) the Oregon Supreme Court held that where the secured party and the debtor agreed that the sub-sale of goods would be at a minimum price of $22,400 plus fees and costs, the sale of such goods for $20,500 was not an authorized sale. In *Southwest Washington Production Credit Association* v *Seattle-First National Bank*, above n. 117 the Supreme Court of Washington simply stated 'Once it has been determined that [the secured party] in fact conditioned its consent to sell the collateral on continued receipt of the proceeds, circumstances under which an unconditional authorization of sale may take place need not be explored.'

122 *Lisbon Bank & Trust Co* v *Murray* 206 NW2d 96 at 99 (Iowa 1973) (following *US* v *Hansen* 311 F2d 477 at 480 (USCA8 Iowa 1963)).

123 *First National Bank & Trust Co of Oklahoma City* v *Iowa Beef Processors*, above n. 87 at 769.

courts.[124] The fact of authorization is dominant: 'no distinction is made between conditional authorization or any other kind of authorization. As between a third party purchaser who agreed to no condition and the security holder which permitted the goods to be placed on the market, clearly the third party has superior right to the goods.'[125] Obviously this approach is useful in the *Highway Foods* context. It can also be argued that this prevailing UCC approach would provide a stronger rationale for the decision in *Fairfax*, and would counter Loi's argument that the Court of Appeal's decision in *Fairfax* unnecessarily stretched the meaning of the particular contractual terms:[126] commercial law may sometimes have to do violence to a contract in order to adhere to a rational higher policy or purpose.

d. Implied Authorization

In the early UCC decision of *Clovis National Bank* v *Thomas* the Supreme Court of New Mexico held that implied authorization was possible.[127] This result was immediately abrogated by the New Mexico legislature,[128] and it seemed as if the alternative approach expressed in the Nebraskan case *Garden City Production Credit Association* v *Lannan*,[129] that the written terms of the security agreement took priority, would predominate.[130] Thus in *Wabasso State Bank* v *Caldwell Packing Co*,[131] the Supreme Court of Minnesota held, following *Lannan*, that the presence of express terms in the security agreement requiring prior written consent to sub-sales, along with state legislation providing that such express terms control both course of dealing and trade usage, meant that a mere course of

124 *Eastern Idaho Production Credit Association* v *Idaho Gem* 122 Idaho 946, 842 P2d 282 at 285 (1992) (describing the reasoning of the court in *First National Bank & Trust Co* v *Iowa Beef Processors* as 'solid'). See also *In re Woods*, above n. 88; *Frantz* v *First National Bank & Trust Co of Wyoming* 687 P2d 1159 at 1161 (Wy 1984); *Mercantile Bank of Springfield* v *Joplin Regional Stockyards* 870 FSupp 278 at 283 (USDC WD Mo 1994); *C & H Farm Service Co of Iowa* v *Farmers Savings Bank* 449 NW2d 866 at 871 (Iowa 1989); *Vacura* v *Haar's Equipment* 364 NW2d 387 at 392 (Minn 1985).

125 *Western Idaho Production Credit Association* v *Simplot Feed Lots* 106 Idaho 260, 678 P2d 52 at 56 (1984).

126 See above n. 36 and accompanying text.

127 *Clovis National Bank* v *Thomas* 77 NM 554, 425 P2d 726 at 730 (1967).

128 Noted at *Central California Equipment Co* v *Dolk Tractor Co*, above n. 106 at 860 and *North Central Kansas Production Credit Association* v *Washington Sales Co* 223 Kan 689, 577 P2d 35 at 39 (1978). A similar fate befell *Planters Production Credit Association* v *Bowles* 256 Ark 1063, 511 SW2d 645 at 649–50 (1974), as noted in *Holmes* v *Riceland Foods* 261 Ark 27, 546 SW2d 414 at 416 (1977).

129 186 Neb 668, 186 NW2d 99 (1971).

130 See e.g. *Baker Production Credit Association* v *Long Creek Meat Co*, above n. 116; *First National Bank of Atoka* v *Calvin Pickle Company* 516 P2d 265 (OklaApp 1973); *Central California Equipment Co* v *Dolk Tractor Co*, above n. 106 at 860–1; *North Central Kansas Production Credit Association* v *Washington Sales Co*, above n. 128.

131 308 Minn 349, 251 NW2d 321 at 325 (1976).

dealing would be unable to contradict those agreed express terms. Later, in *Tennessee Production Credit Association* v *Gold Kist*,[132] the Court of Appeals of Tennessee held that the failure to object to the debtor sub-selling foods without consent, along with an acceptance of the proceeds of such sales, was an insufficient course of conduct to demonstrate authorization. To hold otherwise would mean that the secured party would be presented with a fait accompli, and would lose its interest far too easily.[133]

Nevertheless, the *Clovis* approach appears to have succeeded in the long run. The initial step in the justification of implied authorization was the recognition that oral consent will suffice even though written consent is prescribed.[134] Furthermore, the *Lannan* case was itself overruled.[135] Most importantly though, the actual wording of the UCC's provisions demonstrates the validity of implied consent.

While (old) §9-306(2) stated that the security interest would not attach to the goods themselves where the disposition was authorized 'or otherwise', which could be interpreted as allowing implied authorizations,[136] the current provision (§9-315(a)) does not have such a useful phrase. However, it is repeated in the Official Comments,[137] which seems to suggest that authorization by implication may well still be valid. Thus while in *Matter of Matto's* it was noted that a qualifying authorization had to be clear and unambiguous,[138] and the Supreme Court of Nebraska has stated that an implied authorization should only be found with 'extreme hesitancy' and only where there is 'clear and convincing evidence',[139] there appears to

132 653 SW2d 418 (TennApp 1983).
133 *Ibid*. at 421.
134 See e.g. *North Central Kansas Production Credit Association* v *Washington Sales Co*, above n. 128 at 41; *Colorado State Bank* v *Hoffner* 701 P2d 151 at 153 (ColoApp 1985); *Citizens National Bank of Madelia* v *Mankato Implement* 441 NW2d 483 at 485–7 (Minn 1989).
135 *Farmers State Bank* v *Farmland Foods* 225 Neb 1, 402 NW2d 277 at 282 (1987) explaining that course of conduct refers to the conduct between the parties prior to the relevant security agreement, and not post-agreement conduct.
136 See e.g. *Central Washington Production Credit Association* v *Baker* 11 WashApp 17, 521 P2d 226 at 227 (1974); *Hedrick Savings Bank* v *Myers* 229 NW2d 252 at 256 (Iowa 1975).
137 §9-315, Official Comment 2: 'a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement *or otherwise*'. (Emphasis added.)
138 8 BR 485 at 489 (USBC ED Mich 1981) (following *Central California Equipment Co* v *Dolk Tractor Co*, above n. 106 at 862: 'an implied agreement should be found with extreme hesitancy'); *United National Bank of Parkersburg, W. Va.* v *Norton Machinery Co* 81 OhioApp3d 101, 601 NE2d 486 at 490 (1991) (following *Central Washington Bank* v *Mendelson-Zeller* 113 Wash2d 346, 779 P2d 697 at 701 (1989): 'To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors'). See also *In re Jersey Tractor Trailer Training Inc*, above n. 106 at 153–5.
139 *Five Points Bank* v *Scoular-Bishop Grain Co* 217 Neb 677, 350 NW2d 549 at 552 (1984).

be a convincing volume of authority that implied that authorization is possible.[140]

Certain factors can be elucidated from the case law in order to map the boundaries of implied authorization. Four main factors appear determinative: (1) the secured party's conduct;[141] (2) the course of dealing between the parties;[142] (3) the customary practice in the trade;[143] and (4) the particular context of the transaction,[144] including the circumstances of the parties,[145] and the nature of the collateral itself.[146] Obviously, the longer the course of dealing goes on, the more likely there is to be implied authorization,[147] but six months has been held sufficient.[148] At the other end of the scale, it is clear that a course of dealing can be ended by one of the parties. In *First State Bank* v *Shirley Ag Service*,[149] a bank had a security interest in crops, but the farmer was granted implied authority to sell those crops. The bank decided to foreclose, and served notice to the farmer. This action was deemed to be sufficient to end the course of dealing, thus the subsequent disposition of crops by the farmer was not authorized.[150]

140 See e.g. *Central California Equipment Co* v *Dolk Tractor Co*, above n. 106 at 862; *Hedrick Savings Bank* v *Myers*, above n. 136 at 255; *US* v *Central Livestock Association* 349 FSupp 1033 at 1034 (USDC ND 1972) (following *Clovis National Bank* v *Thomas*, above n. 127).

141 See e.g. *Pioneer Hi-Bred International* v *Keybank National Association* 742 NE2d 967 at 971 (IndApp 2001); *Whirlpool Corp* v *Dailey Construction*, above n. 80 at 751; *Whirlpool Financial Corp* v *Mercantile Business Credit*, above n. 81, following *Mercantile Bank of Springfield* v *Joplin Regional Stockyards*, above n. 124 at 283.

142 See e.g. *Benson County Co-op Credit Union* v *Central Livestock Association* 300 NW2d 236 at 241 (ND 1980): 'course of conduct'; *Moffat County State Bank* v *Producers Livestock Marketing Association* 598 FSupp 1562 at 1568 (USDC Colo 1984): 'course of performance'; *Humboldt Trust & Savings Bank* v *Entler* 349 NW2d 778 at 781–2 (IowaApp 1984); *In re Sun Island Foods* 125 BR 615 at 620 (USBC Hawai'i 1991): 'course of dealings between the parties'.

143 See e.g. *In re Sun Island Foods*, above n. 142 at 620: 'customary practice in the trade'; *In re Quaal* 40 BR 619 at 621 (USBC Minn 1984); *In re Thomas* 38 BR 50 at 52 (USBC ND 1983) (both using the phrase 'usages of trade'). Often failure to follow trade practices will demonstrate the absence of authorization: see e.g. *Vermilion County Production Credit Association* v *Izzard* 111 IllApp2d 190, 249 NE2d 352 at 355 (1969); *North Central Kansas Production Credit Association* v *Boese* 2 KanApp2d 231, 577 P2d 824 (1978); *Baker Production Credit Association* v *Long Creek Meat Co*, above n. 116. It should be noted that these cases all involved a judicial rejection of the possibility of implied authorization as expressed in *Clovis National Bank* v *Thomas*, above n. 127.

144 *In re Jersey Tractor Trailer Training Inc*, above n. 106 at 154 fn. 14.

145 *In re Sun Island Foods*, above n. 142 at 620: 'consent to disposition can be implied depending on the circumstances of the parties'.

146 See e.g. *Platte Valley Bank of Brighton* v *B. & J. Construction* 44 ColoApp 21, 606 P2d 455 at 457 (1980): 'The implied authorization, if any, must be determined based upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties, and the usage of trade.'

147 *Humboldt Trust & Savings Bank* v *Entler*, above n. 142 at 781 (eight years).

148 *Baker Production Credit Association* v *Long Creek Meat Co*, above n. 116.

149 417 NW2d 448 (Iowa 1987).

150 *Ibid*. at 454.

Fundamentally, there must be a demonstration of 'a voluntary and intentional relinquishment of a known and existing right',[151] which is 'clearly apparent from the circumstances';[152] it cannot be 'lightly implied'.[153] Yet it is also important to acknowledge the caveat recently provided by the Tenth Circuit Court of Appeals: '[n]o magic language of release is required'.[154]

So where from the beginning of the relationship with the debtor the bank allowed sub-sales of secured goods without objection and took the cheques for such sales as credit for the debtor's account, and had relied on the debtor to properly account for the proceeds, the Iowa Supreme Court held that there was an established course of dealing demonstrating implied authorization.[155] Similarly, the US Bankruptcy Court has held that when a creditor permits a debtor to sell goods in a manner of the debtor's choosing, while relying on the debtor to remit the funds and failing to require the debtor to obtain written authority prior to sale, the creditor may be seen as acquiescing in the sale.[156] Essentially, the more laissez-faire the secured party's attitude towards protecting their interest, the more likely that implied authorization will be found. In *Gretna State Bank* v *Cornbelt Livestock Co* the bank had never discussed its policy of requiring prior written permission before cattle were sold (apparently, this lack of discussion was with *all* debtors, not just the one involved in this case), and had failed to act upon previous instances of sub-sales of cattle as well as when the particular debtor sub-sold cattle. The bank was seemingly unconcerned with sub-sales of cattle provided the overall size of the herd remained constant, and this was further demonstrated by the bank only declaring debtors to be in default when they allowed the overall size of their herds of cattle to drop below what would be required for adequate production of milk (in this particular case, a herd of around sixty). Unsurprisingly, the Supreme Court of Nebraska held that this demonstrated implied authorization.[157] Four years later the US Bankruptcy Court, applying Nebraskan law, was faced with a case where a secured party consented to sales of hogs by the middleman. The purchaser was a party to some of those sales, following which he permitted goods to remain in the middleman's possession without disclosure of the purchaser's interest. The Court held that the purchaser took free of the security interest, as there had been an authorized disposition. Five main factors were mentioned: first, the security agreement

151 *State Bank, Palmer* v *Scoular-Bishop Grain Co* 217 Neb 379, 349 NW2d 912 at 917 (1984).
152 *Churchill Business Credit* v *Pacific Mutual Door Co*, above n. 81 at 1336.
153 *In re Sunrise R.V.* 105 BR 587 at 592 (USBC ED Cal 1989).
154 *LifeWise Master Funding* v *Telebank* 374 F3d 917 at 924 (USCA10 Utah 2004).
155 *Hedrick Savings Bank* v *Myers*, above n. 136.
156 *In re Quaal*, above n. 143.
157 *Gretna State Bank* v *Cornbelt Livestock Co* 236 Neb 715, 463 NW2d 795 (1990).

contemplated that proceeds from the sale of the hogs would be used to service the relevant debt; second, the secured party was aware that such sales of the hogs were the middleman's main source of income; third, the secured party failed to fully investigate the middleman's business; fourth, the secured party failed to expressly prohibit sub-sales; and fifth, the secured party did not even discuss with the middleman any possible limitations as to sub-sales.[158]

One common problem concerns the effect of proceeds clauses. The original UCC provision, §9-306(2), and the Official Comments thereto, appeared to suggest that the use of a proceeds clause in the security agreement could provide evidence that the secured party impliedly authorized a sub-sale of the goods.[159] While the revisions to Article 9 in 1972 reduced the possibility of such an interpretation, it was not eradicated. Thus in 1988 the Tenth Circuit Court of Appeals held that 'a claim to proceeds is one factor to consider in determining whether the secured party has impliedly authorized the sale of collateral. Certainly it is not dispositive.'[160] The next year the Supreme Court of Alaska took a similar view, that an express provision that the secured party would retain an interest in the proceeds in the event of a sale did not of itself provide sufficient evidence of implied authorization.[161] The restrictive interpretation of the effect of proceeds clauses continued following the 1998 revisions, where the Official Comments make it clear that the 'secured party's right to proceeds under [§9-315] or under the express terms of an agreement does not in itself constitute an authorization of disposition'.[162] However, the Official Comments also state that:

> The change in language from former Section 9–306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned upon the secured party's receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former Article 9.[163]

158 *Matter of Joy* 169 BR 931 at 938 (USBC Neb 1994).

159 See e.g. *McFadden* v *Mercantile-Safe Deposit & Trust Co* 260 Md 601, 273 A2d 198 at 205–7 (1971) (holding that the combination of describing the goods as 'inventory' and the presence of a proceeds clause meant there was authorization); *Hempstead Bank* v *Andy's Car Rental System* 35 AppDiv2d 35 at 39–40, 312 NYS2d 317 (NYAD 2Dept 1970). Cf *Vermilion County Production Credit Association* v *Izzard*, above n. 143 at 354 (holding that the requirements placed upon a secured party to protect themselves meant that they had to impose a proceeds clause, and thus this statutory requirement should not imply a waiver).

160 *J.I. Case Credit Corp* v *Crites*, above n. 106 at 314. In this case, it was held (at 313) that acceptance of part of the proceeds of the sale would not suffice to demonstrate authorization, because the secured party expressly provided that such acceptance of proceeds would not affect its pre-existing rights.

161 *Northern Commercial Co* v *Cobb* 778 P2d 205 at 207–8 (Alaska 1989).

162 §9-315, Official Comment 2.

163 *Ibid*.

A proceeds clause, though insufficient to determine the issue by itself, can provide evidence of an acceptance by the secured party of the possibility of a sub-sale, and potentially even evidence of consent by the secured party to a sub-sale. The key turning point appears to be where the secured party goes beyond claiming a mere right to the proceeds, and acknowledges that the collateral is inventory, the very purpose of which is to be resold. This was recognized early in the UCC's life, where the Court of Appeals of Maryland held that there was an implied authorization, because the goods were regarded as inventory, and the whole purpose of inventory is to be sold.[164] Thus, in *Finance America Commercial Corp* v *Econo Coach*,[165] where a security agreement provided for a security interest in 'all of the Collateral and … the proceeds thereof covering Inventory', it was held that such a description meant the secured party contemplated a possible sub-sale. Furthermore, the secured party contemplated that his interest would continue into the proceeds. This provided sufficient evidence to demonstrate that the debtor's sale of the goods was authorized.[166] The approach in the *Econo* case replicated that taken by the Court of Civil Appeals of Alabama in *Frank Davis Buick AMC-Jeep* v *First Alabama Bank of Huntsville*.[167] There a failure to prohibit sub-sales, combined with a requirement that the secured party be paid as soon as the goods covered by the security agreement were sold, meant that there was authorization by the secured party of sales of such goods.[168] Requiring immediate repayment from the proceeds of the sub-sale crystallizes the purpose of the retention of title clause as being a means of securing repayment rather than being a mechanism for controlling the goods themselves.[169] Thus 'a secured party with a security interest in the inventory of a retail seller may be assumed to have authorized the sale of inventory to purchasers'.[170] Indeed, the US Bankruptcy Court for the Western District, Virginia, has gone as

164 *McFadden* v *Mercantile-Safe Deposit & Trust Co*, above n. 159 at 205–6.
165 118 IllApp3d 385, 454 NE2d 1127 (IllApp2d 1983).
166 *Ibid*. at 1129.
167 423 So2d 855 (AlaCivApp 1982).
168 *Ibid*. at 859.
169 Cf *Gordon* v *Hamm* 63 CalApp4th 1324, 74 CalRptr2d 631 at 634–5 (CalApp2d 1998): 'The lender's sole legitimate interest in the sale of the collateral is to ensure that its loan is repaid, and to determine whether or not it will rely on the collateral for satisfaction of the borrower's obligations.'
170 *Matter of Darling's Homes*, above n. 113.

far as considering it to be 'axiomatic' that in sales of inventory the secured party authorizes such sales.[171]

V. Conclusion

UCC §9-315(a), in providing that authorized dispositions merely result in the secured party having an interest in the proceeds of the sub-sale (as opposed to the security interest following the goods themselves down the chain of transactions), gives body to the 'underlying philosophy of the UCC [which] is to protect the security interest so long as it does not interfere with the normal flow of commerce'.[172] It provides protection for the purchaser, whose level of knowledge or control over the behaviour and actions of parties further up the chain of transactions will be limited. The burden of the risk of loss is placed firmly with the secured party, who is in the best position to assess the value (as against the risk) of allowing someone to have control of their goods without having purchased them outright in the first instance. With these expressions of policy in mind, it becomes agreeable to accept that under §9-315(a) Highway's receiver could have succeeded in showing that the title to the goods had in fact passed to the purchaser (Kingfry) prior to the 'repossession' by Harris. This would have occurred because Harris's interest was solely focused on the proceeds of the sale of the meat. Indeed, it may be possible to state that *generally* '[a]s a matter of everyday practice the seller/supplier would only be concerned with payment, and if this could come about only via sub-sale, then so be it'.[173] This is obvious in the context of the original transaction, whereby Harris sold to Highway, who then sold to Kingfry. In this initial transaction, Harris was concerned with receiving payment. The failure to receive payment led to Harris repossessing the goods under the terms of its retention of title clause. However, Harris did not actually physically repossess the goods: he left them with Kingfry, and this bailment was predicated on the future purchase

171 *In re Frank Meador Leasing*, above n. 80 at 914. It is accepted that the court stated that it is axiomatic that the secured party surrenders its claim in the goods themselves in sales to buyers in the ordinary course of business (i.e. in the context of the *nemo dat* exception provided by §9-320(a), see above n. 77 and following text), but it is submitted that the particular context of the statement (following an explicit analysis of the rationale of authorization operating in the context of retail sellers) demonstrates that the court considered this point to be of general application.

172 *McFadden* v *Mercantile-Safe Deposit & Trust Co*, above n. 159 at 209, following D.W. Lee, 'Perfection of Priorities Under the Uniform Commercial Code' (1962) 17 *Wyoming LJ* 1 at 34. See also 'California Chattel Security and Article 9 of the Uniform Commercial Code' (1961) 8 *UCLA L Rev* 812 at 898; C.L. Knapp, 'Protecting the Buyer of Previously Encumbered Goods: Another Plea for Revision of UCC Section 9-307(1)' (1973) 15 *Arizona L Rev* 861 at 877.

173 de Lacy, above n. 3 at 333. It is not entirely clear whether de Lacy makes this comment in the context of *Romalpa*-type situations, or whether it is a general observation.

of the goods by Kingfry direct from Harris. Thus at all parts of the transaction, Harris was solely concerned with the money value, i.e. the proceeds. With this in mind, it is difficult to separate out *Highway Foods* from the general tenor of the UCC itself and the relevant case law. In particular, the privileged position of inventory, where the acceptance of the possibility, indeed the necessity, of a sub-sale in order to generate the proceeds needed to service the debt appears to suggest quite strongly that Harris had impliedly authorized the disposition by Highway. The retention of title clause between Harris and Highway clearly evidenced a wish on Harris's part to obtain the proceeds of sale, but not to retain the goods themselves. This would of course be the opposing conclusion to that reached under English law. A similar understanding of *Fairfax* can also be constructed in light of the lessons of the UCC. Of course, with *Fairfax*, there was no doubt about the point of the transaction: it was in order to allow for a re-sale of the goods. What can be thus drawn from seeing *Fairfax* through the lens of the UCC is that the conclusion there, so awkwardly reached and subject to critique by Loi, would be swiftly reached, with ease, and would be fully within the policy and doctrine of UCC Article 9 (and, indeed, of the UCC as a whole).

Does the American law really provide an agreeable alternative? Would it not be acceptable to simply allow the secured party and the purchaser to agree to cut the middleman out of the deal, just as what happened in *Highway Foods*? There is force in this suggestion, but it can be critiqued on the grounds that it could lead to the secured party and the purchaser deliberately failing to pay the middleman, which essentially collapses into a mild form of fraud against the middleman. More importantly though, it appears that this approach, unless restricted to classic three-party disputes, could lead to situations of rapidly increasing levels of complexity. If there are multiple secured parties, are they all to be contacted, and negotiated into agreement, by the purchaser? If there are multiple purchasers, must the same extensive process be undertaken by the secured party? Where there are multiple purchasers and security parties, the costs involved would clearly exceed any benefits. What if such an approach is restricted just to clear three-party disputes? It could be argued that there are still problems of transaction costs. It is arguable that the most sensible path for commercial law is to reinforce a unidirectional chain of transactions.[174] The alternative, allowing the unravelling of such chains so that parties not directly connected (e.g. secured party and purchaser, as opposed to the direct connection between secured party and middleman,

174 This is not a mechanism to deal with the problem of circular priority conflicts, for which see e.g. R.J. Wood, 'Circular Priorities in Secured Transactions Law' (2010) 47 *Alberta L Rev* 823.

or middleman and purchaser) can attempt to shorten the chain of transactions, may admit more uncertainty than is appropriate in the field of commercial deals. The importance of clarity and coherency in this area of law is necessitated by the clear popularity of retention of title clauses. Prohibiting the unravelling of chains of transactions could have benefits in terms of certainty for sub-purchasers, i.e. those purchasers who only have a limited knowledge of and/or little control over the nature of the transactions between, say, the secured party, middleman and purchaser. Goode has noted the distinction between inherent and systemic risk. Systemic risk (affecting the market as a whole) is for regulators to deal with. Inherent risk 'should be seen as a necessary consequence of a market-orientated society'.[175] He noted that business failure can be attributed to one or more of three causes: (1) fraud (which is exceptional, and though it is detectable it is not preventable); (2) mismanagement ('a manifestation of inherent human frailty'); and (3) bad luck (like fraud, exceptional and unpreventable). Since only non-participation can eradicate risk resulting from causes (1) and (2), the basic policy is one of risk management: which party is best placed to bear the risk of loss? In a world of retained title, this is a vital question. For the purposes of Article 9 and title conflicts, it is deemed to be the owner rather than the purchaser. This is in contrast to the English law, where the purchaser will bear the risk of loss beyond that which he can possibly manage.

175 R. Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell: London, 1998) at 46.