SALE AND LEASE-BACK AGREEMENTS IN A WORLD OF TITLE RELATIVITY

Michael Gerson (Leasing) Ltd. v Wilkinson and State Securities Ltd.

*Janet Ulph, Department of Law, University of Durham

Introduction

Where there is misconduct, the courts are often faced with a choice between conflicting proprietary claims made by those who have innocently become caught up in the rogue's activities. Very rarely, there is a windfall profit and the court may have the relatively pleasant task of choosing who has the better claim to it;[1] however, usually the rogue is insolvent and one party may suffer as a result.[2]

In an insolvency, the first hurdle for a claimant will be to establish proprietary rights in relation to identifiable property in order to elevate himself above the position of an unsecured creditor. Yet there is always a danger that a claimant can be *divested* of these proprietary rights if another party can also establish proprietary rights over the same property and can successfully rely upon one of the exceptions to the *nemo dat* principle, that no-one can transfer a better title than they have themselves. The recent Court of Appeal decision in *Michael Gerson (Leasing) Ltd. v Wilkinson and State Securities Ltd.* [3] is a significant case, which extends the protection offered to a second purchaser by the 'seller in possession' exception and exposes finance companies to unanticipated risks in relation to goods which they own but which are currently subject to sale and leaseback agreements.

Background

The essential facts were that the seller, Emshelf IX Ltd. ('Emshelf'), sold certain plant and machinery to Michael Gerson (Leasing) Ltd. ('Gerson'), a finance company, under a sale and leaseback agreement under which Emshelf remained in physical possession of this equipment. A year later, Emshelf sold the very same equipment to State Securities Ltd. ('State'), which was another finance company, under a second sale and leaseback agreement. When Emshelf became insolvent, Gerson sued State in conversion and State successfully pleaded in defence that the 'seller in possession' exception, contained in section 8 of the Factors Act 1889 and section 24 of the Sale of Goods Act 1979, applied.

Section 24 of the Sale of Goods Act provides:

> Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person ... of the goods or documents under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

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1 *Foskett v McKeown* [2000] 3 All ER 97, 99 *per* Lord Browne-Wilkinson.

2 *Central Newbur*y Car Auctions Ltd. v Unity Finance Ltd. [1957] 1 QB 371, 379 per Denning L.J.

3 [2000] 3 WLR 1645.

Thus the seller in possession exception may be called into play wherever goods have been purchased but the seller remains in possession of them and subsequently delivers them to a second purchaser or pledgee who can show that the goods were received in good faith. On the facts, the seller, Emshelf had remained in continuing physical possession of the goods. The difficult issue was whether the second purchaser, State, could be said to have received them. State never physically received the goods and it therefore had to argue that, according to the provisions of the sale and leaseback agreement, there had been a notional 'constructive' delivery of the goods by Emshelf before the goods were leased back.

The debate regarding constructive delivery

The question of whether physical delivery of the goods into the hands of a second purchaser is necessary in order to satisfy the statutory provision, or whether proof of constructive delivery is enough, has been a controversial one. Interestingly, in *Michael Gerson*, there was no battle over this matter in the Court of Appeal: counsel for the claimant conceded that, for the purposes of the appeal, constructive delivery sufficed.[4] However, as the concession was so carefully limited, the question could be raised afresh in the future. The matter therefore deserves analysis.

The authorities on this issue have been in disarray for some time. The main difficulty lay with the first instance decision of *Nicholson v Harper*,[5] in which North J. stated that there must be actual physical delivery of the goods after the second sale or pledge in order to satisfy the statutory wording of the seller in possession exception. However, there was also the case of *NZ Securities & Finance Ltd. v Wrightcars Ltd.*,[6] in which an argument that constructive delivery of goods had been made under a sale and leaseback agreement was rejected and it was held that there must be a physical delivery of the goods to the purchaser. In coming to that decision, the New Zealand court relied upon *Nicholson v Harper* and the Australian case of *Bank of New South Wales v Palmer*.[7] In the latter case, Helsham J. suggested that the view which he had formed that the seller in possession exception required physical delivery was supported by the statutory word 'receiving.'

Yet the decision in *Nicholson v Harper* could be described as deeply flawed. There was no possibility on the facts of the case of actual physical delivery because the second pledgee was already in possession of the goods before the pledge in his capacity as warehouseman. This fact was brought to North J.'s attention but the argument that there had been a constructive delivery to the pledgee was rejected without discussion and without any reference to past case law. There were a number of cases decided before *Nicholson v Harper* which North J. should have considered. In *Elmore v Stone*,[8] for example, the claimant had sold two horses to the defendant but had not been paid. Although there was no written memorandum of the sale as required by

4 [2000] 3 WLR 1645, 1649 E - H, per Clarke L.J. At first instance, Michael Kershaw Q.C., sitting as a judge of the High Court, had held that delivery can be constructive for the purposes of the Sale of Goods Act 1979, s. 24: Michael Gerson (Leasing) Ltd. v. Michael Wilkinson and State Securities Ltd.(1998) Unrep. 6 October, QBD (Liverpool).

5 [1895] 2 Ch. 415.

6 [1976] 1 NZLR 77 (Supreme Court in Wellington).

7 [1970] 2 NSWLR 532 (Supreme Court of New South Wales); overruled by Gamer's Motor Centre (Newcastle) Proprietary Ltd. v Natwest Wholesale Australia Proprietary Ltd. (1987) 163 CLR 236.

8 (1809) 1 Taunt 458.

the Statute of Frauds, the agreement would still be enforceable by the claimant if delivery to the buyer could be established. Mansfield C.J. held that, where the seller had agreed to look after the horses for the benefit of the buyer by keeping them at livery after the sale, there had been a constructive delivery of the horses to the buyer. He recognised that constructive delivery can take various forms and gave the example of where the key of a warehouse in which the goods are stored is delivered to the buyer.[9] One might add, as another example, that a bill of lading is the symbol of property in goods and its delivery is treated as delivery of the goods themselves.[10] There are other cases in which physical delivery has not been insisted upon.[11] However, in particular, there have been two persuasive modern authorities concerning another exception to the *nemo dat* rule: in both the first instance English decision of *Forsythe International (UK) Ltd. v Silver Shipping Co Ltd. and Petroglobe International Ltd. (The Saetta)*[12] and the decision of the High Court of Australia in *Gamer's Motor Centre (Newcastle) Proprietary Ltd. v Natwest Wholesale Australia Proprietary Ltd.*,[13] it was accepted that proof of constructive delivery would be enough to satisfy the buyer in possession exception.

The concession made in *Michael Gerson* that constructive delivery sufficed, which was welcomed by Clarke L.J,[14] was surely correct in principle: arguably *Nicholson v Harper* and subsequent authorities[15] would not have stood up to extensive scrutiny because the courts in those cases had not engaged in a detailed review of past case law. Furthermore, the emphasis placed upon the word 'receiving' by Helsham J. in *Bank of New South Wales v Palmer*[16] could be seen as self serving. For example, the word 'taking' can be found in the mercantile agency exception and no significance is attached to it. It is submitted that, if the defendant can prove constructive delivery, then he can properly be described as having received the goods.

Defining constructive delivery: transfer of control

It is delivery to the second purchaser or pledgee, rather than the antecedent contract, which has the effect of divesting the first purchaser of his proprietary rights under the seller in possession exception. But what exactly is needed for constructive delivery? There is statutory guidance in relation to the notion of delivery itself: according to section 61 (1) of the Sale of Goods Act 1979, unless the context suggests otherwise, 'delivery' is the '*voluntary transfer of possession from one person to another*.' The transfer must be voluntary in the sense that a deliberate step

9 Ibid, 460. See further Ward v Turner (1751) 2 Ves Sen 431, 443 per Lord Hardwicke; Dublin City Distillery Ltd. v Doherty [1914] AC 823, 843 et seq., per Lord Atkinson, 852, per Lord Parker; Wrightson v McArthur and Hutchisons (1919) Ltd. [1921] 2 KB 807, 816-817, per Rowlatt J.; Akron Tyre Co. Pty Ltd. v Kittson (1951) 82 CLR 477, 494 per Williams and Kitto J.J.; Official Assignee of Madras v Mercantile Bank of India Ltd. [1935] AC 53, 58-59 per Lord Wright.

10 Meyerstein v Barber (1866) LR 2 CP 38, 48 per Erle C.J., 50 per Willes J.; Official Assignee of Madras v Mercantile Bank of India Ltd. [1935] AC 53, 59 per Lord Wright.

11 Marvin v Wallis (1856) 6 El. & Bl. 726, 25 LJQB 369; Whitehouse v Frost (1810) 12 East 614;Ministry for Supply & Development v Servicemen's Co-operative Joinery Manufacturers Ltd. (1951) 82 CLR 621; Re Morrison (1905) 25 NZLR 532; Re Stoneham [1918-1919] All ER 1051; Thomas v The Times Book Co. Ltd. [1966] 2 All ER 241.

12 [1994] 1 WLR 1334.

13 (1987) 163 CLR 236.

14 [2000] 3 WLR 1645, 1649 E - H, per Clarke L.J.

15 Bank of New South Wales v Palmer [1970] 2 NSWLR 532; NZ Securities & Finance Ltd. v Wrightcars Ltd. [1976] 1 NZLR 77.

16 [1970] 2 NSWLR 532, 535 (Supreme Court of New South Wales); overruled by Gamer's Motor Centre (Newcastle) Proprietary Ltd. v Natwest Wholesale Australia Proprietary Ltd. (1987) 163 CLR 236.

must be taken.[17] When one then turns to consider possession, statutory guidance on constructive possession is provided by section 1(2) of the Factors Act which states that, 'A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents of title are in his actual custody or are held by any other person subject to his control or for him on his behalf.' It is clear from this section that it is wrong to focus solely upon transfer of physical possession; the key is the transfer of control.

Yet commercial arrangements can be complex and gauging the nature and extent of control exercised by one party may not be straightforward. One of the difficulties facing the Court of Appeal in determining if and when control could be said to have been transferred under a sale and leaseback arrangement, was that for many years the question has been obscured by the shadow cast by *Nicholson v Harper*. However, the court confirmed that there may be constructive delivery where there is evidence of a change in the character of possession.[18] This would occur where there has been an attornment: for example, where the seller, although remaining in possession, acknowledges that he holds the goods on account of the buyer;[19] or where a warehouseman does so,[20] or indeed where the buyer already had possession but now acknowledges that he holds them for his own benefit.[21]

In coming to its decision, the Court of Appeal considered *Gamer's Motor Centre (Newcastle) Proprietary Ltd. v Natwest Wholesale Australia Proprietary Ltd.*.[22] The erudite leading judgment given by Mason C.J. in *Gamer* was largely taken up with justifying the principle that constructive delivery was sufficient. If not for the irritant of *Nicholson v Harper*, the High Court of Australia in *Gamer* could have simply concentrated on the crucial question of whether constructive delivery could be found to have taken place on the facts. An agreement had been made by Gamer to sell cars to a dealer subject to a reservation of title clause. The dealer took possession of the cars and resold them to a finance company, Natwest. Natwest never took actual physical possession of the cars; instead, the dealer retained them. Nevertheless, Natwest was able to rely upon the buyer in possession exception. The High Court of Australia held that there had been constructive delivery when the dealer sent a delivery receipt to Natwest giving particulars of the transaction and confirming in effect that Natwest was the owner.[23] A criticism which had been made of the decision in *Gamer* was that a simple delivery note would not ordinarily amount to acknowledgment of change of control.[24] Clarke L.J. expressly dealt with

17 Forsythe International (UK) Ltd. v Silver Shipping Co Ltd. and Petroglobe International Ltd. (The Saetta [1994] 1 WLR 1334, affirmed by Clarke L.J. in Michael Gerson.(Leasing) Ltd. v Wilkinson and State Securities Ltd. [2000] 3 WLR 1645.

18 [2000] 3 WLR 1645, 1655 D-E, per Clarke L.J.; 1668H - 1669A per Pill L.J. See F. Pollock and R.S. Wright, An Essay on Possession in the Common Law (Oxford at the Clarendon Press, 1888) 72-73; Bowstead & Reynolds on Agency (Sweet & Maxwell, 16th edn., 1996, para. 8-170).

19 Marvin v Wallis (1856) 6 El. & Bl. 726; Elmore v Stone (1809) 1 Taunt 458; Hurry v Mangles (1808) 1 Camp 452; Whitehouse v Frost (1810) 12 East 614; Castle v Sworder (1861) 6 H & N 828; contrast, on different facts, Dublin City Distillery Ltd. v Doherty [1914] AC 823; Townley v Crump (1835) 4 Ad & E 58; Carter v Toussaint (1822) 5 B & Ald 855.

20 McEwan v Smith (1849) 2 H L C 309, 325 per The Lord Chancellor; Dublin City Distillery Ltd. v Doherty [1914] AC 823, 847 per Lord Atkinson, 852, per Lord Parker of Waddington; Official Assignee of Madras v Mercantile Bank of India Ltd. [1935] AC 53, 58-59 per Lord Wright. See further, Laurie and Morewood v Dudin & Sons [1926] 1 KB 223; Maynegrain Pty Ltd. v Compafina Bank [1982] 2 NSWLR 141.

21 Re Morrison (1905) 25 NZLR 532.

22 (1987) 163 CLR 236.

23 ibid, 250 per Mason C.J. 263 per Dawson J.

24 See K.C.T. Sutton, Sales and Consumer Law (LBC Information Services, 1995) para. 17.21.

this issue in *Michael Gerson*. He drew upon the report of the facts of *Gamer* at a lower appellate level[25] and concluded that the delivery order in *Gamer* had in fact been more than a simple receipt. The delivery order expressly provided that Natwest could recover the goods without notice and this statement evidenced the transfer of control to Natwest.

The Court of Appeal in *Michael Gerson* then had to consider the particular obligations imposed by a sale and leaseback agreement. There would have had less difficulty if the facts had been otherwise and there had been an ordinary sale followed by a later request from the seller to borrow the goods for a specified period of time. These were the facts in *Marvin v Wallis*,[26] and it was held that, as the seller had acknowledged the buyer's title and merely held the goods as a bailee, there had been constructive delivery of the goods to the buyer sufficient to satisfy the Statute of Frauds. *Michael Gerson* was different: there was one entire transaction. It was argued on behalf of the claimant that Emshelf never lost control of the goods under such an agreement: there was not a moment in time when State could truly be said to be the owner with a right to insist on actual physical delivery of the goods and with the ability to choose whether to lease the goods to Emshelf or not.[27] This argument had considerable force because of the fact that, once the lease took effect, it would be Emshelf who would be treated in law as having possession of the goods.[28] However, the court rejected the argument. In effect, the sale and leaseback agreement was taken as a genuine description of what the parties intended. The court considered the terms of the lease and reasoned that State would not have been entitled to declare that it was the owner of the goods or to fulfil its obligations under the lease (such as delivery to Emshelf) if it did not have constructive possession of the goods in law at some point. It was concluded that there had been a constructive delivery to State followed by a redelivery to Emshelf. Clarke L.J. admitted that he was influenced by commercial considerations in coming to his decision: he thought that sale and leaseback agreements should be brought within the scope of the seller in possession exception.[29]

Implications and critique of the decision

Judged purely from a sale of goods perspective, the decision in *Michael Gerson* can be welcomed. It provides useful guidance on what amounts to constructive delivery by focussing upon control: sale and leaseback agreements were analysed as involving a transfer of control over the goods to the purchaser followed by a retransfer of control to the lessee. Pill L.J. suggested that there was a danger of creating fine distinctions between sale and leaseback agreements and other transactions otherwise.[30] If one accepts that sale and leaseback agreements are more than artificial credit arrangements and genuinely do involve a sale of goods followed by a lease, then they are difficult to distinguish from situations where the seller, a moment after the sale, asks to borrow the goods. Indeed, in *Marvin v Wallis* itself, the request by the seller to borrow the horse followed within seconds of completion of the sale.

25 [1985] 3 NSWLR 475 (Court of Appeal of New South Wales); see [2000] 3 WLR 1645, 1650 G-H per Clarke L.J.

26 (1856) 6 El. & Bl. 726, 25 LJQB 369 (cited in the Court of Appeal as Marvin v. Wallace).

27 [2000] 3 WLR 1645, 1655 F-G, 1669 B-C.

28 See Anglo-Irish Asset Finance v D.S.G. Financial Services [1995] CLY 4491, where it was held that, in the context of the seller in possession exception, it was the hirers, rather than the owner, who had constructive possession of cars let on hire-purchase.

29 [2000] 3 WLR 1645, 1657 A-B. Pill L.J. preferred to express no view on this point: ibid 1669 D.

30 [2000] 3 WLR 1645, 1669D.

Although it was conceded that constructive delivery was sufficient for the 'seller in possession' exception, the decision in *Michael Gerson* can be used to add further weight to the argument that, in principle, constructive delivery should suffice for both the 'seller in possession' and 'buyer in possession' exceptions. Actual physical delivery has never been required for any of the other exceptions to the *nemo dat* rule and, although each exception has its own particular conditions which have to be met, harmony on basic principles is desirable. Moreover, the Court of Appeal's decision in *Michael Gerson* can be seen as in tune with the historical development of the seller in possession exception: Parliament was concerned to protect purchasers where, to all outward appearances, the seller continued to appear as owner of the goods because he still remained in possession of them.[31]

The Court of Appeal's analysis of the law creates greater harmony within the Sale of Goods Act 1979 itself. The concept of constructive delivery and the question of relinquishing control is highly significant in relation to transfer of property. For example, evidence that the seller intended to retain control over the goods after the contract is made will suggest that property in specific goods was not intended to pass at the time of the contract.[32] There is also a linked relationship between control and delivery on the one hand and the transfer of property in the goods by appropriation with the other party's assent on the other: this is true not only in relation to the purchase of a specific quantity of goods from a larger bulk[33] but also in relation to the purchase of generic goods which have been ascertained.[34] As *Re Stapylton Fletcher Ltd.* [35] illustrates, there may be a constructive delivery and the property in goods may be transferred to a buyer even where, because the contract is one of sale and storage, the goods are never physically handed over and returned but simply moved to another warehouse to be stored until required.

Yet some difficulties remain. One argument made on behalf of the claimant was that the defendant did not have possession within the meaning of section 1 (2) of the Factors Act 1889. This was rejected on the basis that constructive possession would suffice.[36] It is submitted that this aspect of the decision is uncontroversial.[37] However, somewhat surprisingly, Clarke L.J.

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31 Pacific Motor Auctions Pty Ltd. v Motor Credits (Hire Finance) Ltd. [1965] AC 867, 886 per Lord Pearce on behalf of the Privy Council.

32 Ministry for Supply & Development v Servicemen's Co-operative Joinery Manufacturers Ltd. (1951) 82 CLR 621, 634-635 per Latham C.J., 641 per Williams J.

33 See Sale of Goods Act 1979, s. 61 (1), as amended: 'delivery' means voluntary transfer of possession from one person to another; except that in relation to sections 20A and B above it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer." See further, L. Gullifer, "Constructive Possession after the Sale of Goods (Amendment) Act 1995" [1999] LMCLQ 93, 104.

34 Sale of Goods Act 1979, s. 18 r. 5 (1) (2); Carlos Federspiel & Co SA v Charles Twigg & Co Ltd. [1957] 1 Lloyd's Rep 240, 255 per Pearson J.

35 [1994] 1 WLR 1181, 1200 per Judge Paul Baker Q.C.

36 [2000] 3 WLR 1645, 1656 F-H.

37 On constructive possession, see City Fur Manufacturing Co. Ltd. v Fureenbond (Brokers) London Ltd. [1937] 1 All ER 799; Forsythe International (UK) Ltd. v Silver Shipping Co Ltd. and Petroglobe International Ltd. (The Saetta [1993] 2 Lloyd's Rep 268; Four Point Garage Ltd. v Carter [1985] 3 All ER 12; Beverley Acceptances Ltd. v Oakley [1982] RTR 417; Lowther v Harris [1927] 1 KB 393. A person will have constructive possession of goods as holder of a document of title: Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co Ltd. [1899] 1 QB 643; Lickbarrow v Mason (1794) 5 TR 683; Kum v Wah Tat Bank Ltd. [1971] 1 Lloyd's Rep 439. See further, J. Ulph, 'Conflicts of Title and the Obligations of the Seller' in E. McKendrick, Sale of Goods (LLP, 2000) paras. 5-040, 5-060 and 5-083.

appeared reluctant to accept the wider argument that the Sale of Goods Act and the Factors Act should be read together as a code and appeared ready to accept that there might be differences of interpretation between them. This raises uncertainty where none existed before. A good faith purchaser can rely on either set of provisions which, apart from one minor detail, are the same.[38] The two statutes are frequently read together:[39] in particular, even where the Sale of Goods Act is pleaded, a courts must use the same generous definition of a document of title which is to be found in the Factors Act.[40] A lack of consistency between the two statutes would be completely undesirable in an area of law which is already highly technical.

There is one outstanding issue concerning the seller in possession exception. It was established by the Privy Council in *Pacific Motor Auctions Pty. Ltd. v Motor Credits (Hire Finance) Ltd.*[41] that a seller has the power to pass a good title to the second buyer provided he remains in continuous physical possession of the goods regardless of the character of the possession. Will constructive possession by the seller suffice in these circumstances?[42] It is submitted that it should where, for example, the seller does not have actual physical possession of the goods because they are stored in a warehouse.[43]

Yet it has to be said that the decision in *Michael Gerson* may not receive a warm welcome from insolvency practitioners. One weakness was that, as there was one transaction, it was difficult to pinpoint exactly when the goods were delivered to State. The court acknowledged the problem but Clarke L.J. sidelined this difficulty by suggesting that it was unnecessary to identify a moment at which the goods were delivered.[44] This is unsatisfactory. If a decision in relation to proprietary rights hangs upon whether constructive delivery has taken place or not, then the court should determine the exact time when such delivery occurred. Traders need to know when proprietary rights have been vested or divested. Timing is everything where there is an insolvency.[45] Arguably the Court of Appeal in *Michael Gerson* should have gone further and expressly stated that constructive delivery of the goods to State took place when the agreement was made: for a moment in time, State could be described as the owner before the lease took effect and redelivery of the goods occurred.

An interesting aspect of the decision relates to the use of sale and leaseback arrangements as a form of secured lending. These agreements have always been vulnerable to attack by creditors in a company's insolvency: if it can be shown that an agreement is in substance a disguised

38 Sale of Goods Act 1979, s. 21(2) provides that the provisions of the Factors Act are not excluded.

39 Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co. Ltd. [1899] 1 QB 643, 652, per A.L. Smith L.J.; City Fur Manufacturing Co. Ltd. v Fureenbond (Brokers) London Ltd. [1937] 1 All ER 799, 802 per Branson J.; Forsythe International (UK) Ltd. v Silver Shipping Co Ltd. and Petroglobe International Ltd. (The Saetta [1993] 2 Lloyd's Rep 268, 275 per Clarke J.

40 Sale of Goods Act 1979, s. 61(1). See further Halsbury's Laws of England Vol. 41, para. 751 n.8.

41 [1965] AC 867.

42 J. Mo, ' "Physical Possession" versus "Constructive Delivery" in Section 28 of the Sale of Goods Act 1923 (NSW) - "Harmonisation" of Pacific Motor Auctions and Gamer's Case' (1993) 16(2) UNSW Law Journal 513, 515, 525.

43 This issue was raised by the High Court in Gamer's Motor Centre (Newcastle) Pty Limited v Natwest Wholesale Australia Pty Ltd. (1987) 163 CLR 236; the judges in the majority were content to give 'delivery' a different meaning from possession if this was necessary: ibid Mason C.J. at 248 - 249; 254 per Brennan J., 260 per Dawson J.

44 [2000] 3 WLR 1645, 1655 H.

45 See, for example, Neste Oy v Lloyd's Bank plc [1983] 2 Lloyd's Rep 658.

mortgage to secure a loan then it is unenforceable unless it has been registered.[46] It is a question of looking at the parties' intentions and the contractual terms to decide whether the sale was genuine or not.[47] This line of attack would have been unattractive to the claimant given that its own right to possession rested on the validity of its sale and leaseback agreement. In any event, the courts have tended to take a generous approach in upholding these agreements. However, the decision in *Michael Gerson* provides a cautionary reminder to finance companies that the flexibility which makes these agreements so appealing may be bought at the expense of safety regarding their security. The defendant succeeded in divesting the claimant of its proprietary rights by using an exception to the *nemo dat* rule. Yet the effect of the decision is that the defendant's proprietary rights could just as easily have been divested in turn if a third sale and leaseback agreement had been made. Owners operate in a world of title relativity:[48] there is always a risk that another person may come forward with a better right to possession.

A sale and leaseback agreement is a useful method by which an ailing trader can obtain a quick injection of capital to keep a business going. Will the decision in *Michael Gerson* affect its popularity? Ordinarily, it would not be feasible for finance companies to take physical possession of goods before leasing them back in order to avoid the situation where the lessee remains as a 'seller in possession.' It is more likely that finance companies will continue to make use of sale and leaseback agreements but will factor in this additional risk by offering to purchase at a lower valuation. Ironically, therefore, the court's decision to take a generous and pragmatic attitude to sale and leaseback arrangements, enabling innocent finance companies to take advantage of the 'seller in possession' exception, may tend to discourage their use. Yet the real problem lies in a more general malaise in the law of credit and security: years ago, in *Moorgate Mercantile Co. Ltd v. Twitchings*,[49] Lord Wilberforce bewailed the lack of a proper registration system of movables [50] to protect innocent purchasers and pointed out that the absence of such a system provided a fertile ground for fraud. Law reform in this area is now overdue.

46 Companies Act 1985, s. 395. Written agreements made by individuals may require registration as a bill of sale under the Bills of Sale Acts 1878-1891. See R.M. Goode, Commercial Law (Penguin Books, 2nd edn., 1995) 652-653.

47 Re Curtain Dream plc [1990] BCLC 925, 935 per Knox J.; Welsh Development Agency v Export Finance Co Ltd. [199] BCLC 148, 154 per Dillon L.J., 186-187 per Staughton L.J. This was one of the main issues at first instance: the defence was that the claimant did not have a proprietary interest because its sale and leaseback agreement was merely a loan secured by a charge. This argument was rejected: Michael Gerson (Leasing) Ltd. v. Michael Wilkinson and State Securities Ltd. (1998) Unrep. 6 October, Q.B.D. (Liverpool).

48 M.G. Bridge, 'The Title Obligations of the Seller of Goods' in N. Palmer and E. McKendrick, Interests in Goods (LLP, 2nd edn, 1998) 303 -304.

49 [1977] AC 890, 901.

50 See, in particular, the Crowther Committee's Report of the Committee of Consumer Credit, Cm 4596 (1971).