

CANADA / JUDGMENT

Merchant Growth Asset Financing Ltd. v. Pyke

2022 BCSC 696

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 696 Merchant Growth Asset Financing Ltd. v. Pyke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Merchant Growth Asset Financing Ltd. v. Pyke,

2022 BCSC 696

Date: 20220502

Docket: S200240

Registry: Vancouver

Between:

Merchant Growth Asset Financing Ltd.

formerly known as Merchant Advance Asset Financing Ltd.

Plaintiff

And

Daryl Edward Pyke and Inez Aileen Pyke

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiff:

K. MacEwan

Counsel for the Defendants:

J. Martin

Place and Date of Hearing:

Vancouver, B.C.

March 28, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 2, 2022

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INTRODUCTION

- [1] In this summary trial application, the plaintiff applies for a declaration that certain personal property of the defendants that is listed as collateral in a security agreement between the parties is not "consumer goods" as defined in s. 1 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 [PPSA]. The plaintiff also seeks judgment against the defendants, jointly and severally, for the amount of arrears owed under an agreement for the rental of equipment, as well as liquidated damages and costs as specified in the agreement.
- [2] The defendants, Daryl Pyke and Inez Pyke, are siblings. Because they have the same last name, I will refer to them individually by their first names in this judgment for ease of reference. The defendants are parties to an agreement with the plaintiff Merchant Growth Asset Financing Ltd. ("Merchant") for the rental of a logging truck. They are also parties to a security agreement which lists certain property owned by Daryl, including a motorcycle, as collateral for the performance of the defendants' obligations under the rental agreement. The defendants defaulted on their rental payments, and Merchant seized the motorcycle.
- [3] The defendants say that the motorcycle falls within the definition of "consumer goods" under the PPSA because it was acquired solely for Daryl's personal use. The defendants say that, as a consequence, the "seize or sue" provision in s. 67 of the PPSA is applicable, leaving Merchant with the choice of: (a) seizing the consumer goods; or (b) bringing an action to recover judgment against the defendants. The defendants say that since Merchant elected to seize the consumer goods, the defendants' unperformed obligations under the rental agreement are extinguished by operation of s. 67(2) of the PPSA.
- [4] Merchant says that its security agreement with the defendants expressly provides that the collateral is not consumer goods. Thus, at the time that Merchant seized the motorcycle, it did not make a deliberate election between seizing or suing. Merchant says that the defendants induced it to enter the rental agreement on the basis of their representation that the collateral was not consumer goods, and they should not be permitted to re-characterize the nature of the security after the motorcycle was seized. The value of the motorcycle is likely a fraction of the overall indebtedness of the defendants. If Merchant is limited to seizing the motorcycle, then Merchant would be precluded from recovering a significant debt from the defendants that the defendants contractually committed to pay. Such a result, Merchant says, is unfair and inconsistent with the objectives of the PPSA, which includes the protection of secured creditors.
- [5] The issue raised in this case is primarily one of statutory interpretation: does s. 67 of the PPSA apply when the subject security agreement defines collateral in a manner that excludes consumer goods? The material facts that give rise to the issue of interpretation are not in dispute. The defendants agree that the case is suitable for resolution as a summary trial. They seek an order dismissing the action against both defendants.

- [6] Finally, there is a further issue which only relates to the action against Inez. She signed the first page of rental agreement, and was required to initial the terms and conditions on pages 2 and 3. The record on the summary trial does not include page 3 of the rental agreement with Inez, and thus there is no copy with her signature on that page. This is significant because clause 9 on page 3 of the rental agreement outlines the remedies available to the plaintiff on default. Inez says she should not be liable for the default remedies contained on page 3 of the rental agreement, including liquidated damages, because there is no evidence before the Court that she signed the relevant page of the agreement.

FACTS

The rental agreement and security agreement

- [7] On October 1, 2018, the defendants entered into an agreement with Merchant to lease a 2013 Kenworth T800 truck (the "Equipment") in return for monthly payments that are set out in a payment schedule in the agreement (the "Rental Agreement"). For ease of reference, I will refer to the "debtor" in describing the commitments set out in the Rental Agreement. The Rental Agreement included the following relevant terms:
- a) the debtor will make an initial monthly payment of \$10,416, and thereafter make 47 monthly payments of \$3,200, plus taxes;
 - b) the debtor grants Merchant a continuing security interest in, and charge over, their interest in the Equipment, and over all of their present and after-acquired personal property;
 - c) at the conclusion of the rental term, the debtor will have the option to purchase the Equipment for \$500, if all rental payments have been made;
 - d) the debtor will be in default of the Rental Agreement if they fail to pay any amount due within 10 days of the due date;
 - e) on default, the debtor must pay all arrears owing, and, as liquidated damages, the net present value of the remaining payments under the Rental Agreement, plus interest; and
 - f) the debtor will pay Merchant its costs and expenses incurred as a result of default, including all legal fees on a solicitor and own client full indemnity basis.
- [8] On October 1, 2018, the defendants also signed a security agreement with Merchant (the "Security Agreement"). The Security Agreement included the following relevant terms:
- a) pursuant to the Rental Agreement, the debtor agrees to provide additional and continuing security "in the goods described in Schedule 'A' attached hereto";
 - b) the goods described in Schedule "A" consist of:
 - i) a 1997 SRI 16' X 80' modular home (the "Mobile Home");
 - ii) a 1999 Superior logging trailer (the "Logging Trailer"); and

iii) a 2008 Harley Fatboy motorcycle (the "Motorcycle").

(Collectively, the "Collateral").

c) the definitions section includes the following term:

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.

d) the debtor shall not remove the Collateral from its ordinary location in Creston, B.C., without the creditor's prior written consent;

e) the debtor shall maintain the Collateral in a condition and state of repair that preserves its value; and

f) the debtor acknowledges that they have had sufficient time to review the Security Agreement thoroughly, understands their obligations under the Agreement, and has been given an opportunity to obtain independent legal advice.

[9] It should be noted that although clause 2.1 of the Security Agreement references the Ontario Personal Property Security Act, R.S.O. 1990, c. P.10, it is common ground that there are no relevant differences in the definitions under the Ontario legislation and British Columbia's PPSA. In particular, both statutes define "consumer goods" as goods used or acquired for use primarily for personal, family or household purposes.

The defendants' default

[10] In or about February 2019, the defendants stopped making monthly payments under the Rental Agreement. At the defendants' request, Merchant provided the defendants with a proposed amendment and security agreement dated April 16, 2019 (the "Amended Agreement"), pursuant to which Merchant agreed to reduce the monthly rental payments for February, March, and April 2019, and increase the remaining payments. Neither defendant signed the Amended Agreement.

[11] On May 9, 2019, Merchant sent a letter by registered mail to the defendants demanding that they pay the outstanding arrears, which then totalled \$14,437.36. Merchant advised of its intention to seize the Equipment and commence legal proceedings for arrears and liquidated damages under the Rental Agreement if payment was not received by May 19, 2019.

[12] The defendants did not respond to the demand letter. No further rental payments were made to Merchant.

- [13] On or about June 10, 2019, Merchant seized the Equipment, and attempted to seize the Collateral. In communications with the bailiff acting for Merchant, Daryl indicated that he was prepared to deliver the Motorcycle to Merchant, but stated that the Logging Trailer was damaged and was being stored in Mackenzie, B.C. Daryl delivered the Motorcycle to Merchant on June 13, 2019. It appears that the Mobile Home is being stored on property where the defendants both reside. To date, Merchant has not seized either the Logging Trailer or the Mobile Home.
- [14] In January 2020, Merchant sold the Equipment for the net sum of \$31,172.18.
- [15] Merchant calculates that the net present value of the amount the defendants owe under the Rental Agreement is \$230,217.04, as of February 22, 2022. Merchant has accounted for the proceeds of the sale of the Equipment in making this calculation.
- [16] Merchant has not sold the Motorcycle, pending the resolution of the present proceeding. The Logging Trailer is damaged and would require repair before Merchant could sell it. The value of the Mobile Home is unknown, but Merchant does not anticipate receiving anything beyond a nominal sum if it is sold. Merchant expects that a significant portion of the amount owing under the Rental Agreement will remain outstanding even after the sale of any (or all) of the Collateral.

THE DEFENDANTS' EVIDENCE

- [17] Daryl and Inez both swore affidavits for the purpose of the summary trial.
- [18] Daryl deposes that before he leased the Equipment, he was driving a different haul truck which he used to pull the Logging Trailer in the course of his job hauling logs. However, Daryl was in need of a new truck. He saw the Equipment at a truck dealership in Prince George, and he expressed interest in purchasing it. Individuals at the truck dealership put Daryl in contact with an agent for Merchant.
- [19] Daryl says the Rental Agreement and the Security Agreement were signed at the truck dealership in Prince George. He says he felt rushed in the process of signing the documents, and that the paperwork was "flying around". He found it to be a confusing process. Daryl says he cannot recall anyone telling him that the Collateral was not allowed to include consumer goods.
- [20] Daryl says that the Motorcycle and the Mobile Home are only for his personal use. He purchased the Motorcycle in 2017 as a way of relieving stress and having fun in his downtime. The Mobile Home was given to him by his niece, Inez's daughter, in about 2015. It had fire damage. Daryl moved the mobile home to the property where he and Inez now live in about 2016. The Mobile Home has been used solely for Daryl's personal use since 2018. He has a bedroom in the Mobile Home.

- [21] Daryl says that he verbally told the people he was dealing with about the rental and financing of the Equipment that he was using the Logging Trailer for jobs in the area of Mackenzie. He says he advised the bailiff acting for Merchant of the location of the Logging Trailer.
- [22] Inez deposes that she and Daryl are not in business together. She deposes that she is "part of the agreement" because Merchant wanted extra security. Inez's daughter helped her DocuSign the documents. Inez cannot recall the specifics of signing the documents, so she cannot say if she initialled page 3 of the Rental Agreement. She does not recall anyone telling her that the Collateral was not allowed to include consumer goods.

PROCEDURAL BACKGROUND

The pleadings

- [23] Merchant filed its original notice of civil claim on January 8, 2020, seeking judgment against the defendants, jointly and severally, for the amount of the arrears owing under the Rental Agreement, as well as liquidated damages, interest, and costs.
- [24] The defendants filed their response to civil claim on February 4, 2020. The defendants plead that the Motorcycle and the Mobile Home were, at all material times, consumer goods within the meaning of the PPSA. In the legal basis of their response to civil claim, Part 3, the defendants plead that s. 67 of the PPSA applies and has the effect of limiting Merchant's remedies to the seizure of the Motorcycle. At para. 10 of Part 3 of the response to civil claim, the defendants plead, in the alternative, that:
- (a) the total liquidated damages sought by the Plaintiff, and the application of the liquidated damages provisions in the Rental Agreement, are unreasonable in the circumstances, are subject to the Plaintiff's duty to mitigate, and should be reduced accordingly; and
 - (b) further, or in the alternative, the Plaintiff will be unjustly enriched should it realize the total liquidated damages sought which would otherwise be unequitable in the circumstances, and the amount should be reduced accordingly.
- [25] On March 3, 2020, Merchant filed a reply to the response to civil claim. Merchant pleads that the defendants represented and agreed that the Collateral listed in the Security Agreement did not include consumer goods, and they are now estopped from taking a contrary position. Merchant says that it reasonably relied on the defendants' representation, and that the representation induced Merchant to enter into the Rental Agreement. Alternatively, Merchant pleads that the defendants caused substantial damage to the Logging Trailer and, therefore, an order should be made pursuant to s. 67(9) of the PPSA that ss. 67(1)-(7) do not apply so as to limit Merchant's rights and remedies.

- [26] On May 14, 2020, Merchant filed an amended notice of civil claim, which repeats the allegations in the reply with respect to the defendants' representations about the nature of the Collateral. The amended notice of civil claim adds a cause of action for negligent or fraudulent misrepresentation.

The summary trial application

- [27] Merchant filed this summary trial application on August 6, 2021. Merchant's primary position is that the personal property listed as Collateral in the Security Agreement is not, by definition, consumer goods. Merchant seeks a declaration to that effect, as well as judgment against the defendants, jointly and severally, for the amounts owing under the Rental Agreement, including liquidated damages.
- [28] Merchant's alternative position is that if the Collateral--and the Motorcycle in particular--is consumer goods, then s. 67(9) of the PPSA applies to limit the rights and remedies that the defendants would otherwise have under ss. 67(1)-(7). Section 67(9) applies where "the goods" have been substantially damaged or have been allowed to deteriorate through wilful or reckless acts or neglect on the part of the debtor. Merchant argues that s. 67(9) is triggered by the defendants' conduct in relocating and damaging the Logging Trailer, which constituted a breach of the terms of the Security Agreement.
- [29] The defendants defend the summary trial application on the basis that the Motorcycle falls within the definition of consumer goods under the PPSA, and thus s. 67(1) applies to limit Merchant's remedies to seizing the Motorcycle or suing on the debt. Since Merchant elected to seize the Motorcycle, the defendants' unperformed obligations under the Rental Agreement are now extinguished by s. 67(2) of the PPSA. The defendants deny that they represented the Collateral to be consumer goods. They say that, regardless, it is Merchant--as the sophisticated party and drafter of the Rental Agreement--who should have made sufficient inquiries to satisfy itself that the personal property, such as the Motorcycle, was not consumer goods.
- [30] The defendants advanced no argument or evidence on the summary trial application to establish the alternative defence pleaded in their response to civil claim that the liquidated damages are unreasonable and should be reduced. At the hearing of the summary trial, counsel for the defendants advised that the defendants did not pursue that point on the summary trial. The defendants are prepared to meet the summary trial application solely on the basis of the wording of s. 67 of the PPSA.

ANALYSIS

Suitability for summary trial

- [31] Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], permits the court to grant judgment, on an issue or generally, on a summary trial. Rule 9-7(15)(a) of the SCCR establishes conditions for the exercise of the court's discretion to grant judgment on a summary trial. Judgment should not be granted where the court is unable to find the facts necessary to decide the issues of fact or law, or if it would be unjust to decide the issues summarily.
- [32] The parties agree that this case is suitable for resolution through a summary trial. The material facts are not in dispute. Examinations for discovery have taken place, so the parties have had an opportunity to fully explore the evidence. Given that the defendants do not pursue their pleaded defence based on the alleged unreasonableness of the liquidated damages and the plaintiff's failure to mitigate, the issue that arises for determination is primarily one of statutory interpretation. This is a legal question that is well-suited to the summary trial process.
- [33] I am satisfied that the conditions for the granting of judgment in R. 9-7(15)(a) of the SCCR are met. For the reasons that follow, I am able to make the necessary factual findings to decide the issues of fact and law that arise. In my view, it is just to decide the issues summarily.

The PPSA

- [34] The PPSA is a unified statutory scheme that applies to all interests that, in substance, create security interests in personal property. When it was enacted, the PPSA replaced a patchwork of statutory, common law, and equitable rules with a statutory regime that was designed to introduce greater clarity and symmetry in British Columbia's secured financing law: 674921 B.C. Ltd. v. New Solutions Financial Corporation, 2006 BCCA 49 at para. 1 [New Solutions]; Ronald C.C. Cuming, Q.C. and Roderick J. Wood, British Columbia Personal Property Security Act Handbook, 4th ed (Scarborough, Ontario: Carswell, 1998) at lvii [PPSA Handbook].
- [35] The PPSA defines three sub-categories of "goods" for the purpose of the statute: consumer goods, equipment, and inventory. Goods are categorized based on their use by the debtor, rather than their inherent characteristics. "Consumer goods" are defined in s. 1 of the PPSA as:
- goods that are used or acquired for use primarily for personal, family or household purposes
- [36] Subsection 1(4) of the PPSA provides that, unless otherwise stated in the statute, a determination of whether goods are consumer goods, inventory, or equipment must be made as of the time the security interest in the goods attaches.

- [37] In order for a security interest to come into existence, there must be a valid and enforceable contract between the secured party and the debtor. Pursuant to s. 9 of the PPSA a security agreement is effective according to its terms. In order for a security interest to be enforceable against a third party, it must meet the writing requirements in s. 10.
- [38] Pursuant to s. 12(1)(c) of the PPSA, a security interest does not attach until it becomes enforceable under s. 10, except for the purpose of enforcing rights between the parties. A security interest is perfected when it has attached and all steps required for perfection have been completed: PPSA, s. 19. A security interest in collateral may be perfected by the registration of a financing statement which contains the requisite collateral description: PPSA, s. 25. In general, attachment will ensure that the security interest is enforceable against the debtor, while perfection is important to establishing priority in the collateral where there is competition from other creditors: PPSA Handbook at 145.
- [39] Section 42 of the PPSA establishes a personal property registry (the "Registry") for the purpose of registrations under the Act, including the registration of financing statements. The Registry is the mechanism for providing public disclosure, by registration, of the existence or potential existence of security interests that fall within the scope of the PPSA: PPSA Handbook at 307.
- [40] Part 5 of the PPSA sets out the rights and remedies of a secured creditor on default. Generally speaking, if a debtor is in default under a security agreement, the remedies of the secured party include those provided for in the security agreement and the rights and remedies provided for in Part 5: PPSA, s. 56(2). Pursuant to s. 58(2), the rights of the secured party on default include the right to take possession of the collateral. If the debtor in default under a security agreement that provides for a security interest in consumer goods has paid at least two-thirds of the total amount of the obligation secured, the secured party must not seize consumer goods: PPSA, s. 58(3).
- [41] Section 61 ("Voluntary foreclosure") provides a process by which a secured creditor may retain the collateral in satisfaction of the obligation secured by it.
- [42] Section 67 of the PPSA sets out the rights and remedies of secured creditors where a debtor is in default under a security agreement that provides for a security interest in consumer goods. Subsections 67(1) and (2) provide:
- 67 (1) Subject to section 58 (3), if a debtor is in default under a security agreement that provides for a security interest in consumer goods, the secured party may
- (a) exercise his or her rights as provided in section 58,
 - (b) proceed as provided in section 61,
 - (c) accept surrender of the goods by the debtor, or

- (d) subject to the terms of the agreement, bring action to recover a judgment or take proceedings to obtain a certificate under the Creditor Assistance Act against the debtor.
- (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, other than a mortgage on land executed before July 1, 1973, and
 - (b) the unperformed obligations of a guarantor of, or indemnitor respecting the obligations, are extinguished.

[43] Subsection 67(3) of the PPSA provides that if the secured party proceeds under subsections (1)(a) or (c) with respect to both consumer goods and other collateral, and the obligations of the debtor are extinguished under s. 67(2), the obligations are revived if the secured party returns all the consumer goods to the debtor within 20 days. Subsection 67(3) was apparently intended to protect the secured party in circumstances where the collateral under a security agreement could capture both consumer and non-consumer goods, and the secured creditor inadvertently seizes consumer goods along with non-consumer goods: PPSA Handbook at 429-30.

[44] Subsection 67(9) of the PPSA, as noted, provides that a debtor may lose the rights and remedies in ss. 67(1)-(7) where the goods have been substantially damaged or allowed to deteriorate through the debtor's wilful or reckless acts or neglect.

Discussion

Does s. 67 of the PPSA apply?

- [45] The parties were unable to refer me to any cases which have addressed the question of the operation of s. 67 where a debtor asserts, only after default, that the collateral is consumer goods despite a contrary description in the security agreement. The resolution of the dispute largely turns on the wording of the PPSA and 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?

- [47] The relevant principles of contractual interpretation are reviewed in the Supreme Court of Canada's judgment in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 56-61 [Sattva]. As explained in *Sattva*, the interpretation of a written contract must be grounded in the text and read in light of the entire contract. While surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of the agreement. Surrounding circumstances consist only of objective evidence of the background facts at the time of the execution of the contract; that is, what the parties mutually knew or ought to have known as of the date of the contract. The subjective state of mind or intent of each party is not a relevant consideration: *Sattva* at para. 59; *Berthin v. Berthin*, 2016 BCCA 104 at para. 46 [Berthin].
- [48] Before turning to consideration of the wording and context of the Security Agreement, it is important to be clear about arguments that the defendants are not advancing. While the defendants' evidence emphasizes the relative power imbalance between the parties, the defendants have not pleaded--and do not argue--that the Security Agreement is an unconscionable transaction, or otherwise void on public policy grounds. The defendants do not say that they lacked capacity to enter into the Security Agreement, or that its terms are too uncertain to be enforceable. The defendants appear to concede that the Security Agreement is binding and enforceable, with the proviso that Merchant's remedies for the defendants' default under the Agreement are said to be limited by s. 67 of the PPSA.
- [49] The context for the parties' contractual arrangement are set out in the recitals to the Security Agreement, which provide as follows:

WHEREAS

1. The Debtor has entered into a lease agreement with the Secured Party for certain manufacturing equipment, dated 10/1/18 and Lease #10210 (the "Lease Agreement");
2. It is a condition of the Lease Agreement that the Debtor provide additional and continuing security for the payment and performance of its obligations under the Lease Agreement; and
3. The Debtor has agreed to provide additional and continuing security in the goods described in Schedule "A" attached hereto

[Emphasis added.]

- [50] Schedule "A" lists, as "Collateral", the Mobile Home, Logging Trailer, and Motorcycle.
- [51] Clause 1 of the Security Agreement provides as follows in relation to the creation of a security interest:

As a general and continuing security for the payment of indebtedness (as defined below), including any ultimate unpaid balance thereof, owed to the Secured Party and to secure the performance of the obligation under this security agreement or any Related Documents (as defined below), the Debtor hereby grants to the Secured Party a security interest in the Collateral and any and all proceeds therefrom, whether now owned or hereafter acquired directly or indirectly by the Debtor, whether now existing or hereafter arising.

- [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.
- [54] The defendants say that they did not understand that the Collateral could not consist of consumer goods. Even accepting that the defendants did not appreciate the significance of the exclusion of consumer goods from the Security Agreement, the defendants' subjective beliefs do not change the meaning of the contract. While surrounding circumstances will be considered in interpreting the terms of a contract, the relevant circumstances are limited to objective evidence of background facts known to both parties; evidence of the subjective intentions of the parties is not relevant: *Sattva* at paras. 58-59; *Berthin* at para. 46.
- [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*:
- [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.
- [58] The defendants argue that the present scenario is what was contemplated by the legislature in enacting s. 67(3) of the PPSA. Under this provision, if a creditor--such as Merchant--unwittingly seizes consumer goods, they may return the goods to the debtor within 20 days and thereby avoid the extinguishment of the debtor's unperformed obligations. I do not agree that the legislature enacted s. 67(3) with the present scenario in mind.
- [59] First, s. 67(3) does not provide a remedy to Merchant for what has transpired here. This section applies when a creditor seizes, or accepts surrender of, goods that include both consumer goods and other collateral. On the defendants' theory, Merchant has only seized consumer goods (i.e., the Motorcycle). Further, the 20-day period that a secured creditor has under s. 67(3) to return consumer goods had expired by the time Merchant was made aware of the defendants' position that the Motorcycle was consumer goods.
- [60] Second, the defendants' proposed interpretation of s. 67(3) of the PPSA presumes that the legislature anticipated, and intended to provide a post-default remedy for, the mischaracterization of collateral in a security agreement. Such an interpretation is contrary to the statutory objectives of transparency and commercial certainty. In my view, it is more plausible that the legislature intended s. 67(3) to apply where the security agreement, properly interpreted, provides for a security interest in both consumer goods and other goods. The authors of the PPSA Handbook offer the following example at 429-430:

For example, a security agreement may provide for a security interest in all of the present and after-acquired personal property of a person who is the sole proprietor of a small business. The intention of the parties is to provide for a security interest in the business assets of the debtor, but the wording of the agreement is such as to extend the security interest to consumer goods owned by the debtor. Section 67(2.1) [now s. 67(3)] was apparently designed to protect a secured party in this situation when he inadvertently seizes or accepts surrender of consumer goods along with the non-consumer goods of the debtor.

[Footnotes omitted; emphasis added.]

- [61] The present case, by contrast, does not involve wording in an agreement that is broad enough to capture consumer goods, but rather an agreement that expressly excludes consumer goods. In this summary trial, the defendants can only succeed by overriding the terms of the Security Agreement. For the reasons stated, I do not believe the outcome sought by the defendants is consistent with either the terms of the Security Agreement or the provisions of the PPSA.
- [62] In light of my conclusion that s. 67 of the PPSA does not apply to limit Merchant's rights and remedies on the defendants' default, it is unnecessary to address Merchant's arguments based on s. 67(9).
- [63] In the result, Merchant is entitled to judgment in this action against the defendants. The only remaining question is whether Merchant's remedies as against Inez should be limited as a result of the fact that an initialled version of page 3 of the Rental Agreement with Inez cannot be located.

Remedies against Inez

- [64] As I understand Inez's argument, she does not say that the missing page 3 of the Security Agreement should result in a dismissal of the action against her. Rather, she says that without an initialled copy of page 3, the Court cannot find that Inez agreed that Merchant had the remedies on default that are set out in clause 9 of the Rental Agreement. In particular, the provision in clause 9 for liquidated damages, indemnity costs, and interest are all found on page 3.
- [65] There is no question that Inez signed the Rental Agreement on the first page. In so doing, she acknowledged that:
- YOU have read, understand, and accept this Agreement, including Terms and Conditions on page 2 and 3 hereof...
- [66] The Rental Agreement clearly included a page 3. The reasons why the version with Inez's signature is not included in the record are largely unexplained. Inez does not say she did not see or initial page 3; rather, she says she cannot recall having done so.
- [67] In my view, any uncertainty as to whether the terms and conditions on page 3 of the Rental Agreement bind Inez is answered by her response to Merchant's notice to admit. In response to the notice to admit, "the defendants" admitted that they entered the Rental Agreement, and also admitted the authenticity of a three-page Rental Agreement that was appended to the notice to admit. Those admissions are, in my view, sufficient to establish that the contract between Inez and Merchant included the terms and conditions list on page 3.
- [68] Accordingly, Merchant's remedies as against Inez include the remedies on default that are listed in clause 9 of the Rental Agreement.

CONCLUSION/ORDERS

[69] For the foregoing reasons, I grant the following declarations:

- a) the Security Agreement is not "a security agreement that provides for a security interest in consumer goods", within the meaning of s. 67(1) of the PPSA; and
- b) Merchant's rights and remedies are not limited by s. 67 of the PPSA.

[70] I therefore grant the following orders:

- a) the defendants are jointly and severally liable to Merchant for the arrears owing under the Rental Agreement, plus liquidated damages; and
- b) the defendants are also jointly and severally liable for costs and interest, as specified in the Rental Agreement.

"Horsman J."

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