COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pyke v. Merchant Growth Asset Financing Ltd.,* 2024 BCCA 188

Date: 20240514
Docket: CA48318

Between:

Daryl Edward Pyke and Inez Aileen Pyke

Appellants
(Defendants)

And

Merchant Growth Asset Financing Ltd.
formerly known as Merchant Advance Asset Financing Ltd.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 2, 2022 (*Merchant Growth Asset Financing Ltd. v. Pyke*, 2022 BCSC 696, Vancouver Docket S200240).

Counsel for the Appellants (via videoconference):	J.L. Martin
Counsel for the Respondent:	A.L. Folino K.M. MacEwan
Place and Date of Hearing:	Vancouver, British Columbia April 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 14, 2024

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Grauer

Summary:

The appellants entered an agreement to lease a logging truck from the respondent. They secured their obligations through a security agreement under which they pledged a motorcycle as collateral. After the appellants defaulted on their lease payments, the secured party seized the motorcycle as allowed by the security agreement. It then sued the appellants for revenue losses flowing from their default. The appellants argued that the "seize or sue" provisions of the Personal Property Security Act precluded a lawsuit following seizure of the motorcycle. The judge held for the secured party, interpreting the security agreement as designating the motorcycle as not being a consumer good. On Appeal: Appeal allowed and action dismissed. The question of whether an item is a consumer good depends on facts and not on a contractual designation. While a representation by a debtor may found an estoppel if it is reasonably relied upon by the secured party, there was no such representation in this case.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The issue on this appeal is whether Merchant Growth Asset Financing Ltd. ("Merchant Growth") is entitled to sue Daryl and Inez Pyke for damages for defaulting on lease payments under a contract for the lease of a logging truck.

[2] It is common ground that the Pykes entered into the lease agreement with Merchant Growth, and that they failed to make the required payments. It is also common ground that following the default, Merchant Growth repossessed the truck and also seized a motorcycle that Mr. Pyke had pledged as collateral to secure the lease payments.

[3] The Pykes argue that under s. 67 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 [the "*PPSA*"], the seizure of the motorcycle, which they contend was a "consumer good", served to extinguish any right Merchant Growth had to sue them for unpaid lease payments.

[4] Merchant Growth, for its part, refers to provisions of the security agreement, and argues that the agreement did not provide for security over any "consumer goods".

[5] The summary trial judge accepted the position put forward by Merchant Growth and declared that s. 67 of the *PPSA* did not limit Merchant Growth's rights

under the lease agreement. She granted Merchant Growth judgment for the lease payment arrears as well as for liquidated damages. The Pykes appeal.

The Lease and Security Agreements

[6] Daryl Pyke is a logger and truck driver. In October 2018, he attended at a truck dealership with the intention of entering into an agreement to acquire a new logging truck. Although his sister, Inez Pyke, is not involved in Mr. Pyke's business, she attended in order to provide additional financial assurance to the lessor/vendor.

[7] The Pykes entered into an agreement to lease a logging truck from Merchant Growth for a period of four years (the "Lease Agreement"). The Lease Agreement required them to make an initial payment of $10,416.00, and thereafter to make monthly payments of $3,200 plus taxes. At the conclusion of the lease period, they had an option to purchase the truck for $500.

[8] At the same time, the parties entered into an agreement to secure the lease payments (the "Security Agreement"). Although the Security Agreement document in evidence appears to be between Daryl Pyke, alone, as debtor and Merchant Growth as secured party, a notice to admit served by Merchant Growth on the Pykes asked for an admission that Daryl and Inez Pyke, together, entered into the Security Agreement as debtors. They made that admission, and the case has been presented on that basis. Despite the fact that the written agreement in evidence is not consistent with the admission, the case must be decided on the basis of what has been admitted.

[9] In the Security Agreement, the Pykes pledged certain personal property to secure their obligations under the Lease Agreement. Three items of property are named as collateral: a modular home, a logging trailer, and a motorcycle.

[10] In February 2019, the Pykes stopped making payments under the Lease Agreement. Merchant Growth sent a demand letter to them in May 2019, but they did not respond. On June 10, 2019, Merchant Growth repossessed the logging truck. On June 13, it requested that Mr. Pyke surrender the motorcycle to it, which he did.

[11] It is apparent that the other items of collateral had negligible value. The logging trailer was apparently damaged, and the modular home appears to have had limited, if any, market value.

[12] In January 2020, Merchant Growth sold the logging truck for $31,172.18. It also commenced the current action, seeking both arrears owing under the Lease Agreement and liquidated damages for the loss of prospective lease revenue. The net present value of the unpaid lease payments at the time of trial, after deducting the amount received on the sale of the truck, was $230,217.04. At that time, Merchant Growth continued to hold the motorcycle.

Relevant Statutory Provisions

[13] Section 67 of the *PPSA*, commonly described as a "seize or sue" provision, applies to "consumer goods". The relevant part of the section reads as follows:

> 67 (1) … [I]f a debtor is in default under a security agreement that provides for a security interest in consumer goods, the secured party may
>
> (a) exercise the secured party's rights as provided in section 58 [which deals with seizing the collateral],
>
> (b) proceed as provided in section 61 [which deals with voluntary foreclosure as against collateral],
>
> (c) accept surrender of the goods by the debtor, or
>
> (d) subject to the terms of the agreement, bring action to recover a judgment ….
>
> (2) If the secured party proceeds under subsection (1) (a), (b) or (c) with respect to consumer goods,
>
> (a) the debtor's unperformed obligations under
>
> (i) the security agreement, or
>
> (ii) a related agreement …
>
> (b) …
>
> are extinguished.

[14] The statute defines "consumer goods" in s. 1 to mean "goods that are used or acquired for use primarily for personal, family, or household purposes".

[15] Section 56(3) of the *PPSA*, as relevant to this case, reads as follows:

> 56(3) … [N]o provision of sections … 58 to 69, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

Detailed Provisions of the Security Agreement

[16] While it is only two pages in length, the Security Agreement is a complex document that is not easily read or comprehended. The typeface is small, and the language is difficult.

[17] For the purposes of this case, a key provision is the first paragraph under the heading “Definitions”. It is as follows:

> 2.1 **Personal Property Security Act**. All phrases which are defined in the *Personal Property Security Act*, R.S.O. 1990 c. P.10 (the “PPSA”) and not otherwise defined in this security agreement shall have the meaning ascribed by the PPSA, provided always that the term “goods” shall never include “consumer goods” of the Debtor as that term is defined in the PPSA.

[18] The reference to the Ontario statute makes it apparent that the document was intended for use in Ontario rather than British Columbia. That said, there are, for the purposes of this case, no important differences between the Ontario statute and the B.C. *PPSA*. In the circumstances, I am prepared to deal with this case as if the agreement had referenced the B.C. legislation.

[19] Apart from its appearance in clause 2.1, the word “goods” scarcely appears in the Security Agreement. It is not present elsewhere in the body of the agreement, but it does appear in one of the recitals. The third recital to the agreement states “[t]he Debtor has agreed to provide additional and continuing security in the goods described in Schedule A attached hereto”. Schedule A is simply a list headed “collateral”. The word “collateral” is used throughout the agreement to describe the property that serves as security for the debt.

Evidence on Whether the Motorcycle was a Consumer Good

[20] In his affidavit evidence on the summary trial, Mr. Pyke deposed as follows:

> 30. I bought the Motorcycle for my downtime, to relieve stress and to have fun. I bought it for my personal use.
>
> 31. After I purchased the Motorcycle, I started going to work in Mackenzie, BC … and did not actually use the Motorcycle much.
>
> 32. I did use the Motorcycle a few times around the property [that I live on]. I believe that I bought a 4-day permit for it once.
>
> 33. Leading up to the time that [I] signed the [Lease Agreement and Security Agreement], although I did not use the Motorcycle much, I did have it for my personal use, hoping one day to use it more. My purpose of having the Motorcycle did not change ….

This evidence is unchallenged, and supports the position that the motorcycle is a consumer good.

Position of the Parties on the Summary Trial

[21] Both parties agreed that the matter was suitable for disposition by way of summary trial. The Pykes argued that it was evident that the motorcycle was a consumer good. The result, they contended, was that the seizure of the motorcycle deprived Merchant Growth of the right to sue for the unpaid lease payments.

[22] For its part, Merchant Growth took the position that, given the third recital and the definition in s. 2.1 (both quoted above), the Security Agreement amounted to a representation by the Pykes that the motorcycle was not a consumer good. They asserted that Merchant Growth reasonably relied on that representation and the Pykes were, therefore, estopped from relying on evidence to the effect that the motorcycle was a consumer good.

The Judgment Below

[23] The judge considered that the focus of the inquiry should not be on the actual status of the motorcycle as a “consumer good” or “non-consumer good”, but rather on the Security Agreement:

> [46] While the parties’ submissions focussed on the question of whether the Collateral was consumer goods, in my view the interpretive question is a slightly different one. The question is whether the defendants are in default under “a security agreement that provides for a security interest in consumer goods”, which is the condition set out in s. 67(1) of the *PPSA* for the application of s. 67. This raises a question not only of statutory interpretation,

> but also of contractual interpretation: is the Security Agreement an agreement that provides for a security interest in consumer goods?
>
> [Emphasis in original.]

[24] The judge answered the question as follows:

> [52] As noted above, the wording of clause 2.1 of the Security Agreement defines the term "goods" in a manner that expressly excludes "consumer goods".
>
> [53] The clear terms of the Security Agreement, accordingly, provide that the Collateral described in Schedule "A" is not consumer goods. There is nothing in the surrounding circumstances that would support a finding that the parties had a contrary objective intention. The Collateral provided security for commitments made by the defendants in relation to the commercial lease of Equipment to be used for business purposes. The parties knew, or ought to have known, that Merchant required the Collateral for the purpose of securing the defendants' indebtedness. It was objectively reasonable in the circumstances for Merchant to require the defendants to provide Collateral that was not consumer goods so that Merchant was not restricted in its remedies in case of default.
>
> [Emphasis in original.]

[25] The judge considered that the only remaining issue was whether the actual status of the motorcycle as a consumer good could serve to override what she found to be the clear intention of the contract:

> [55] The only remaining question is whether the provisions of the *PPSA* dictate that the Security Agreement should be interpreted as an "agreement that provides for a security interest in consumer goods", despite its express provisions to the contrary. In my view, there is nothing in the *PPSA* that would support such a result. As stated by the Court of Appeal in *New Solutions* [*674921 B.C. Ltd. v. New Solutions Financial Corporation*, 2006 BCCA 49]:
>
> > [5] Underlying the entire PPSA scheme, however, is the principle that the law of contract continues to apply to relationships between secured creditors and their debtors and that agreements between them must still be construed "according to [their] terms", as s. 9 of the Act provides. …
>
> [56] The defendants' argument, if accepted, would fundamentally change Merchant's rights and remedies under the Security Agreement, based on the existence of facts—the defendants' subjective use of the Collateral—that were not known, and could not have been known, to Merchant at the time of the execution of the Agreement. This would result in significant unfairness to Merchant. Merchant would be limited to recovering only a fraction of the defendants' indebtedness as a result of seizing collateral that was

> represented by the debtors not to be consumer goods, and only characterized as consumer goods after the fact.
>
> [57] The "seize or sue" provisions in s. 67 of the PPSA assume a deliberate election between remedies by the secured creditor under "a security agreement that provides for a security interest in consumer goods". The statutory scheme would be undermined if, after default, a debtor was permitted to change the description of collateral in a security agreement that is not, on its express terms, an agreement that provides for a security interest in consumer goods.

Analysis

[26] Regrettably, I am unable to agree with the judge's analysis. Section 56(3) of the *PPSA* specifically states that parties cannot contract out of the provisions of s. 67. Determining whether a security agreement provides for a security interest in consumer goods, therefore, requires more than a simple perusal of the contractual language. Section 56(3) does not allow parties to contract for remedies that are prohibited by the statute. They cannot, with a nudge and a wink, use contractual language to state that consumer goods are other than consumer goods.

[27] That does not mean that the debtor's representations will be irrelevant. As Merchant Growth argued, the debtor is in a privileged position when it comes to identifying property as a "consumer good" or as "equipment". A clear representation by the debtor that an item is not a consumer good, if reasonably relied on by the secured party, may form the basis for an estoppel. Where it does, the debtor will be stuck with its representation, and will be precluded from relying on evidence that contradicts it.

[28] Had the judge analysed the issue in this case as one concerned with estoppel rather than with contractual interpretation, she would not have reached the conclusion that she did. There is, in the circumstances of this case, no clear representation by the Pykes to the effect that the motorcycle was other than a consumer good.

[29] The third recital in the Security Agreement presents interpretive challenges. If the Pykes had looked at the agreement in detail, they would have seen that the

motorcycle was listed in Schedule A as collateral but would also have realized that, as a consumer good, it was excluded from the ambit of the word “goods” by the language of clause 2.1. That would have meant that the recital “the Debtor has agreed to provide additional and continuing security in the goods described in Schedule A” would not have applied to the motorcycle. But the mere fact that the recital did not apply would be of no moment. Nothing in the Security Agreement precluded the motorcycle from being collateral or prevented the Pykes from pledging it.

[30] It is, however, fanciful to imagine that the Pykes would have had the inclination or ability to engage in such detailed contractual analysis. In determining whether the Pykes are precluded from putting evidence before the court to establish that the motorcycle is a consumer good, the proper inquiry concerns the nature of any representation that they made, and the reasonableness of Merchant Growth’s reliance on it.

[31] Here, with all due respect to the chambers judge, I am unable to read the Security Agreement as amounting to a representation by the Pykes that the motorcycle was other than a consumer good. Equally, given the opacity of the contractual document, the amount of time the Pykes had to examine it and their level of education, it cannot be said that any reliance Merchant Growth placed on the alleged “representation” was reasonable.

[32] I fully accept that the primary goal of the *PPSA* is to provide commercial certainty and predictability. As the respondent points out, citing *KBA Canada, Inc. v. Supreme Graphics Limited*, 2014 BCCA 117, this Court has frequently emphasized those goals:

> [20] It is well-established that the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing. The statute includes clear rules for registration of financing statements in respect of security interests and for priorities among secured creditors. Courts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity. The general approach to the statute is well-described in the first chapter of Ronald

C.C. Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, 2d ed. (Toronto: Irwin Law, 2012) at 51:

> The PPSA is founded on certain legislative policies that generally inform its interpretation. The most prominent of these is the advancement of commercial certainty and predictability. This is a primary value in commercial law generally. Its principal application in the PPSA context takes the form of an appropriate reluctance to countenance judicial glosses on the statutory rules, especially those dealing with priority.

[21] This approach is in keeping with the purpose and language of the statute. As Newbury J.A. commented in *674921 B.C. Ltd. v. New Solutions Financial Corporation*, 2006 BCCA 49, the statute was designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty:

> [1] … [P]riority dispute[s] between … secured creditors over the proceeds of chattel security … have become rare since the adoption, by most Canadian provinces, of Personal Property Security Acts …. In British Columbia, as in most other Canadian provinces, the *Personal Property Security Act* … swept away various statutory, common law and equitable rules dealing with secured transactions involving personal property …. This patchwork of rules relating to constructive and actual knowledge, title, registration, crystallization, realization and priorities had developed over many years in response to changing exigencies and without any overall rationale. The new unified statutory scheme ("PPSA") applies to all interests that "in substance" create security interests on personal property.

[33] While the statute strives for commercial certainty and predictability, it also contains provisions, such as s. 67, that appear to have a consumer-protection function. Those provisions cannot be judicially excised from the statute — like all other legislation, they are to be "construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" in accordance with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

[34] I do not accept the chambers judge's implication that secured parties are placed in an untenable position. They are fully entitled to demand clear representations by debtors at the time that security agreements are entered into. If, for example, Mr. Pyke had been asked to sign a collateral list that specifically stated: "I certify that the following items of collateral are not goods used or acquired

primarily for personal, family or household purposes", the respondent would be in a strong position.

[35] In contrast, the position it finds itself in on this appeal is weak, because it made no efforts to determine the facts before entering into the agreement and did not take steps to remedy the situation when it seized the motorcycle. Its position is further weakened by the fact that the property in issue in this case — a Harley Fatboy Motorcycle — is an item much more commonly seen as a "consumer good" than as "equipment" — it is clearly not "inventory" in this case — as those concepts are defined in the *PPSA*.

[36] It is not, in my view, unfair to a lender to expect it to take steps, before taking security, to ascertain the nature of that security. A debtor cannot unilaterally change the categorization of an asset at the time of default. Section 1(4) of the *PPSA* provides that, in the absence of a more specific statutory provision, the determination of whether a piece of property is a consumer good is determined at the time the security interest attaches.

Conclusion

[37] I would allow the appeal, and declare that the motorcycle is a consumer good. Merchant Growth's seizure of the motorcycle precludes it, under s. 67 of the *PPSA*, from pursuing further legal action to recover damages for the appellants' default under the Lease Agreement.

[38] While Merchant Growth raised some additional issues in the court below, it has pursued them in this Court. Accordingly, I would dismiss Merchant Growth's claim.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Grauer"