

## CONSTRUCTIVE POSSESSION AND CONSTRUCTIVE DELIVERY IN TRANSFER OF TITLE TO GOODS

GAIL PEARSON\*

### I INTRODUCTION

The rules relating to the transfer of title to goods are old but significant law. They are the unstated backdrop to many commercial transactions. There is usually much to be said for the claims of all parties in a title dispute – the classic dispute is between two innocent parties. It is not an area ripe for judicial activism. When new fact situations require determination the rules may change slowly. Discovering that you do not own goods that you believed to be yours may have important consequences.

The perennial contest in this area of the law concerns cars (having replaced horses as the main source of disputes) and recent cases have included disputes over construction materials, oil bunkers on a chartered vessel, and industrial plant.<sup>1</sup> Typically, disputes arise because of the separation of possession and ownership. This may occur due to the purposes for which the goods are used. For example, in a construction scenario involving contractors and sub-buyers or as part of a tax-effective financing arrangement involving sale and leaseback. Thus, title to goods and the rules under sale of goods legislation are key ingredients to understanding the legal effect of transactions that occur in a broad range of commercial situations, for example, structured and project financing and vessel charterparties. They are also useful in analysing more traditional and narrowly focused disputes, for example, where the same goods have merely been sold to two or more buyers.

There are five long-established statutory exceptions to the *nemo dat* principle that one cannot transfer a better title than that which one possesses.<sup>2</sup> All of these

---

\* Senior Lecturer, Faculty of Law, University of New South Wales.

1 *Archivent Sales and Development Ltd v Strathclyde Regional Council* (1984) 27 BLR 98; *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1994] 1 All ER 851; *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] 1 All ER 148.

2 This principle derives from the Latin adage *nemo dat quod non habet* ('no one can give what he does not have') and is often referred to as the *nemo dat* rule. The exceptions are found in: *Sale of Goods Act 1923* (NSW): s 26(1) (apparent ownership and apparent authority); *Factors (Mercantile Agents) Act 1923* (NSW) s 5 (the mercantile agent entrusted with possession); *Sale of Goods Act 1923* (NSW) s 27 (the voidable sale); s 28(1) (buyer in possession); s 28(2) (seller in possession).

exceptions arise where a person who is not the true owner has possession of the goods and sells them. The underlying rationale is that possession of the goods makes it appear to an innocent buyer that the seller has the right to sell. However, none of the exceptions depends on possession alone. The exceptions, through their various elements, may additionally examine the actions of the true owner, the nature of the possession of the person without title, and the characteristics of the subsequent sale.

Two exceptions deal with the sale of goods by a seller or a buyer, without title but in possession, after a prior sale.<sup>3</sup> These exceptions are referred to as the 'seller in possession' and the 'buyer in possession' exceptions. This article considers aspects of their operation. Both exceptions focus on the possession of the person who sells without title and the delivery of the goods by that person under the subsequent sale.

### **The Relevant Provisions<sup>4</sup>**

#### *Sale of Goods Act 1923 (NSW) s 28(1):*

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 or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have 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.

Key to the seller in possession: the seller first sells to the person who becomes the true owner yet remains in possession and makes a second sale.

#### *Sale of Goods Act 1923 (NSW) s 28(2):*

Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent entrusted by the owner with the goods or documents of title.

Key to the buyer in possession: the buyer agrees to buy (or has bought under a voidable sale which has been avoided), is not the true owner yet obtains possession and sells to a sub-buyer.

The current position in Australian law is that the seller in possession and the buyer in possession should have actual possession, and that only the buyer in possession can give delivery by a constructive delivery.<sup>5</sup> The seller in possession

---

3 *Sale of Goods Act 1923 (NSW) s 28(1) (the seller in possession); s 28(2) (the buyer in possession).*

4 These provisions are in similar terms in all jurisdictions within the common law world, all of which derive from the codification in the *Sale of Goods Act 1898 (UK)*.

5 *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236.

must have uninterrupted physical custody of the goods.<sup>6</sup> The buyer in possession must be in possession with the consent of the true owner.<sup>7</sup> It is not controversial that where goods are in the actual custody of a third party, say for storage, and held on behalf of a seller or buyer in possession then constructive possession is sufficient.<sup>8</sup>

A number of questions are therefore raised. Should constructive possession be sufficient to constitute a person as a buyer in possession or as a seller in possession? When the seller in possession or the buyer in possession delivers to the person under the second sale or to the sub-buyer, what is required of the seller in possession or of the buyer in possession for this to be a voluntary transfer of possession? In a constructive delivery, which requires giving constructive possession, should the test be a change in the control of the goods or a change in the character of the possession of the goods? Can a seller or buyer in constructive possession make a constructive delivery?

The recognition of constructive possession and constructive delivery widens the situations in which a person may lose ownership, and, conversely, the situations where an innocent buyer may gain title. Therefore, it is important to understand when constructive possession or constructive delivery may arise.

## II THE MEANING OF POSSESSION – THE STARTING POINT

Possession is central to transactions involving goods.<sup>9</sup> The starting point in contemporary analysis is still *Possession In The Common Law*.<sup>10</sup> In 1888 Pollock and Wright wrote of possession: ‘The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context’.<sup>11</sup> This is a warning that is still current. Pollock and Wright distinguish between physical control (or ‘actual possession’), the right to possess (an incident of property), and ‘constructive possession’ (the right to possess when separated from possession).<sup>12</sup> The transfer of possession may involve a change in the actual physical possession of the thing or a change of possession without any change of actual custody. Pollock and Wright describe the latter as ‘constructive delivery’ and distinguish three forms of constructive delivery. In the first, the

---

6 *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* (1965) 2 All ER 105.

7 It would be insufficient if the possession were given for some purpose totally unconnected with the sale. See *Langmead v Thyer Rubber Co Limited* [1947] SASR 29.

8 *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd* [1937] 1 All ER 799.

9 On possession generally, and on the question as to whether it is a matter of fact or of law and whether in its legal sense the concept can exist independently of particular legal rules see D R Harris, ‘The Concept of Possession in English Law’ in Anthony Gordon Guest (ed), *Oxford Essays in Jurisprudence* (1961); Alice Tay, ‘The Concept of Possession in the Common Law: Foundations for a New Approach’ (1964) 4(4) *Melbourne University Law Review* 476; Reginald Walter Michael Dias, *Jurisprudence* (5<sup>th</sup> ed, 1985), 272–91 (ch 13 ‘Possession’).

10 Frederick Pollock and Robert Samuel Wright, *An Essay on Possession In The Common Law* (1888).

11 *Ibid* 28.

12 *Ibid* 26–7.

seller in possession agrees to hold the goods for the buyer and recognises the buyer's right to possession as owner. This involves a delivery to the buyer immediately followed by redelivery to the seller as bailee. In the second case, the goods are in the physical possession of a third person, and then the seller, the buyer and that third person agree that the third person holds the goods on behalf of the buyer. In the third case, the buyer has possession of the goods as the bailee of the seller.<sup>13</sup> Pollock and Wright also refer to symbolic delivery, transfer of control of goods through a key, and partial delivery where part of a bulk is delivered in the name of the whole.<sup>14</sup>

### III CONSTRUCTIVE POSSESSION BY THE BUYER IN POSSESSION

Recent English cases have established that constructive possession is sufficient for the buyer in possession. In *Four Point Garage Ltd v Carter*<sup>15</sup> ('*Four Point Garage*') the buyer, who requested the seller to deliver directly to the sub-buyer, was held to be in constructive possession. In *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* ('*The Saetta*')<sup>16</sup> oil bunkers in the possession of the owners of a vessel were found to be in the constructive possession of the charterers. This raises the question of whether this approach would be followed in Australia. It also suggests that we should ask: if constructive possession is sufficient for the buyer in possession, should it be considered for the seller in possession?

In *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*<sup>17</sup> ('*Gamer's case*')<sup>18</sup> it was not necessary to consider whether the possession by the buyer in possession could be constructive possession because the buyer in possession had physical custody of the goods. The High Court was required to consider whether there had been a constructive delivery from a buyer in actual possession without title to an innocent sub-buyer who did not gain actual possession. It was found there had been a transfer of constructive possession to the sub-buyer. The majority made a distinction between the possession required of the buyer in possession and the possession required for the transfer of possession to the sub-buyer.

---

13 Ibid 72–4.

14 Ibid 61, 70.

15 [1985] 3 All ER 12.

16 [1994] 1 All ER 851.

17 (1987) 163 CLR 236.

18 See Craig Carracher, 'Nemo Dat, Section 28 of the *Sale of Goods Act* and *Gamer's Case*' (1992) 9 *Australian Bar Review* 55; Alan Davidson, 'Constructive Delivery and Sale by a Buyer or Seller in Possession: The *Gamer's Motor Centre Case*' (1991) 19 *Australian Business Law Review* 261; John 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) *University of New South Wales Law Journal* 513.

In *Gamer's* case Mason CJ considered the distinction between the meaning of 'possession' at the beginning of ss 28(1) and 28(2) and 'delivery'<sup>19</sup> which means a voluntary transfer of 'possession'. Chief Justice Mason concluded that although 'possession' meant the same thing at the start of both sections, this did not lead to the conclusion that it meant the same thing as an elaboration of the meaning of 'delivery' later in the sections.<sup>20</sup> Here, Mason CJ developed reasoning to contrast actual physical possession at the start of the sections with the possibility of constructive possession/constructive delivery later in the sections. His Honour said

it must be accepted, in accordance with what was said in *Pacific Motor Auctions* that 'possession' has the same meaning in s 28(1) and s 28(2). But this does not mean that the meaning which the word has in the context in which it appears at the commencement of the two sub-sections is the meaning which it bears when it appears in the statutory definition of 'delivery'.<sup>21</sup>

This suggests that as with the seller in possession, the buyer in possession should also be in physical possession, or at least be in constructive possession, of the goods in storage.

In the United Kingdom it has been held that a buyer who asks the seller to deliver directly to the sub-buyer without taking actual possession will nevertheless be a buyer in possession. In *Four Point Garage* the buyer asked his seller to deliver the car directly to the sub-buyer. It was held that this amounted to a delivery of constructive possession by the seller to the buyer and a second delivery of possession to the sub-buyer.<sup>22</sup> Constructive possession was sufficient for the buyer in possession. This was necessary if the sub-buyer was to gain title, for there was a reservation of title between the seller and the buyer (in possession). This was a case where the buyer in possession was in constructive possession and the sub-buyer gained actual possession.

*Four Point Garage* applied *E & S Ruben v Faire Bros & Co Ltd* ('*Ruben v Faire*').<sup>23</sup> In that case the issue was whether the buyer had accepted the goods.<sup>24</sup> There, at the request of the buyer, the seller set aside the goods at the seller's premises and subsequently delivered the goods directly to the sub-buyer. It was held that this amounted to a constructive delivery from the seller to the buyer at the seller's premises.

*Ruben v Faire* was also considered in the New Zealand case of *Hammer and Barrow v Coca Cola*.<sup>25</sup> The judgment does not explicitly consider the above

---

19 *Sale of Goods Act 1923* (NSW) s 5(1).

20 *Gamer's* case (1987) 163 CLR 236, 248–9.

21 *Ibid.*

22 *Four Point Garage* [1985] 3 All ER 12, 15.

23 [1949] 1 All ER 215.

24 Thus it was not directly on the question of whether the buyer was a buyer in possession for the purpose of the *nemo dat* exception.

25 [1962] NZLR 723. In this case it was held that a direct delivery from the seller to the sub-buyer did not amount to acceptance of the goods if the contract between the buyer and the seller contemplated that the place of the sub-buyer should be the place of examination prior to acceptance of the goods. Delivery to the place of the sub-buyer was not inconsistent with the right of the seller to have the goods returned to the place of examination.

question, but it seems implicit that the buyer had constructive possession of the goods. Justice Richmond said:

[P]ossession of the goods on the part of [the sub-buyer] must be regarded as subject to the exercise by [the buyer] of its rights of examination and rejection. In effect, and whether the matter be regarded from the point of view of the ownership in the goods or the possession of the goods, I do not think that [the buyer] had ... divested itself of the power to return the goods to [the seller].<sup>26</sup>

In *Four Point Garage*, Simon Brown J rejected argument that the principle of constructive delivery to the buyer applied only to the acceptance/rejection context. His Honour stated:

It seems to me a perfectly sound principle of general application. There appears no possible good reason to differentiate under the statute between a case where, as here, the plaintiff sellers themselves deliver direct to the sub-purchaser and a case where, as could so easily have occurred instead, the seller delivers to his buyer, who then forthwith delivers on to the sub-purchaser. Often no doubt the precise arrangement would depend on no more than the geographical interrelationship of the three parties.<sup>27</sup>

*The Saetta* confirmed the position that the buyer could be a buyer in possession with constructive possession. In that case the subject of the sale was bunkers of oil delivered to a motor vessel, *The Saetta*, which was under a time charter. Forsythe, a trader in bunkers of oil, sold bunkers to the charterer, Petroglobe. The contract had a retention of title clause subject to payment. In order to fulfil the sale, Forsythe bought the bunkers from Baytur. At the request of Forsythe, Baytur delivered the goods directly to the vessel. Subsequently, the owner of the vessel, Silver Shipping, terminated the charter for non-payment of the hire and proceeded to use up the bunkers. Forsythe, who had not been paid, brought an action to recover the price from the charterer, or the value from the owner of the vessel, as damages for conversion. Silver Shipping rejected the claim in conversion arguing that title to the bunkers had passed to them when the charter was terminated.

Under the terms of the charterparty, the charterer was required to provide and pay for fuel. It was the charterer's obligation to accept and pay for all bunkers on board the vessel at the time of the vessel's delivery. The obligation of the vessel's owners was to accept and pay for all bunkers remaining on board when the vessel was redelivered at the end of the charter, or if the charter were terminated. The owner of the vessel claimed title to the bunkers as sub-buyers from the charterer, who was the buyer in possession. The charterer had not paid for the bunkers and so had simply *agreed* to buy.

The question of the buyer's (the charterer's) possession arose because of the peculiarities associated with possession of bunkers on board a vessel during a charter. During a charter of the type in issue there is a split between property and possession. In *The St Anna*, under the provisions of a similar charterparty, it was held that property in those bunkers aboard a vessel at the time of delivery

---

26 *Hammer and Barrow v Coca Cola* [1962] NZLR 723, 731.

27 *Four Point Garage* [1985] 3 All ER 12, 15.

becomes the property of the charterer.<sup>28</sup> Although it is the charterer who has property in the bunkers, it is the owner of the vessel who has possession of the bunkers. In *Stellar Chartering and Brokerage Inc v Efibanca – Ente Finanziario Interbancario*, ‘*The Span Terza*’ (No 2) Lord Diplock said ‘the bunkers while aboard ... were at all material times the property of the charterers; the shipowners had possession of them as bailees of the charterers’.<sup>29</sup> Further, ‘the shipowners’ are ‘under a duty to procure that [the bunkers] ... are used by the master in carrying out the orders which the charterers are authorised by the charterparty to give him as to the employment of the vessel’.<sup>30</sup>

If the bunkers are the property of the charterer (subject to the reservation of title) yet in the actual custody of the vessel’s owner, can it be said that the charterers also have possession of the bunkers? In *The Saetta* Clarke J held that the bunkers were in the possession of the charterer. The bunkers were to be used to carry out the orders of the charterer, the charterer had an immediate right to possession of the bunkers and the charterer could have ordered the bunkers to be delivered to another vessel. Justice Clarke stated: ‘In these circumstances it seems to me that the bunkers can fairly be said to have been held by the owners subject to the charterer’s control or on their behalf’.<sup>31</sup> His Honour affirmed the view that possession is not limited to actual physical possession and may extend to the situation where the goods are held by some other person on behalf of, or subject to the control of, the person whose possession is material.<sup>32</sup> In doing so, Clarke J affirmed *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd*<sup>33</sup> (‘*City Fur*’) where it was held that the seller was in constructive possession of goods in the actual custody of the warehouse.

In *The Saetta* it was held that the charterer Petroglobe was a buyer in possession, with constructive possession of the oil bunkers, which were in the custody of the vessel owners. Here, the vessel owner, who had actual possession, was not a third party but was claiming title to the goods. This is similar to the *Four Point Garage* scenario where the seller, at the buyer’s request, bypasses the buyer and delivers actual possession to the sub-buyer.

In *The Saetta* Clarke J also stated that Justice Branson’s views in *City Fur* were in agreement with the decisions in *Archivent Sales and Development Ltd v Strathclyde Regional Council*<sup>34</sup> (‘*Archivent Sales*’) and *Gamer’s* case.<sup>35</sup> However, in both these cases the buyer in possession had custody of the goods. In *Gamer’s* case the sub-buyer had constructive possession of goods in the actual custody of the buyer in possession. In *Archivent Sales* the goods were physically delivered (subject to a reservation of title) to the construction site where the contractor/buyer was to perform work for the sub-buyer. As a result of the

---

28 (1980) 1 Lloyd’s Rep 180 (Sheen J).

29 (1984) 1 WLR 27, 33.

30 Ibid 31.

31 *The Saetta* [1994] 1 All ER 851, 861 (Clarke J).

32 Ibid 862.

33 [1937] 1 All ER 799.

34 (1984) 27 BLR 98.

35 *The Saetta* [1994] 1 All ER 851, 802.

contract between the buyer/contractor and the sub-buyer, the goods were under the sub-buyer's control and could not be removed without consent. Lord Mayfield said that 'control does not negative possession'.<sup>36</sup>

In both *Four Point Garage* and *The Saetta*, the seller (or the seller to the seller) delivered the goods to the sub-buyer. In *Four Point Garage* it would be hard to say that the sub-buyer held the car subject to the control of the buyer. Yet in both cases it could be said that the buyer had the *appearance* of the right to sell since the seller willingly bypassed delivery to the buyer in favour of delivery to the sub-buyer. In the case of *The Saetta*, it is hard to see how the delivery to the vessel could have occurred any other way.

The issue of whether constructive possession might be sufficient to establish a buyer in possession is yet to be considered in Australia. Since Chief Justice Mason's dicta in *Gamer's* case suggested that actual possession is required, the issue has not been addressed. If the appropriate fact situation arises for decision, the buyer in possession should encompass the situation where a neutral third party has physical custody subject to the control of the buyer and the situation where the seller delivers directly to the sub-buyer. If *The Saetta* is followed, the buyer in possession should also extend to the situation where the sub-buyer has custody of the goods, and the buyer, for some purpose, has control of the goods. Where the buyer has custody, albeit for a short period, and the sub-buyer has control (as in *Archivent Sales*), the issue of the buyer's constructive possession is irrelevant as the buyer would be in actual possession.

#### IV SHOULD CONSTRUCTIVE POSSESSION BE SUFFICIENT FOR THE SELLER IN POSSESSION?

If constructive possession were sufficient to establish a person as a buyer in possession, should the seller in possession be confined to that person with actual possession? The principle of uninterrupted physical custody, derived from *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd*,<sup>37</sup> can easily be extended to the situation in *City Fur*, where the seller in possession has constructive possession through control of goods that are in the actual possession of a neutral third party.

Section 28(1) of the *Sale of Goods Act 1923* (NSW) refers to the seller who 'continues or is in possession'. The language of 'or is in possession' refers to the situation where the seller does not have possession at the time of the first sale but comes into possession by the time of the second sale.<sup>38</sup> As previously discussed, a person who buys to on-sell and asks the seller to deliver directly to the sub-buyer may never obtain custody but may be a buyer in constructive possession. Can a person be a seller in possession in a similar situation?

---

36 *Archivent Sales* (1984) 27 BLR 98, 108.

37 [1965] 2 All ER 105.

38 See *Mitchell v Jones* (1905) 24 NZLR 932, 935.



Consider the following scenario. The seller sells under the first sale, transfers title but does not deliver. That seller then sells the same goods under a second sale. The seller then asks the person from whom the seller bought the goods (ie, the seller to the seller) to deliver the goods to the buyer under the second sale. Is the seller in constructive possession of those goods that have been delivered to the buyer under the second sale?

Constructive possession involves the right to obtain custody. How is the above scenario any different from the situation in *Four Point Garage* where the buyer did not have title? It might be argued that in *Four Point Garage* the buyer was able to gain title by paying his seller, whereas in this hypothetical situation the seller has lost his/her power to regain title as a result of the first sale. However, in both situations the role of the buyer in possession and the role of the putative seller in possession is the conduit to the ultimate buyer. The buyer in possession, who is yet to obtain the goods, directs them straight to the sub-buyer. The putative seller in possession, who does not have actual possession of the goods, directs them to the person under the second sale. It is here that the constructive possession may be imputed, since the seller, like the buyer in possession, has control over where the seller to the seller is to deliver the goods. The seller can choose to direct the goods to the first sale or to the second sale.

Here also the seller appears to have the right to sell as the seller to the seller is prepared to deliver to the buyer under second sale. Section 28(1) does not require the seller to be in possession with the consent of the buyer under the first sale.<sup>39</sup> It seems illogical that the person who buys from a buyer in possession should be protected, yet the person who buys from a person who is a seller (in possession) should not be protected, when in both hypothetical transactions, the goods remain with the seller to the buyer in possession/seller in possession and are delivered from that person at the instruction of the buyer in possession/seller in possession to the innocent buyer. How is the position of the buyer under the first sale any different where the goods remain with the original seller, than where the goods remain with the seller in possession?

## V THE SALE FROM THE PERSON IN POSSESSION

To gain title, there must be a delivery to the buyer who contracts with a seller or buyer in possession. ‘Delivery’ is defined as ‘voluntary transfer of *possession* from one person to another’.<sup>40</sup> This contrasts with the other three exceptions to the *nemo dat* rule which do not necessarily require the seller without title to part with possession in order for the acquirer to prevail over the true owner in a contest for title.

There are two factors in addition to possession that underlie the ability of a buyer from the seller or buyer in possession to claim title in a contest with the true owner. First, the person selling the goods, who is not the true owner, once

---

<sup>39</sup> *Sale of Goods Act 1923* (NSW).

<sup>40</sup> *Sale of Goods Act 1923* (NSW) s 5(1) (emphasis added).

was the true owner<sup>41</sup> or could legitimately become the true owner.<sup>42</sup> Consensual possession of goods is insufficient in itself to enable one to pass good title. Secondly, it is not enough simply to sell to the subsequent buyer. It is the delivery by the person who is not the true owner to the subsequent buyer that is critical. It is the delivery that the true owner is said to have authorised.<sup>43</sup> In *Gamer's* case Mason CJ commented on s 28(2) saying 'the effect of the subsection is to give validity to a delivery which would, but for the absence of title in the person making it, be an effective delivery'.<sup>44</sup> A person who may once have had, or who may legitimately acquire good title to goods, and who is in possession may be able to pass the title to those goods provided that he delivers the goods.

In Australia, in the case of the buyer in possession, delivery may be constructive delivery. In *Gamer's* case a retail car dealer purchased and obtained actual possession of cars from a wholesaler who reserved title subject to payment. The retail car dealer purchased these cars under a floor plan agreement with finance provided by Natwest Wholesale. Under this arrangement, the retail car dealer warranted that the cars were unencumbered and sent a signed document called 'Delivery Receipt for Trade-In or Used Vehicles' to Natwest. The document acknowledged that the dealer held the cars according to the floor plan arrangement. There was no physical delivery of the cars from the retail car dealer to the financier. It was held that there was a constructive delivery to the financier since the handing over of the delivery receipt served a dual purpose acknowledging that the dealer held the car pursuant to both the sale and the floor plan arrangement.<sup>45</sup> The case establishes that the delivery by the buyer in possession to the sub-buyer is not limited to a change in the actual possession of the goods. It is not necessary that the sub-buyer gain actual physical custody. It is sufficient if the sub-buyer acquires constructive possession of the goods. 'It is possession by the first buyer which creates the mischief, not failure to take actual delivery.'<sup>46</sup>

## VI CONSTRUCTIVE DELIVERY AS A VOLUNTARY TRANSFER OF POSSESSION

As previously stated, 'delivery' is defined as 'voluntary transfer of possession from one person to another'.<sup>47</sup> Before *The Saetta* there had been no occasion to consider the meaning of voluntary. In *The Saetta* the court had to decide whether

---

41 For example, the case where the title of the seller or buyer in possession has been avoided.

42 For example, the case where a person has only agreed to buy and the property has not yet passed.

43 See *Sale of Goods Act 1923* (NSW) s 28(1): 'the delivery ... shall have the same effect ... as if person making the delivery ... were expressly authorised by the owner ...'; s 28(2): 'the delivery – shall have the same effect – as if the person making the delivery ... were a mercantile agent intrusted by the owner'.

44 *Gamer's* case (1987) 163 CLR 236, 248.

45 Ibid 250 (Mason CJ).

46 *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475, 491 (McHugh JA).

47 *Sale of Goods Act 1923* (NSW) s 5(1) (emphasis added).

the purported delivery on the termination of a contract, when the goods were already in the custody of the deliverer, was voluntary. The court found that the transfer of possession was not voluntary; it had occurred automatically, not by will.

The oil bunkers in *The Saetta* were in the possession of the vessel owners who held them on behalf of, or subject to, the control of the charterers. This gave the charterers constructive possession. The owners of the vessel terminated the charterparty for non-payment of the hire. Under the terms of the contract, if the charterers owned the bunkers onboard, title to those bunkers transferred to the owners of the vessel on the termination of the charterparty. As the charterers did not have title to the bunkers, the owners of the vessel could claim title only if they established first, that the charterers were in possession as persons who had agreed to buy the bunkers, and secondly, that the charterers had voluntarily transferred possession of the bunkers to them.

While accepting that delivery could occur through a transfer of constructive possession, Clarke J found that a mere change of possession from the buyer in possession to a third party was insufficient to constitute delivery. The transfer of possession, constructive or otherwise, was required to be voluntary. Justice Clarke said, 'there must be some voluntary act by the buyer in possession amounting to delivery, although it need not amount to an act of physical delivery of the goods. Mere inaction would not in my judgment be sufficient'.<sup>48</sup> In *The Saetta*, all that happened was that the owners of the vessel terminated the contract of hire and the owners gained the sole possession of the bunkers. Justice Clarke held that there was no voluntary transfer of possession to the owners of the vessel and thus no delivery. His Honour stated:

The transfer of possession from the charterers to the owners was not in my judgment achieved by any act or even acquiescence on the part of the charterers ... The charterers did nothing ... It was not the failure of the charterers to pay the hire that had the effect of transferring their right to possession of the bunkers to the owners, it was the owners' action in bringing the charterparty to an end ... In my judgment the transfer was involuntary.<sup>49</sup>

In determining what constituted an involuntary transfer of possession, Clarke J examined two cases where the voluntary transfer of possession from the buyer in possession to the sub-buyer was achieved with very little effort on the part of the buyer in possession. In *Gamer's* case it was held that the delivery of the receipts signed by the car dealer pursuant to the finance agreement, constituted a voluntary transfer of possession.

In *Worcester Works Finance Ltd v Cooden Engineering Co Ltd*<sup>50</sup> ('*Worcester Works*'), Griffiths, a car dealer, sold a car to a finance company but remained in possession of the car, as the purported hire-purchaser was a fake. The car dealer failed to pay Cooden, the person from whom he had bought the car, so Cooden came and took possession of the car. Cooden had sold the car to the car dealer had not avoided this sale prior to the sale from the dealer to the finance company,

---

48 *The Saetta* [1994] 1 All ER 851, 866.

49 Ibid 866.

50 [1971] 3 All ER 708.

so the finance company gained good title and the car dealer was a seller in possession. The retaking of the car by Cooden, the person who had initially sold to the car dealer, was treated as a disposition of the car because it was understood that Cooden gave up its rights on the unmet cheque. Clearly there was a transfer of possession from the car dealer, the seller in possession, to the third party, Cooden.

In *The Saetta* Clarke J explored whether the disposition from the car dealer was a voluntary transfer of possession. In *Worcester Works* Lord Denning had said the seller in possession ‘acquiesced in their retaking it. That was, I think, tantamount to a delivery or transfer by him’.<sup>51</sup> But in *Worcester Works* the seller in possession had ‘cheerfully handed over the key’<sup>52</sup> and the car was ‘given up voluntarily’.<sup>53</sup> Justice Clarke in *The Saetta* said the seller in possession in *Worcester Works* ‘did not simply stand by. On the contrary, he “cheerfully handed over the key”. That seems to me not to be mere acquiescence but to amount to a voluntary act of constructive delivery of the car’.<sup>54</sup>

*Worcester Works* concerned actual delivery by the seller in possession and *Gamer’s* case involved constructive delivery by the buyer in possession. The recasting of what occurred in *Worcester Works* and in *Gamer’s* case as voluntary acts on the part of the seller in possession or buyer in possession is significant. The analysis in *The Saetta* has introduced a further requirement for constructive possession for the purposes of constructive delivery. It must be possible to characterise as voluntary, some positive action on the part of the seller or buyer in possession in concert with the transfer of possession, which constitutes the delivery. This contrasts with the requirements for constructive possession for the purposes of being the buyer in possession, which does not examine whether the coming into possession is something that is voluntary or involuntary.

## VII CONSTRUCTIVE DELIVERY BY THE SELLER IN POSSESSION

In *Michael Gerson (Leasing) Ltd v Wilkinson*<sup>55</sup> (*‘Gerson’*) the English Court of Appeal decided that a single transaction involving a sale and leaseback where the seller retained actual possession amounted to a constructive delivery to the financier/lessor. *Gerson* established that the seller in possession may give constructive delivery. *Gerson* emphasised ‘change in the character of possession’ in the absence of ‘control’ as a test for constructive possession/delivery. Lord Justice Clarke delivered the leading judgment.

The goods at issue in *Gerson* were various items of heavy plant and equipment owned by Emshel IX Ltd. Emshel sold the goods to Michael Gerson (Leasing) Ltd in a sale and leaseback arrangement. Emshel retained physical possession of

---

51 [1971] 3 All ER 708, 712.

52 Ibid 713 (Phillimore LJ).

53 Ibid 714 (Megaw LJ).

54 *The Saetta* [1994] 1 All ER 851, 866.

55 [2001] 1 All ER 148.

the goods. Subsequently Emsheff sold a portion of those goods to State Securities Ltd ('State') under another sale and leaseback arrangement. Emsheff failed to make payments under both leases. Both Gerson and State terminated their respective leases and sold the goods to Sagebush Ltd. The transaction between Gerson and Sagebush occurred in February and was subject to payment by Sagebush. The sale of the portion of the goods between State and Sagebush was made in March of the same year. In that same month, Sagebush sold the goods to Wilkinson. The matter came for decision when Gerson brought an action against State and Wilkinson for damages for conversion.

In the sale between Emsheff and Gerson, Emsheff became a seller in possession with Gerson as the true owner. Since Emsheff retained continuity of physical possession, it was possible for Emsheff to transfer good title to the subsequent buyer, State, provided the goods were delivered to State under a sale. It was accepted that the delivery contemplated by the statute was constructive delivery.<sup>56</sup> Lord Justice Clarke found that there was indeed a constructive delivery between Emsheff and State.

## VIII CONSTRUCTIVE DELIVERY – CONTROL AND/OR CHANGE IN THE CHARACTER OF POSSESSION

In *Gerson* the court found that the seller in possession made a constructive delivery to the subsequent buyer under the second sale by focusing on the change in the character of the seller's possession rather than on any control over the goods that could be asserted by the subsequent buyer.

Lord Justice Clarke considered the treatment of constructive delivery in *Gamer's* case and in *The Saetta* and found the deciding factor in both of those cases was control over the goods. In *Gamer's* case the finance company who bought from the car dealer (the buyer in possession) was in constructive possession of the cars by virtue of the financing contract between the two parties, which provided that the finance company could take possession of the cars at any time without notice. This meant that the cars were subject to the control of the finance company. This aspect of the relationship was not emphasised in the High Court decision, which did not consider the relevant clause in the contract between the retail car dealer and the financier. Indeed in *Gerson* much was made of resort to the case as decided in the New South Wales Court of Appeal.<sup>57</sup>

In *The Saetta* the charterer (buyer in possession) was in constructive possession because of the control exercised over the vessel's owner, who had actual possession. Both of those cases, said Clarke LJ, were cases 'where A was held to be in possession of property in the actual custody of B because of the nature and extent of the control which A exerted over the property'.<sup>58</sup>

---

<sup>56</sup> Ibid 152.

<sup>57</sup> Ibid 153. See also *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475.

<sup>58</sup> *Gerson* [2001] 1 All ER 148, 153.

In *Gerson* Clarke LJ held that State, the buyer in the second sale, did not have the requisite control over the goods for constructive possession by this avenue. In the transaction between Emsheff and State, the leaseback from State to Emsheff did not give State any control over the goods:

Emsheff was holding the ... goods in its own right as lessee of State. State had no control over the goods at that time. It was not in the same position as Natwest in the *Gamer's Motor Centre* case or of the charterers in *The Saetta*.<sup>59</sup>

It was not possible to find constructive delivery by virtue of any control over the goods.

The court in *Gerson* found constructive delivery through a change in the character of the possession. For Emsheff, the seller in possession, to pass title to State it was necessary to find a delivery to State, and delivery involves a voluntary transfer of possession. Lord Justice Clarke found the delivery through the sale and leaseback itself, which were, in effect the one transaction. They 'were both part of the one transaction. Thus the sale would not have taken place without the leaseback and the leaseback could not of course have occurred without the sale'.<sup>60</sup> It should be noted, however, that the invoice was dated 19 August and the leaseback evidenced by the lease agreement was dated 28 August. Lord Justice Clarke concluded that it was probable that 'notwithstanding the invoice, there was no binding agreement of sale and leaseback between Emsheff and State until the lease was signed on 28 August'.<sup>61</sup>

Lord Justice Pill also discussed the constructive delivery from Emsheff to State through the sale and leaseback and concluded that 'the change in the character of possession upon the sale and leaseback in this case is sufficient to establish that a constructive delivery has been made'.<sup>62</sup>

Lord Justice Clarke reached his conclusion in *Gerson* by reasoning backwards. Under the terms of the leaseback, State explicitly gave possession to the lessee (Emsheff). In order to confer possession, State must have had ownership and a right to possession, which would give State a right to transfer possession. In order for State to give delivery to Emsheff there must have been a constructive delivery from Emsheff to State. If there had been a constructive delivery from Emsheff to State then State had title and the right to transfer possession.

The finding of constructive delivery through a change in the character of the possession depended on an analysis of delivery by attornment. There is a delivery by attornment when the seller acknowledges to the buyer that s/he holds and possesses the goods as bailee for the buyer. Lord Justice Clarke found a constructive delivery from Emsheff to State by referring to Pollock and Wright, Bowstead and the authorities of *Marvin v Wallace*<sup>63</sup> and *Dublin City Distillery Ltd v Doherty*.<sup>64</sup> His Honour said:

---

59 Ibid 153–4.

60 Ibid 154.

61 Ibid 161.

62 Ibid 170.

63 (1856) 6 El & Bl 726; 119 ER 1035.

64 [1914] AC 823.

In my judgment the legal position is as set out by both *Pollock and Wright* and *Bowstead*. Thus, where a seller in possession of the goods sold acknowledges that he is holding the goods on account of the buyer in the circumstances where (as *Pollock and Wright* put it at p 72) he recognises the purchaser's right to possess as owner and his continuing to hold the goods thereafter as the bailee with a possession derived from that right, then (as *Pollock and Wright* put it at p 73) the transaction amounts to delivery to the buyer immediately followed by redelivery to the seller as bailee and that is so whether the seller's custody is 'in the character of a bailee for reward or of a borrower'. There is a change of the character of the seller's possession when he holds the goods for the buyer and, indeed, when he subsequently becomes say, the bailee from the buyer for reward.<sup>65</sup>

*Marvin v Wallace* involved the sale of a horse. After the sale the seller asked the buyer if he could borrow the horse. The buyer agreed to the loan provided the seller took care of the horse. It was held that there was a delivery of the horse from the seller to the buyer since the buyer assumed ownership by permitting the seller to take it and ride it.<sup>66</sup> In *Dublin City Distillery Ltd v Doherty* it was held that an agreement between the owner/pledger and the pledgee, 'the effect of which is to change the possession of the pledger from a possession on his own account as owner into possession as bailee for the pledgee' has effect as 'delivery of the goods to the pledgee and a redelivery of the goods by the pledgee to the pledger as bailee ... A mere book entry cannot, however, have this effect.'<sup>67</sup>

In *Gerson*, Clarke LJ found that when Emsshelf, the seller in possession, entered into the leaseback agreement with State this amounted to an acknowledgement by Emsshelf that it now held the goods on behalf of State. His Honour said:

I do not think that it is necessary to identify a moment at which the goods were delivered to State by Emsshelf. The effect of the sale and leaseback arrangement was that the goods must be taken to have been delivered to State because State could not otherwise have leased them back to Emsshelf ... Equally it seems to me that there was here an acknowledgement by Emsshelf that it held the goods on behalf of State in the lease itself.<sup>68</sup>

The lease by itself did not create the constructive delivery from Emsshelf. It was the sale, together with the acknowledgment by the seller, via the lease, that the buyer now had the right to lease (that is, dispose of the possession of the goods), which created the buyer's constructive possession.

The distinguished academic Sir Roy Goode QC appeared for Gerson, the buyer under the first sale who became the true owner, and argued that there was no constructive delivery from Emsshelf to State. It is worth considering the three bases of this argument. First, Sir Roy argued that this situation, where the sale and leaseback was one agreement, was distinct from the situation in *Marvin v Wallace* where the sale and loan were separate. Secondly, he posited that there was no acknowledgement by Emsshelf of State's right to possession. The final point was that there was no sufficient voluntary act of delivery from Emsshelf to State. Sir Roy, in argument, said that there should be an identifiable moment in

---

65 *Gerson* [2001] 1 All ER 148, 157–8.

66 *Marvin v Wallace* (1856) 6 El & Bl 726; 119 ER 1035.

67 *Dublin City Distillery Ltd v Doherty* [1914] AC 823, 852.

68 *Gerson* [2001] 1 All ER 148, 158.

time at which there was an assumption of control by the constructive possessor, who should be able to instruct the person with actual possession what to do with the goods.<sup>69</sup> Sir Roy maintained that there was no point in time at which State could instruct Emsheff what to do with the goods or decide whether or not to lease the goods to Emsheff.<sup>70</sup> In effect there was no moment at which State assumed control.

The court rejected this argument. Lord Justice Clarke said: 'I do not think it is necessary to identify a moment at which the goods were delivered.'<sup>71</sup> Lord Justice Pill acknowledged there was force in the argument that the concept of constructive delivery would be less artificial if 'delivery can be taken to have occurred only when there has been an assumption of control by the constructive possessor'.<sup>72</sup> However, he rejected the further proposition that there must be a moment of time at which the constructive possessor can say the goods are held for him.<sup>73</sup> It was also held that the making of an agreement for sale and entry into a lease constituted a sufficient voluntary act.<sup>74</sup>

*Gerson* emphasises change in the character of the possession rather than control as the test of constructive possession. The court in *Gerson* did not reject the proposition that constructive possession may involve control over goods not in custody. However, it did reject the notion that it must be possible to say that such control is assumed at a particular point in time.

In *Gamer's* case, change in the character of the possession of the buyer in possession was emphasised alongside control. Chief Justice Mason said: 'The question then is whether ... there was a change in the character of the Dealer's possession ...'<sup>75</sup> Justice Dawson said: 'The character of the possession of the vehicles by the Dealer was altered'.<sup>76</sup> Justice Brennan said:

'It is well established' said Williams and Kitto JJ in *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477 at 494, 'that constructive delivery sufficient to pass the title in chattels may be effected by a change in the character of an uninterrupted custody': see also *Minister for Supply & Development v Servicemen's Cooperative Joinery Manufacturers Ltd* (1951) 82 CLR 621 at 641.<sup>77</sup>

The emphasis on a change in the character of the possession focuses more on the person making the delivery than on the person to whom the delivery is made. *Gerson* establishes that the buyer with neither actual possession nor control may still have constructive possession of the goods if there has been a change in the character of the seller's possession so that it can be said that the buyer has taken constructive delivery.

---

69 Ibid 158, 170.

70 Ibid 158.

71 Ibid.

72 Ibid 170.

73 Ibid.

74 Ibid 158.

75 *Gamer's* case (1987) 163 CLR 236, 250.

76 Ibid 263.

77 Ibid 255.



## IX IS IT STILL NECESSARY FOR THE DELIVERY TO BE DISTINCT FROM THE SALE?

In *Gamer's* case Mason CJ said that for the purposes of transferring title via the buyer in possession there must be a delivery in addition to the sale.<sup>78</sup> In *Gamer's* case this was satisfied by very little. The handing over of the delivery receipt was said to evidence the sale from the dealer to the financier but not be the sale itself; and the handing over of the delivery receipt was also the acknowledgment by the dealer/seller that it held the cars as bailee for the buyer pursuant to an agreement that the dealer should make a retail sale of the car.<sup>79</sup>

In *Gerson*, Clarke LJ pointed out that conceptually it made no difference if a sale and leaseback constituted one agreement or if the sale and loan constituted two separate agreements as in *Marvin v Wallace*. His Honour said:

Although on the facts of *Marvin's* case the loan arrangement was made after the contract of sale, I do not think that in principle it would or should have made any difference if the sale agreement and the bailment had been contained in the same contract. I can see no reason why it should be held that there was a delivery and redelivery in the one case and not in the other.<sup>80</sup>

The requirement from *Gamer's* case that the sale and delivery be distinct was not discussed explicitly in *Gerson*. *Gerson* may be interpreted as preserving the requirement of a distinction between the sale and delivery as the documents evidencing each were dated on separate occasions. However, if Clarke LJ is interpreted as saying that it makes no difference if the sale and attornment/delivery are contemporaneous then the dicta in *Gamer's* case should no longer be persuasive. It may be that the latter is the better view as Clarke LJ said further:

Finally, it seems to me that the conclusions set out *above* make sense in modern conditions. This and other cases show that purchase of goods is commonly financed by sale and leaseback arrangements such as those entered into by both *Gerson* and *State* in the instant case. It seems to me that it makes commercial sense to hold that such arrangements involve a transfer of constructive possession to the finance company who buys the goods and leases them back, such that the innocent finance company can take advantage of the provisions of ... [the] Act.<sup>81</sup>

The contest in *Gerson* was between two finance companies. If *State* had constructive possession of the goods by virtue of a sale and leaseback, then so did *Gerson*. Contrary to Clarke LJ, Pill LJ expressed no view as to whether it made commercial sense to allow the innocent finance company to take title.<sup>82</sup> Lord Justice Clarke did not address the question of why one buyer with constructive possession should prevail over another buyer who had obtained constructive possession. The first buyer bought on the strength of actual possession and ownership. The second buyer bought on the strength of actual

---

78 *Gamer's* case (1987) 163 CLR 236, 249. This was also Justice Gaudron's view at 276. Both Mason CJ and Gaudron J affirmed *Nicholson v Harper* [1895] 2 Ch 415.

79 Ibid 250.

80 Ibid 158.

81 *Gerson* [2001] 1 All ER 148, 159 (emphasis added).

82 Ibid 170.

possession which appeared to be ownership. What occurs here is that the second in time prevails and acquires title over the buyer who was first in time. The section giving title to the buyer from the seller in possession is said to act on the delivery, not the sale. It is by virtue of this delivery/possession that the second buyer obtains title. Yet here, without the operation of the Act, the second buyer has obtained no more than the first buyer – constructive possession. Chief Justice Mason's dicta in *Gamer's* case that there must be a delivery that is separate from the sale may be seen as an attempt to preserve the rationale for allowing the second buyer to acquire title and defeat the first buyer. By finding that a contemporaneous sale and leaseback which appears to elide the sale, delivery and redelivery is sufficient to constitute a constructive delivery, there is a danger that the rationale for allowing the second buyer to take title is obscured.

## **X CONSTRUCTIVE POSSESSION AND CONSTRUCTIVE DELIVERY**

Does the buyer with constructive possession under an initial sale still have constructive possession once title has passed to the subsequent buyer under the second sale via a constructive delivery?

Emsheff sold first to Gerson and then to State. The action taken in *Gerson* required consideration of the sale from Gerson to Sagebush, which occurred one year after the sale from Emsheff to State. At first instance, the court had found that property had passed to Wilkinson who bought from Sagebush, the buyer in possession, who had obtained possession from Gerson, the seller. The Court of Appeal first considered the sale from Gerson to Sagebush. The three judges concluded that no contract was formed between Gerson and Sagebush and that if there were a contract formed, the parties did not intend property to pass until Sagebush had paid Gerson. Sagebush did not pay Gerson. Consequently, Sagebush did not gain title to the goods.<sup>83</sup> It was argued for Wilkinson, who sought to take title through Sagebush, that if there were a contract between Gerson and Sagebush that Wilkinson took title by virtue of the buyer in possession provision – with Gerson as the seller and Sagebush as the buyer in possession. Lord Justice Clarke considered this analysis and concluded that Sagebush did not have possession at any time. Gerson had been content to allow Emsheff to have actual possession and had also insisted on a retention of title clause as between Gerson and Sagebush.<sup>84</sup> Since Sagebush did not have possession, Wilkinson could not take title from a buyer in possession.

If the court had found Gerson consented to possession by Sagebush, then the question would have arisen as to whether Gerson would be able to confer possession on Sagebush. Emsheff had actual possession of the goods. Gerson, the first buyer, had gained ownership and constructive possession by reason of the sale and leaseback in 1995 and State, the subsequent buyer, had gained

---

<sup>83</sup> Ibid 164–5, 169, 171.

<sup>84</sup> Ibid 165–6.

constructive possession by reason of the sale and leaseback in 1996. Gerson sold to Sagebush in 1997. When State gained title to the goods, Gerson lost title. If Gerson had sold to Sagebush, Gerson would have sold in the belief that it was the owner, but without actual title. Would this be sufficient to satisfy the requirement that the buyer in possession (Sagebush) be in possession with the consent of the seller?

In *National Employers Mutual General Insurance Association Ltd v Jones*<sup>85</sup> it was held that for the purposes of the *Sale of Goods Act 1979* (UK) a thief could not be the seller. In that case a car was stolen and sold five times. The fifth buyer claimed that the fourth buyer was in possession with the consent of the seller, the third buyer. In the *Gerson* scenario it was the onetime owner, Gerson, who had lost title by operation of the Act. It can be argued that neither the thief nor the disposed owner should be treated as the seller who may consent to the possession of the buyer in possession since this would push the exceptions to the *nemo dat* rule too far.

If the chain is pushed back further, and notice taken of Gerson's loss of title, Gerson would be the buyer in possession with the consent of the seller (Emsheff) but would not have been the buyer in possession with the consent of the owner since State never consented to any possession by Gerson. However, at the time that Gerson acquired constructive possession from Emsheff via the sale and leaseback, Emsheff was the owner. If a buyer in (constructive) possession can give (constructive) possession to the sub-buyer, then Sagebush should be able to acquire and pass title to Wilkinson. The problem here is that once Gerson has lost title, must Gerson also lose (constructive) possession?

This begs the question as to whether a seller or buyer in possession who has constructive possession may ever be able to give constructive possession to the subsequent buyer. In *Gamer's* case, the buyer in possession had actual possession and gave constructive possession to the financier. In *Four Point Garage*, the buyer in possession gained constructive possession and the subsequent buyer gained actual possession through the delivery from the seller direct to the subsequent buyer. In *The Saetta*, the oil bunkers were physically on the ship which the buyer in possession had chartered and which the owner owned. The goods were delivered directly by the seller to the ship. Both subsequent buyers had actual possession. In *Gerson*, if there had been no retention of title clause between Gerson and Sagebush, the court would have had to deal squarely with the question of whether a seller or buyer in constructive possession can give constructive possession to the subsequent buyer. Logically, there is no obstacle to this, as many goods are traded in a chain sequence without actual possession changing hands. In transactions involving documents of title it is the document which is delivered. Here in *Gerson*, the chain of title had merely been interrupted by operation of the Act.

---

85 [1990] 1 AC 24.

## XI SOME CONCLUSIONS

The first requirement for taking title via *Sale of Goods Act 1923* (NSW) s 28(1) and s 28(2) is that the seller or the buyer, who is not the true owner, has possession of the goods. There is now a divergence between Australian law and English law as to whether constructive possession is sufficient. Notwithstanding the decision in *Gamer's* case, Australian courts should follow the English decisions, and, when appropriate, find that constructive possession is sufficient to constitute a buyer in possession. Logically if the buyer can be a buyer in (constructive) possession, the same should be the case for the seller in possession.

If Australian courts follow the lead of the English decisions there will be significant change to the law on delivery which finance companies and others dealing in goods will need to heed. In addition to a constructive delivery from the buyer in possession as in *Gamer's* case, a transfer of constructive possession should be sufficient for delivery from the seller in possession. To this extent, *Gerson* should be followed in Australia.

Control over the property and a change in the character of the possession may both be incidents of constructive possession.<sup>86</sup> In *Gamer's* case there was both control by the financier sub-buyer and a change in the character of the possession of the dealer, who, after the sale to the financier, held the cars under the floor plan arrangement. In *The Saetta* the charterers were in constructive possession by virtue of the control which they exercised under the charterparty. In *Gerson* there was a change in the character of the possession by Emsshelf of the heavy plant as a result of the contemporaneous sale and leaseback. Additionally, it may no longer be necessary to distinguish clearly between the sale and the delivery as a result of the decision in *Gerson*. Neither control nor a change in the character of the possession will be sufficient for delivery unless the constructive possession is conferred voluntarily. A delivery triggered automatically by a clause on termination of a contract is not voluntary as in *The Saetta*. A delivery via a contemporaneous sale and leaseback is voluntary as in *Gerson*. If a person in constructive possession is able to deliver by conferring constructive possession, this widens the protection to buyers, but diminishes the security of owners.

The acceptance of constructive possession as a means of transferring property raises questions about the underlying rationale for exceptions to the *nemo dat* principle. The lines between control, possession and property may be more blurred. This may be an argument for a more effective registration system for certain types of transactions – particularly if the sale transaction is linked to financing.

---

86 Cf Janet Ulph, 'Conflicts of Title and the Obligations of the Seller' in Ewan McKendrick (ed), *Sale of Goods* (2000) 201, who says that the question of control is pivotal in determining who has possession. A buyer should be a buyer in possession if that buyer gains constructive possession.