Citation: KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.
2000 BCCA 458

Date: 20000818

Docket: CA023765
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

KPMG, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF THE BANKRUPT, GREG ALLAN ELLINGSEN

APPLICANT
(RESPONDENT)

AND:

HALLMARK FORD SALES LTD.

RESPONDENT
(APPELLANT)

Before: The Honourable Chief Justice Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Donald

J.J. Casey — Counsel for the Appellant

S.A. Wilson — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
8 March 2000

Place and Date of Judgment: Vancouver, British Columbia
18 August 2000

Majority Reasons by:
The Honourable Mr. Justice Donald (pp. 1-24, paras. 1-41)

Dissenting Reasons by:
The Honourable Chief Justice McEachern (pp. 25-29, paras. 42-57)

Majority Reasons by:
The Honourable Mr. Justice Lambert (pp. 30-43, paras. 58-81)

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] Hallmark Ford Sales Ltd. agreed to sell a truck to Greg Allan Ellingsen and let him take the truck to his logging operations without paying for it. Hallmark transferred ownership to Ellingsen on the expectation that the deal would be financed by a bank. Ellingsen would cover the balance by a trade-in.

[2] Various delays occurred in the financing arrangements. Three months after taking the truck Ellingsen went into bankruptcy. The Trustee now has the truck (or its sale proceeds) and asserts that it is an asset forming part of the general estate of the bankrupt.

[3] The Trustee brought a motion in the Supreme Court of British Columbia in bankruptcy for an order that the truck is vested in the Trustee free and clear of any claims by Hallmark and for an order that Hallmark discharge a registration against the truck in the Personal Property Registry. The latter refers to a registration filed in desperation by Hallmark after the bankruptcy occurred.

[4] On 29 September 1997 the motion was granted on the terms sought by the Trustee. Hallmark appeals from this decision on several grounds, including the contention that the chambers

judge erred in failing to find a remedial constructive trust in its favour. As I would allow the appeal on that ground, I do not propose to discuss the other grounds of appeal. In my judgment, a constructive trust is necessary to prevent an unjust enrichment.

[5] The deal in question took place on 2 January 1997 at Hallmark's lot in Surrey. Hallmark agreed to take back a used truck it had earlier sold to Ellingsen under an incorrect declaration that the truck had not been in an accident involving more than $2,000 damage. In arranging the sale of the new truck Hallmark ascribed a trade-in value to the old truck as though it had not been previously damaged. To complete the purchase Ellingsen needed financing to pay out the outstanding balance of approximately $27,500 due under a conditional sales contract in favour of the Bank of Nova Scotia and to cover the balance of the purchase price of the new truck, $12,105.11.

[6] Ellingsen completed the required credit application, and advised Johann Halldorson, the salesman, that if the credit application was not approved, his own bank in Penticton, the Bank of Nova Scotia, would be willing to finance the deal. He said he needed to conclude the transaction quickly as he had to return to work up north in the bush. The credit

application was left with Randy Jenks, the business manager of Hallmark.

[7] Jenks attempted to obtain financing on behalf of Ellingsen for the transaction. He initially called the Bank of Nova Scotia and determined the amount required to pay out the conditional sales contract and then called the Hongkong Bank to seek credit approval for the required amount of $39,641.10. He also spoke to the manager of Ellingsen's bank in Penticton, who indicated that he was prepared to work with Hallmark on the deal, but he wanted to see Ellingsen and receive the deal information first.

[8] Approximately three hours later that same day, Ellingsen returned to the dealership and was told by Jenks that financing had not yet been obtained. Ellingsen put pressure on Hallmark to complete the transaction as he was eager to leave for his job in the north. Jenks deposes that as a result of the pressure and based on the expectation that approval of financing would be forthcoming, he agreed to permit the delivery of the new truck to Ellingsen and to transfer the new truck into his name. Before doing so, Jenks had Ellingsen sign a Motor Vehicle Purchase Agreement dated 2 January, 1997; a Hongkong Bank Conditional Sales Agreement bearing the same date; a blank Scotia Bank Buyer's Statement

and two blank Scotia Bank Conditional Sales Agreements; a blank Motor Vehicle Purchase Agreement; and a blank Credit Application for the Hongkong Bank of Canada. He also had Ellingsen sign a transfer form transferring the old truck to Hallmark which Jenks intended to process upon completion of the financing for the new truck. Jenks asked Ellingsen to sign the above noted documents in blank in case they were needed as part of the financing package. Hallmark executed the transfer but none of the other documents.

[9] Jenks then arranged for Ellingsen's insurance and Ellingsen left the dealership with the new truck. Jenks claims that the sale was conditional upon the financing being obtained, and says that although he never expressed to Ellingsen what would happen if the financing was not obtained, it was clear that the transaction was subject to the obtaining of financing. He maintains that it was always understood that Hallmark had not agreed to finance the transaction and that it was obvious that in the event financing approval was not obtained, Ellingsen would be required to return the new truck.

[10] The Motor Vehicle Purchase Agreement dated 2 January, 1997 signed by Ellingsen stipulated that the transaction was "subject to credit approval". Under "Purchaser Declarations" it said:

> Purchaser understands that this agreement does not become binding on the parties hereto until accepted and executed by a duly authorized official of the Dealer. Salespersons do not have this authority. Deposits, partial payments and down payments are non-refundable.

[11] Ellingsen denies that it was ever expressed to him that the sale was conditional, and agrees that the issue of what would happen if the financing was declined was never discussed, as he had not anticipated there would be a problem.

[12] On 8 January 1997 the Hongkong Bank advised Hallmark that it would finance the transaction provided Ellingsen made a downpayment of $5,000. Jenks called Ellingsen and told him about the approval subject to a downpayment, and Ellingsen advised that he could not make that payment until he arrived from his work up north. Jenks responded that this would be acceptable, and that he needed Ellingsen to sign a new Hongkong Bank Conditional Sales Agreement showing the downpayment. Ellingsen agreed to sign and return the document on receipt. Jenks sent the documents out, and when he did not receive them back, he made numerous unsuccessful attempts to reach Ellingsen.

[13] On 15 March 1997 Ellingsen called Hallmark to ask that it "pay out the lien" on the old truck, and if it did not, Hallmark would have to come and get the new truck. Halldorson

told Ellingsen that Jenks needed the contract, referring to the $5,000 downpayment, signed and returned. Approximately one week later, Ellingsen spoke to Jenks, who informed him again that Hallmark could not pay out the lien on the old truck until the financing contract was signed and returned, and that the old truck had been sitting on Hallmark's lot since January and that Hallmark could not process the transfer until the financing on the new truck had been concluded. Ellingsen told Jenks, as he had told Halldorson earlier, that he would return from the bush in April and he would deal with the paperwork then.

[14] On 11 April 1997 Jenks received a call from an employee of the Bank of Nova Scotia about payment of the lien on the old truck. Jenks informed her that he could not pay out the amount owed until he had received the financing documentation on the new truck, and that if he had not received it within two weeks, he was going to try to find the new truck and bring it back to Hallmark. On the same day, Ellingsen filed an assignment into bankruptcy. After the bankruptcy, the Bank of Nova Scotia seized the old truck from the Hallmark lot pursuant to its conditional sales contract which had been registered at the Personal Property Registry.

[15] Shortly after the assignment into bankruptcy, a representative of the Trustee advised Hallmark that Hallmark had no claim on the new truck as a Financing Statement under the ***Personal Property Security Act*** had not been filed. Without obtaining legal advice, Hallmark then filed a financing statement in the Personal Property Registry.

[16] In the court below Hallmark framed its argument on the law of trust in the manner described by the chambers judge:

> [11] Hallmark's position is that there was never a concluded sale of the new truck to Ellingsen, and that beneficial ownership of the new truck did not ever pass. Hallmark says that Ellingsen held only bare legal title, and was a trustee of the beneficial interest in the new truck in favour of Hallmark. Hallmark further says that there was no security interest which existed and could be registered in this case given the nature of the transaction, and consequently, the PPSA has no application. Finally, Hallmark says that the trustee has no interest in the new truck, given the express provisions of the BIA [*Bankruptcy and Insolvency Act*], and particularly s. 67 of the same, which provides that the property of the bankrupt shall not comprise property held by a bankrupt in trust for another.

[17] The chambers judge concluded that the transaction was a sale rather than a creation of a trust. She held that the unpaid sales price gave rise to a security interest which could have been registered and had it been registered it would

have protected Hallmark from the bankruptcy. Her reasoning went as follows:

> [12] I cannot accept that the nature of the transaction between Hallmark and Ellingsen in January of 1997 was the creation of a trust. On the facts, Ellingsen must have considered that he had purchased, and that he owned, the new truck, even though the purchase price had not as of yet been paid. It is inconceivable that, as Hallmark now argues, Ellingsen could have driven the new truck in his work up north for more than three months, and then simply returned the new truck to Hallmark, or that he could have resisted an action by Hallmark for the purchase price of the new truck, on the basis that no deal had been made between the parties.
>
> [13] Further, Hallmark did not conduct itself in a way that would be consistent with a trust relationship, with mere legal title to the new truck having passed. Hallmark was aware, within weeks of the transaction, that there was a problem with financing. Hallmark made no effort to obtain possession of the truck, or to even demand return of the truck. The only interest Hallmark had at that time was to receive payment for the truck from someone, whether it be Ellingsen, or a finance company, or a combination of the two.
>
> [14] I have concluded, on these facts, that the nature of the transaction was a sale, with payment anticipated and agreed by the parties to be made shortly after the transfer of title and possession. The transaction created what was in substance a security interest, as that term is defined in s. 1 and s. 2 of the PPSA, on the part of Hallmark, which Hallmark could, and given what happened should, have registered in the Personal Property Registry. Given that Hallmark did not register, and thereby perfect, its security interest prior to the date of bankruptcy, I find that the new truck forms part of the bankrupt's estate, and is available for distribution to the estate's creditors.

[18] With respect, I do not think the evidence reasonably supports the finding that this was a sale and that Hallmark retained a security interest after it released the truck. The deal was subject to financing by a third party which never materialized. There was no enforceable instrument on which Hallmark could sue Ellingsen for the purchase price. As Hallmark did not sign the Motor Vehicle Purchase Agreement it was never brought into effect. Ellingsen did not agree to pay cash for the new truck and at no time did Hallmark agree to finance the deal itself. The documents make it plain that credit was to be approved by a lending institution.

[19] Hallmark imprudently transferred ownership registration to Ellingsen and therein lies the problem. On the surface the transfer implies that a concluded contract of purchase and sale took place and that the relationship between the parties was one of debtor and creditor. But on a full appreciation of all the circumstances I think the only reasonable conclusion is that the proposed sale never occurred because a condition precedent, the proposed financing, was not fulfilled. The transfer facilitated acquisition of insurance and moved the transaction along but it did not complete it.

[20] The Trustee argues that if the term "subject to credit approval" was a condition precedent Hallmark waived it by transferring ownership registration. With respect, I do not think that conforms to the fact that the financing continued to be a problem after the transfer. I note, in particular, that the Hongkong Bank was not prepared to finance the deal as written and insisted that Ellingsen put $5,000 down.

[21] The Trustee further argues that the Motor Vehicle Purchase Agreement and the Hongkong Bank Conditional Sales Agreement are structured so that the financing obligation is primarily between the seller and the purchaser with the bank taking the paper as assignee. This is said to establish a debtor-creditor relationship independent of the bank's involvement. While it is true that the full cost of borrowing and the payment schedule are set out in the sales agreement and that the conditional sales agreement is between the seller and purchaser with the bank as assignee, the fact remains that neither agreement was executed. They were not executed because financing was not concluded and so we return to the position that Ellingsen had a truck that he had no right to keep when he was unable to meet the conditions of financing.

[22] The more difficult area for analysis in this case is the relationship between the ***Personal Property Security Act*** (***PPSA***)

and the law of remedial constructive trusts. Hallmark's case for a constructive trust can be broken down this way:

1. The contract of sale was ineffective through non-fulfillment of a condition precedent.

2. Hallmark is entitled to a proprietary remedy (return of the truck), on meeting three conditions:

   (a) no transaction effective to vest property rights has taken place;

   (b) it must be possible to trace the property;

   (c) against the actual holder of the property it is unjust that the claimant not be allowed to re-take it: G.H.L. Fridman and J.G. McLeod, ***Restitution*** (Toronto: Carswell, 1982) at 568-9.

3. Hallmark meets all three conditions: the contract was ineffective because no financing was arranged; the truck was still in Ellingsen's possession at time of bankruptcy; and Hallmark did not extend credit to Ellingsen. Not having extended credit, Hallmark occupies a different position from that of the general creditors of the bankrupt estate who did extend credit. The creditors would unfairly enjoy a

windfall if the truck formed part of the assets available to them: P.D. Maddaugh and J.D. McCamus ***The Law of Restitution*** (Aurora: Canada Law Book, 1990) at 137.

4. Section 67(1)(a) of the ***Bankruptcy and Insolvency Act*** (***BIA***) provides that the property of the bankrupt should not comprise property held by a bankrupt in trust for another:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
> *(a)* property held by the bankrupt in trust for any other person.

5. A trust in the form of a constructive trust should be imposed to prevent an unjust enrichment with the order taking effect just prior to the bankruptcy so that s. 67(1)(a) of the ***BIA*** is engaged.

6. Since the trust is constructed as a remedy by the court on the doctrine of unjust enrichment it falls within an exclusion provided in s. 4(a) of the ***PPSA*** as an "interest given by a rule of law". Section 4(a) of the ***PPSA*** reads:

> Except as otherwise provided in this Act, this Act does not apply to the following:
>
> (a) a lien, charge or other interest given by a rule of law or by an enactment unless the enactment

> contains an express provision that this Act applies;
>
> [Emphasis added]

[23] Hallmark must find an exclusion from the ***PPSA*** because if its interest was "a security interest" within the meaning of the ***PPSA*** (such interest can include a "trust" if the trust secures payment or performance of an obligation: (s. 2(1)(b)), then unless the interest is perfected by registration it is not effective against the trustee in bankruptcy: s. 20(b)(*i*). Section 2(1) of the ***PPSA*** reads:

> **2** (1) Subject to section 4, this Act applies
>
> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation.
>
> [Emphasis added]

Section 20(b)(*i*) reads*:*

> **20** A security interest
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, or ...

[24] "Security Interest" is defined in s. 1 of the ***PPSA*** as:

> **"security interest"** means
> (a) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and ...
>
> [Emphasis added]

[25] The Trustee submits that this transaction comes within the ***PPSA*** and that the interest held by Hallmark is an unperfected interest and thereby ineffective against the Trustee under s. 20(b)(*i*). The argument is founded on two conditions on the reverse side of the Motor Vehicle Purchase Agreement which are said to reserve rights to Hallmark in the event of a default by the purchaser. They are conditions 3(a) and 7(a):

> 3. If any cheque or other bill of exchange tendered as payment of any amount due as set out on the reverse side hereof is dishonoured, such cheque or bill of exchange shall be deemed not to be payment and shall be null and void and of no effect. If any such dishonoured cheque or bill of exchange forms all or part of the amount due by the Purchaser to the Dealer, then:
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> (a) the Purchaser agrees that the Dealer shall have immediate possession of the motor vehicle as if the Dealer had never parted

> with possession and the Dealer may exercise all rights to possession;
>
> .....
>
> 7. Subject to paragraph 3 of this Agreement, if the Purchaser defaults in the payment of any amount due hereby or defaults in the performance or observance of any other matter or thing required to be observed or performed by the Purchaser or if any proceeding is commenced by or against the Purchaser under any bankruptcy or insolvency laws, then
>
> (a) the entire amount due by the Purchaser to the Dealer shall become immediately due and payable at the option of the Dealer.

[26] The difficulty with this argument is that it is premised on a concluded contract which is absent here. Hallmark's right to recover the truck does not arise, and could not arise, on the conditions quoted above; Hallmark's remedy lies outside the document and is found in the power of the court to provide a restitutionary remedy.

[27] The Trustee submits, in the alternative, that any equitable interest supporting a trust in the circumstances amounts to a security interest for the purposes of the ***PPSA***, in the sense that that interest only existed as a method for securing payment of the truck.

[28] I think this argument goes to the kind of trust, implied or resulting, for which Hallmark argued below and which formed part of Hallmark's alternative submissions before us. As I apprehend the position, an implied or resulting trust arises

from an understanding that Ellingsen would hold the truck in trust for Hallmark until financing was completed. But I am not concerned with these other trusts having been persuaded that the appropriate remedy is the constructive trust. I do not know how it could be said that a constructive trust secures a payment or the performance of an obligation; rather its purpose is to prevent an unjust outcome. The chambers judge inquired whether the behaviour of the parties "was consistent with a trust relationship". That can only refer to an implied or a resulting trust and is not relevant to the question whether a constructive trust should be imposed.

[29] The final point raised by the Trustee in relation to the ***PPSA*** is that s. 20(b)(*i*) provides a "juristic reason" for the deprivation of Hallmark and the corresponding enrichment of the general creditors of the estate. This refers to the classic three-part formula for determining unjust enrichment. McLachlin J. (now C.J.C.) put it this way in ***Peter v. Beblow,*** [1993] 1 S.C.R. 980 at 987:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

[30] If Hallmark's interest is a security interest the consequences of not registering the interest are prescribed by s. 20(b)(*i*) of the ***PPSA***. The collateral goes into the general estate by operation of statute and hence a juristic reason exists for the enrichment. It is necessary to repeat, in order to deal with this point, that in my opinion Hallmark's interest was not a security interest within the meaning of the ***Act***. There was nothing to register. The truck was not collateral to any enforceable contract. The substance of the transaction, not its form, must determine whether a security interest was created: see ***Skybridge Holdings Inc. (Trustee of) v. British Columbia (Registrar of Travel Services)*** (1999), 173 D.L.R. (4th) 333, 68 B.C.L.R. (3d) 209 (C.A.). It follows that s. 20(b)(*i*) does not provide a juristic reason in answer to a claim of unjust enrichment.

[31] Is this an appropriate case for a remedial constructive trust? Two issues arise for discussion. First, why should equity intervene in a commercial transaction where Hallmark could have protected itself contractually? Second, is it appropriate to use a constructive trust to alter the priorities amongst creditors in a bankruptcy?

[32] On the first question, it is useful to refer to an article by D.M. Paciocco: "The Remedial Constructive Trust: A

Principled Basis for Priorities Over Creditors" (1989) 68 Canadian Bar Review 315. Professor Paciocco distinguishes between the application of the constructive trust in family and commercial settings, arguing that the courts should be cautious in ordering specific relief in commercial cases. The constructive trust was adopted in the matrimonial context as a means of explaining the specific relief that courts were already awarding under the awkward resulting trust analysis. There is no parallel in the commercial context. Unlike in the spousal context, in commercial contexts parties are expected to protect their interests contractually. In addition, there are the further considerations of security of title as tied to efficiency of commerce and the protection of third parties from undisclosed charges. He concludes at 351:

> In commercial cases proprietary relief will not be warranted where the plaintiff parted with the property or money which represents the defendant's enrichment, while accepting the role of a general creditor. This will occur where there is a valid contract between the parties which accounts for the defendant's enrichment, or a contract which has been avoided where the condition which rendered the contract ineffective does not vitiate the voluntariness of the plaintiff's decision to assume the role of a general creditor…

[33] In her majority reasons in ***Peter v. Beblow***, McLachlin J. refused to distinguish between family and commercial cases. She said at 996-97:

> I doubt the wisdom of dividing unjust enrichment cases into two categories – commercial and family – for the purpose of determining whether a constructive trust lies. … In short, the concern for clarity and doctrinal integrity with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

[34] The more specific answer to the learned commentator's proposition as quoted above is that in the present case Hallmark never intended to grant credit to Ellingsen and so there is no justification for placing Hallmark in a class of general creditors.

[35] As I have said, Hallmark was imprudent in allowing the truck to leave the lot as it did, but it accepted the risk in the interest of good customer relations that it may have to take back a used truck if financing fell through, and in that event it would not be able to recover the depreciation. Ellingsen induced Hallmark to believe that he would be able to meet the Bank's cash requirements for the loan and so Hallmark waited the three months before bankruptcy occurred. Ellingsen knew he had no right to keep the truck and said as much to Jenks, the business manager of Hallmark, when he suggested during the telephone conversation of 15 March 1997 that Hallmark would have to pick up the truck.

[36] On the second question, that dealing with the priority of creditors, I wish to refer to the Ontario Court of Appeal decision in ***Barnabe v. Touhey*** (1995), 26 O.R. (3d) 477, which reversed a ruling that a court may impose a constructive trust for the very purpose of securing priority for some claimants over other creditors. At 479 the Court said:

> While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[37] The Court of Appeal went on to determine that there was no unjust enrichment on the facts of the case so the above remarks are probably *obiter dicta*. Nevertheless, the case serves as a useful caution that in weighing the equities other creditors may have to be considered. In my judgment, for the reasons I have given, Hallmark does not stand on the same footing as the general creditors and as a result I do not think the remedy I would impose unfairly deprives other creditors of an asset to which they have any reasonable entitlement.

[38] I turn to consider the issue of timing: can the constructive trust be imposed prior to the bankruptcy? In order for the remedy to have any practical effect, it must be imposed before the bankruptcy, otherwise s. 67(1)(a) of the ***BIA*** could not operate. Support for the proposed timing can be found in ***Rawluk v. Rawluk***, [1990] S.C.R. 70 at 91:

> It is important in this respect to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. As Professors Oosterhoff and Gillese state, "the date at which a constructive trust arises…is now generally accepted to be the date upon which a duty to make restitution occurs" (Oosterhoff and Gillese, *A.H. Oosterhoff: Text, Commentary and Cases on Trusts* (3rd ed. 1987), at p. 579). Professor Scott has stated in *Law of Trusts*, *op. cit.*, at pp. 323-4, that:
>
> > The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. … It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.

[39] McLachlin J., in giving the minority judgment, agreed at 103 that the property interest, if conferred, may extend back to the point when it arose.

> That property interest, it appears, may be taken as extending back to the date when the trust was "earned" or perfected. In *Hussey v. Palmer*, in a passage referred to by Dickson J. in *Rathwell v. Rathwell*…Lord Denning postulated that the interest may arise at the time of declaration or from the outset, as the case may require. Scott views the trust as being in force from the outset, with a discretion in the court as to whether it should be enforced: Scott op. cit., §462.2. Another American scholar regards it as coming into existence only on an order being made, but having retrospective operation: Bogert, The Law of Trusts and Trustees, (2nd ed. 1979), §472.

[40] Hallmark was entitled to the return of the truck when it became certain that the condition precedent could not be fulfilled. This point would have been reached, at the latest, when it became obvious that Ellingsen was stalling Hallmark for time without any real prospect of being able to put $5,000 down on the truck. In these circumstances it would be appropriate to make the order for a remedial constructive trust effective on and after 15 March 1997 when Ellingsen told Hallmark that it would have to come and get the new truck. Accordingly, the remedial constructive trust would have been in effect on the date of Ellingsen's assignment in bankruptcy on 11 April 1997.

[41] For these reasons I would allow the appeal and impose a constructive trust on the truck in favour of Hallmark with effect from 15 March 1997. I understand that by agreement the

truck has been sold and the proceeds held by the Trustee pending the decision on this appeal. The restitutionary remedy I intend will be satisfied by payment of those proceeds plus costs.

"The Honourable Mr. Justice Donald"

Dissenting Reasons for Judgment of the Honourable Chief Justice McEachern:

[42] I have read the Reasons for Judgment of Mr. Justice Donald on this appeal. I regret that I am unable to agree with the conclusions he has reached. I am, however, content to accept the careful statement of the facts that he has prepared and I need not repeat what he has said in that regard.

[43] In my judgment, Mr. Ellingsen purchased the new truck from Hallmark by turning in his old truck, by assuring Hallmark that his bank would finance the purchase if the dealer's financing resources were not fruitful, by signing a Motor Vehicle Purchase Agreement setting out conditions of sale, by accepting registration of the new truck in his name and by taking possession of the new truck.

[44] The Purchase Agreement signed by Mr. Ellingsen provided that the purchase balance would be payable "…in 60 equal monthly installments of $709.05 commencing on the 18 day of Feb. '97 with a final balance of $709.05 to be paid on the 18 day of Jan. 2002…" (clause 8).

[45] It is true this Agreement to Purchase, a printed form, stated "SUBJECT TO CREDIT APPROVAL". The Agreement, however, also provided remedies for the repossession of the truck in

the event of non-payment, and Hallmark was at all times the unpaid vendor of the truck. Pending the completion of financing, the obligation of Mr. Ellingsen was to carry out the terms of the agreement. It is unthinkable that Mr. Ellingsen could retain the truck without completing the financing or that Hallmark would be without remedies. Either under the Agreement or at common law, Hallmark was entitled to be paid or to have the truck back. Hallmark, at least, waived the subject clause when it transferred title to Mr. Ellingsen. Mr. Ellingsen, in turn, must be taken to have waived the clause when he retained the truck without arranging the financing. However one analyzes this transaction, mutual obligations arose as soon as Mr. Ellingsen took possession of the truck.

[46] Accordingly, I have no doubt that this Purchase Agreement, or the mutual obligations undertaken by the parties, created a security interest in favour of Hallmark as defined in the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359 (the ***Act***). In fact, Hallmark registered it as such after Mr. Ellingsen had filed for bankruptcy and declared the new truck as a part of his estate at the time of his assignment in bankruptcy.

[47] Mr. Casey, in his able argument, conceded that he had to rely upon a trust analysis in order to escape the consequences of the ***Act***. Mr. Justice Donald has undertaken such an analysis and concludes that there was no completed sale, and that it would be an unjust enrichment to the estate if Hallmark were deprived of its property interest in the new truck. He relies in part on the classic definition of a constructive trust furnished by McLachlin J. (now C.J.C.) in ***Peter v. Beblow***, [1993] 1 S.C.R. 980 at 987:

> …An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment, (2) a corresponding deprivation, and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

[48] With respect, there are good juristic reasons for this enrichment (if such it is) in the provisions of the ***Act***, which is intended to provide the certainty that is so necessary in the commercial law. It is probably unnecessary to point out that the assertion of a constructive trust based on unjust enrichment could become commonplace, with unfortunate commercial consequences, if such a remedy is made available upon a failure to make the necessary filings under the ***Act***.

[49] Assuming for the moment that there was no completed purchase agreement in this case, which I do not accept, it

becomes necessary to analyze further the position of Hallmark to see whether its then rights would prevail against a trustee in bankruptcy. This requires a closer examination of the ***Act***.

[50] As already mentioned, there is no doubt Mr. Ellingsen agreed to purchase the truck and pay for it by trading in his old truck and by financing the balance at his own bank if necessary. On this basis, he took possession (and title) to the truck. There was no thought or discussion of a trust.

[51] What happened, obviously, was that Hallmark took a chance that the purchase price would be paid by or on behalf of Mr. Ellingsen, and Hallmark neglected to perfect its security interest by the appropriate filing until after the bankruptcy of Ellingsen.

[52] This is precisely the kind of case the Legislature had in mind when it enacted the ***Act***.

[53] A "security interest" under the ***Act*** means "an interest in goods … that secures payment or performance of an obligation…" At the very least, this transaction, even if characterized as a failed Purchase Agreement, entitled Hallmark to a return of the vehicle or to a debt and a corresponding obligation on Mr. Ellingsen to return the truck or pay for it. I need say no more about debt because such a debt would not prevail over a

trustee in bankruptcy. If Hallmark's entitlement was to a return of the vehicle, that interest could only be protected by an appropriate filing under the ***Act***.

[54] This is because, subject to section 4, the ***Act*** applies:

> …to every transaction that in substance creates a security interest, without regard to its form…" (section 2(1)(a)). (Emphasis added.)

[55] Under this definition the obligation to return the truck creates a security interest in Hallmark.

[56] Turning to s. 4, the ***Act*** does not apply to interests "given by a rule of law" which could include a constructive trust, although I have serious reservations about the introduction of such concepts into consumer transactions. However, I have already concluded that there are strong juristic reasons militating against the recognition of an unjust enrichment or a constructive trust in the circumstances of this case.

[57] For these reasons, whether or not the Purchase Agreement was a completed agreement, Hallmark must fail in its attempt to establish an unregistered interest in this vehicle that survives a bankruptcy. I would dismiss this appeal.

"The Honourable Chief Justice McEachern"

Concurring Reasons for Judgment of the Honourable Mr. Justice Lambert:

[58] I have had the advantage of reading, in draft form, the reasons of Mr. Justice Donald and the reasons of Chief Justice McEachern. I agree with Mr. Justice Donald. But Chief Justice McEachern has expressed concerns about the integrity of the ***Personal Property Security Act*** and about the potential frustration of the legislative intention underlying that Act. Accordingly, I consider that I should indicate why I do not share those concerns in the circumstances of this case. To the extent that I repeat what has been said by Mr. Justice Donald, I do so only to emphasize that in my opinion the integrity of the ***Personal Property Security Act*** remains unimpaired by the decision in this case.

The Scholarly Writing

[59] I have been much assisted in my consideration of this appeal by the insights contained in David M. Paciocco, The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors (1989), 68 Can.Bar Rev. 315; Leonard Rotman, Deconstructing the Constructive Trust (1999), 37 (1) Alberta Law Review 133; and Robert Chambers, Constructive Trusts in Canada (1999), 37 (1) Alberta Law Review 173. That is by no

means a complete list of the scholarly writing about the principles relevant to this appeal.

The Substance of the Transaction

[60] Section 2(1)(a) of the ***Personal Property Security Act*** affirms that the Act applies to every transaction that in substance creates a security interest, without regard to its form. That provision gives statutory force to the long-standing principle of equity that equity looks to the substance of events and not to their superficial appearance.

[61] In this case the contemplated transaction was never completed. The contemplated transaction was that Ellingsen would trade in the truck which had been sold to him by Hallmark under a misrepresentation and would purchase in its place a second truck for a higher price which would be financed either by the H.S.B.C. Bank or, if that financing did not go into place, by the Bank of Nova Scotia, Penticton Branch. It was never contemplated that Hallmark would finance the purchase. The contemplated financing security was to be in place before the transaction was complete. But because Ellingsen had bought the first truck under a misrepresentation, and because he needed a truck in his work, he was given possession of the truck, and of documents which

made him the registered owner, before the financing was in place.

[62] In my opinion, the financing being in place was a condition precedent to the completion of the contract of purchase and sale of the second truck. That condition was never fulfilled. The registration of Ellingsen or his company as owner of the second truck is merely some evidence of ownership but it is not conclusive of true substantive ownership. The registration carries with it the consequence of being regarded as owner under the ***Motor Vehicle Act*** but it does not confer true ownership if ownership does not exist in fact. See ***Larocque v. Lutz*** (1980), 16 B.C.L.R. 348 at 351 (B.C.S.C. per Ruttan, J.) affirmed on this point and others, (1981), 27 B.C.L.R. 357 at 366 (B.C.C.A.); ***Singh v. McRae,*** [1971] 5 W.W.R. 544 (B.C.S.C.); and ***Peters v. Shoreview Enterprises Ltd.***, [1987] B.C.J. No. 1687, (Q.L.) at p.9 (B.C.S.C.). Since the condition precedent to Ellingsen's acquisition of ownership of the second truck was never fulfilled and never waived, it is my opinion that Ellingsen never acquired ownership of the truck or of a proprietary interest in the truck.

[63] It seems to me to follow that the truck should not form any part of Ellingsen's estate in bankruptcy. Ellingsen had

no interest at all in the truck after he told Hallmark that Hallmark could come and retake possession of the truck. At that time he abandoned any interest he may have had in the truck arising from his right to fulfil the condition precedent by completing the financing. So at that point the truck was owned entirely by Hallmark and Ellingsen only had simple possession.

[64] This point was not the focus of the argument at trial or on appeal, where it was assumed, as I understand the arguments, that Ellingsen had acquired some form of title. The argument was about whether that form of title was held as trustee for Hallmark. But when I consider the substance of the transaction between Ellingsen and Hallmark, as I am required to do both for the purposes of the ***Personal Property Security Act*** and for the purposes of determining the application of equitable principles, it is the substance which I have just described which ought to govern the application of the statute and the creation of the equities. However, the fact that Ellingsen's interest was mere possession does not prevent the imposition of a remedial constructive trust, either as against Ellingsen himself or against his trustee in bankruptcy. See ***Paciocco*** at p.329, and the authorities cited in footnote 75.

Unjust Enrichment in Commercial Cases

[65] It was said in ***Pettkus v. Becker***, [1980] 2 S.C.R. 834 at 848, and repeated often since, that what is required to establish an unjust enrichment is:

(1) An enrichment,

(2) a corresponding deprivation, and

(3) the absence of a juristic reason for the enrichment.

But like most simple legal tests it must be applied thoughtfully and not mechanically, particularly with respect to whether there is a juristic reason for the enrichment which is said to have taken the enrichment out of the category of being "unjust". The juristic reason may be legal or equitable or both. But it must be measured in accordance with the principles of equity which underlie the remedies of restitution and the remedial constructive trust. So the "injustice" of an enrichment must be measured by the standard of "good conscience" and, in a commercial case, the "good conscience" must be good commercial conscience.

[66] With respect to the requirement of "good commercial conscience", I refer to the majority judgment of four judges of this Court in ***Atlas Cabinets & Furniture Ltd. v. Nat. Trust***

Co. (1990), 45 B.C.L.R. (2d) 99, particularly at pp. 109-112.

At p.109, in relation to the three tests for unjust enrichment set out in ***Pettkus v. Becker***, this was said:

> In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. In a domestic relationship, equality of the parties to the relationship should normally be the standard of fairness. But, in a business relationship, honest dealing, not equal dealing, should set the standard of fairness. That is not to say that the three factors enumerated in ***Pettkus v. Becker*** are not equally applicable in commercial cases. They were referred to and treated as applicable in the majority reasons, on this point , of Chief Justice Dickson in ***Hunter v. Syncrude***, at p.471. But it is important to understand what is meant by "enrichment", by "deprivation" and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment".
>
> ...
>
> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in ***Pettkus v. Becker*** when they are applied to a commercial relationship.

[67] In my opinion that passage continues to set out the applicable principles with respect to unjust enrichment in a commercial relationship.

The Remedial Constructive Trust in Commercial Cases

[68] The leading case on the application of a remedial constructive trust in a commercial case is ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217 (S.C.C.) where the judgment of a majority of five judges in a seven judge division was given by Madam Justice McLachlin. The case was a commercial case. After reviewing the authorities, Madam Justice McLachlin said this, at p.236, para.34:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[69] While it is not necessary for the purposes of this case to add anything to the passage I have quoted, I think that

these passages from the judgment of Mr. Justice Deane in the High Court of Australia in ***Muschinski v. Dodds***, [1986] 60 A.L.J.R. 52, at p.65 indicate an important feature of the limits of the remedial constructive trust:

> The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles:....
>
> Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity.

[70] It is not necessary for the purposes of this case to decide whether the remedial constructive trust arises when the right to restitution arises, or when the enrichment occurs, or when the juristic reason for the enrichment fails, on the one hand, or whether it arises when declared by the court but with true retroactive effect (not merely retrospective effect) to the date when the right to restitution arose, or when the enrichment occurred, or the juristic reason for the enrichment failed, on the other hand. In this case, as in most cases,

the result would be the same, which is probably why the point, as far as I know, must still be regarded as unsettled.

The Remedial Constructive Trust in This Case

[71] The principles applicable to this case are contained in the passage I have just quoted from the reasons of Madam Justice McLachlin in ***Soulos v. Korkontzilas***. A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties.

[72] For the reasons that I have given in describing the substance of the transaction, it is not, in my opinion, in accordance with sound commercial conscience as between Ellingsen and Hallmark to permit Ellingsen to be regarded as retaining a proprietary interest in the second truck over and

above his continuing equitable interest, if any, in the first truck.

[73] I turn to the secured creditors and general creditors of the bankrupt. They are set out in the Statement of Affairs which was filed. Except for the bank account of $1,200 and furniture valued at $1,420, both of which were pledged as security, one to the Bank of Nova Scotia and the other to Trans Canada Credit Corporation, the only asset of the estate was said to be the second truck. If the second truck is made subject to a remedial constructive trust then the two secured creditors, if they have claims over and above their security, and all of the general creditors, will receive no recovery on their claims. But there is absolutely nothing in this matter to indicate that the creditors are anything other than ordinary household creditors or ordinary small trade creditors, or to indicate that they advanced credit on the basis that Ellingsen had an unencumbered proprietary interest in the second truck. There is no indication in the material that any third party was misled or prejudiced by an assumption that since no security interest was registered against the second truck, it must be available to meet the demands of Ellingsen's creditors.

[74] In those circumstances, the relationship between Ellingsen and Hallmark invites the imposition of a remedial constructive trust, and there is nothing in the evidence with respect to secured creditors, general creditors or third parties which would make the imposition of a remedial constructive trust improper or contrary to good commercial conscience.

The Integrity of the *Personal Property Security Act*

[75] If the ***Personal Property Security Act*** applied, it would not be prevented from operation by the fact that there was no legally effective document creating a security interest in the collateral represented by the second truck, because no such document is necessary to the registration of a financing statement to perfect a security interest in collateral.

[76] And if the ***Personal Property Security Act*** applied, it would not be prevented from operating by the fact that the interest of Ellingsen was possessory only until such time as the condition precedent was fulfilled, since an interest in possession by a non-owner may be sufficient to support the registration of a financing statement to record a security interest by the owner in the collateral.

[77] Furthermore, the ***Personal Property Security Act*** may never have applied because the interest of Hallmark in the second truck was not an interest "that secures payment of the performance of an obligation" within the meaning of the definition of "security interests" in the Act, with the result that, there being no security interest in collateral, the Act would have no application. But it is not necessary for me to decide that point and I prefer not to do so until a case arises where it is essential to the decision.

[78] The reason why that point need not be decided is that by the declaration of a remedial constructive trust such as is proposed in this case that trust would become effective at the time when Hallmark was told by Ellingsen on 15 March to come and collect the truck. At that point Ellingsen's possession of the truck unjustly enriched him without any continuing juristic reason and Hallmark became entitled to restitution.

[79] The ***Personal Property Security Act*** provides explicitly, in s.4(a), that the Act does not apply to an interest given by a rule of law. The remedial constructive trust that came into being on 15 March, either directly at the time, or retroactively to that time by the declaration of this Court, is an interest given by a rule of law and so is excluded from the operation of the Act.

[80] The integrity of the ***Personal Property Security Act*** is maintained because this is not a case of a simple failure to register a financing statement in a timely way. The two elements which protect the integrity of the Act, though imposing a remedial constructive trust in this case, are, first, that the acts of the parties and not the failure to register created the right to restitution and the unjust enrichment, both of which came into being entirely independently of the Act, and both of which came into being through a failure of a contract to arise at all and not from non-performance of a contract or from a breach of contract, and, second, that no one has been shown to have been prejudiced by an absence of registration, neither a secured creditor, nor a general creditor, nor a third party, all of whom must have taken their credit risks without any assumption that the second truck was unencumbered. There is no evidence of any party relying on the absence of registration to extend credit. If there had been such prejudice or any such reliance, then such prejudice or reliance might well have affected the question of whether a remedial constructive trust ought to be declared and, if so, on the terms and extent of the remedial constructive trust.

Conclusion and Disposition

[81] I agree with Mr. Justice Donald. For the reasons I have given in supplement to the reasons of Mr. Justice Donald, I would respond to the motion for directions under s-s.34(1) of the ***Bankruptcy and Insolvency Act*** by declaring that the Truck referred to in the Notice of Motion was held by Ellingsen as a constructive trustee for the benefit of Hallmark on and after 15 March, 1997 and came into the possession of KPMG as Trustee in Bankruptcy of Mr. Ellingsen subject to that constructive trust. It follows, in accordance with s.67(1)(a) of the ***Bankruptcy and Insolvency Act*** that the truck was not the property of the bankrupt at the date of bankruptcy and that the funds arising from its disposition must be paid over to Hallmark.

"The Honourable Mr. Justice Lambert"