

When Are Consumer Goods Not Consumer Goods? When The Lessee Tells You They Are Not

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Finance companies are always concerned whether the goods they are financing or the other collateral they are taking as security could be determined to be “consumer goods” under the law. Consumer goods are those that are used or acquired primarily for personal, family or household purposes. If goods are found to be consumer goods, then obligors gain certain advantages under the applicable provincial/territorial Personal Property Security Act that are not afforded to corporate obligors, including: (i) the “two thirds rule” in the province of Ontario, where the finance company must go to court in respect of the financed assets if more than two thirds of the underlying obligation has been repaid by the obligor; and (ii) the British Columbia seize or sue rules where the finance company must make an election of either seizing the financed assets as its entire recovery or not seizing such financed assets and suing the obligor for the amount owing.

The recent British Columbia Supreme Court decision in *Merchant Growth Asset Funding Ltd. v. Pyke* (2022 Carswell BC 1093, 2002 BCSC 696) provides some guidance. The facts in the case are straight forward. Co-obligors entered into a rental agreement with Merchant Growth Asset Funding Ltd. (Merchant) for a logging truck and as collateral security for the rental obligations, one of the co-obligors entered into a security agreement which granted a security interest in a motorcycle. The security agreement specifically provided that the collateral did not constitute consumer goods. Payments under the rental agreement were defaulted upon and Merchant seized the motorcycle and commenced an action. The obligor that provided the security over the motorcycle claimed that: (i) the motorcycle was in fact a consumer good notwithstanding that the terms of the security agreement set out that the collateral granted to Merchant (including the motorcycle) was not consumer goods; (ii) Merchant, as the more sophisticated party, should have made sufficient inquiries to satisfy itself that the motorcycle was not, in fact, a consumer good based on its nature and use; and (iii) Merchant, by electing to seize the motorcycle, was precluded from bringing an action for further recovery and the obligations under the rental agreement were satisfied.

The issue turned on whether the security agreement provided for a security interest in consumer goods. The Court held the terms of the security agreement, which stated that “the term ‘goods’ shall never include ‘consumer goods’ of the Debtor as that term is defined in the PPSA,” to be determinative. The Court acknowledged that the obligor may not have appreciated the significance of the exclusion of consumer goods from the security agreement, but that the obligor’s subjective beliefs did not change the meaning of the contract. The Court noted that the subjective uses of the goods were not known and could not have been known to Merchant at the time of the execution of the security agreement and a finding that such goods were consumer goods would result in significant unfairness to Merchant. In summary, the Court ruled

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that the words of the contract would determine if a security interest was granted in consumer goods or not. The Court ruled in favour of Merchant and ordered that arrears under the rental agreement be paid by the co-obligors, plus liquidated damages, costs and interest.

The determination that finance companies can rely on the terms of their agreements in respect of the consumer goods analysis is clearly helpful as it provides some certainty to the lending relationship and does not impose obligations on finance companies to conduct inquiries into the use of particular goods. Finance companies may wish to have their agreements reviewed to determine if the contractual terms therein are sufficient to exclude consumer goods. Caution may be required in interpreting this case too broadly, as its focus was under the *Personal Property Security Act* (British Columbia) and it is uncertain whether a case brought under consumer protection legislation would have a similar result.

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