

## THE ROLE OF TRUSTS IN THE *PPSA*

JAMIE GLISTER\*

### I INTRODUCTION

Section 12(1) of the *Personal Property Securities Act 2009* (Cth) ('*PPSA*') provides that a 'security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)'.

Subsection (2) gives a non-exhaustive list of transactions that will create security interests for the purposes of section 12(1). Although trusts are not included as specific examples, unlike personal properties securities legislation in some other jurisdictions,<sup>1</sup> the list does include trust receipts and transfers of title.<sup>2</sup> To be security interests within the meaning of the *PPSA*, however, the transactions must still in substance secure payment or performance of an obligation. That functional test is the key to the whole scheme.

In this article I suggest that one device that is assumed to be caught by section 12, a trust provided for by a retention of title proceeds clause, could in fact fall outside the definition of security interest. The trust would then be subject to the old priorities rules rather than those in the *PPSA*. My argument focuses on the reasoning of the majority in the *Associated Alloys* case.<sup>3</sup> Although that case concerned an implied contractual term, drafters can include express clauses to take advantage of the High Court's analysis. If those clauses are worded properly they may create valid trusts that do not count as *PPSA* security interests.

The article then discusses the place of constructive trusts in the new system, given that the *PPSA* exempts from its scope interests that are created by the operation of law. The problem here is that a plain reading of the legislation would seem to both include and exclude many interests at the same time. Finally,

---

\* Faculty of Law, University of Sydney. Thanks to John Stumbles, Sheelagh McCracken and the referees for discussion and comment. They should not be taken to agree with me, and any errors remain my own.

1 See, eg, *Personal Property Security Act*, SS 1993, c P-6.2 ('*Sask PPSA*') s 3(1)(b); *Personal Property Security Act*, RSBC 1996, c-359 ('*BCPPSA*') s 2(1)(b). In New Zealand, security trust deeds and trust receipts are given as examples: *Personal Property Securities Act 1999* (NZ) ('*NZPPSA*') s 17(3).

2 *PPSA* s 12(2)(g) (trust receipts), s 12(2)(k) (transfers of title).

3 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 ('*Associated Alloys*'). As is well known, evidential difficulties meant that a trust was not found in the case itself. See below n 82.

I also make some observations about the role of *Quistclose* trusts in personal property security regimes.<sup>4</sup> These trusts are expressly excluded from the Australian *PPSA*, but their status is uncertain in Canada and New Zealand.

## II TRUSTS OF PROCEEDS

In the *Associated Alloys* case, a contract for the sale of steel plate included the following provision:

In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds.<sup>5</sup>

The provision appeared under the heading ‘reservation of title’. Proceeds clauses are seen as a form of advanced retention of title device and are usually included in that part of a contract. However, it should be noted that the efficacy of such clauses does not depend on whether title has been retained in the original goods. Indeed, Bryson J found at trial in *Associated Alloys* that the steel plate ceased to exist before the derived products were sold on to third parties, so title was not retained at the point of subsale.<sup>6</sup> But that did not affect the operation of the proceeds clause because the question was not whether title had been ‘retained’ to the proceeds; instead it was whether the (effectively independent) proceeds clause operated as a charge or as a trust. His Honour held:

A decision whether in Equity a mortgage or charge exists is made according to the substance and whole circumstances of the parties’ relationship. When the [proceeds] subclause is approached in that way it is in my view altogether obvious that it gives the vendor an entitlement to a charge over the proceeds of the sale of the derived goods, because the trust is a trust over the part of the proceeds which equals the amount owing, and it was obviously the parties’ intention that when that amount was paid, the trust would cease to exist.<sup>7</sup>

The unregistered charge would then be void against the buyer’s administrators and liquidators under section 266(1) of the then *Corporations Law*. On appeal, the Court of Appeal relevantly agreed with Bryson J and only differed on whether the buyer’s book debts, in addition to its actual receipts, counted as ‘proceeds’ that could be subject to the trust/charge.<sup>8</sup>

---

4 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

5 *Associated Alloys* (2000) 202 CLR 588, 597.

6 *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* (1996) 14 ACLC 952, 955. This finding was not challenged in the higher courts.

7 *Ibid* 958.

8 *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd (admin apptd) (rec and mgr apptd)* (1998) 16 ACLC 1633. On this point the High Court concluded that ‘proceeds’ is to be construed as ‘referring to moneys received by the buyer and not debts’: *Associated Alloys* (2000) 202 CLR 588, 602 [25].

On further appeal, the High Court analysed the device in a completely different way. Rather than see the device as something defeasible on payment of a debt, and therefore as a registrable charge, the majority found that the seller could indeed have avoided the provisions of the *Corporations Law*. While the lower courts had assumed that the trust must be defeasible because otherwise the seller could be paid the price and remain entitled as a trust beneficiary, the High Court saw no problem with the coexistence of trustee/beneficiary and debtor/creditor relations. The key was to imply a term into the contract providing that the constitution of the trust was an alternative way of *discharging* the buyer's obligation in the first place.<sup>9</sup> There could then be no question of defeasibility, and no question of a registrable charge. Even the credit period allowed to the buyer could be accommodated within this trust analysis because it simply identified a period during which the seller could not call upon the trust property.<sup>10</sup>

### A Earlier Authority

The majority's decision was surprising because, in contrast to the judgments of Bryson J and the Court of Appeal, it appeared to depart from a settled English line of authority on proceeds trusts. In *Re Bond Worth Ltd*,<sup>11</sup> Slade J held that a proceeds clause purporting to create a trust over the buyer's entire proceeds was in fact a registrable charge. The same analysis was applied by Mummery J in *Compaq Computer Ltd v Abercorn Group Ltd*, where the judge explained:

Compaq's beneficial interest in the proceeds of sale, whether in an account in the name of Abercorn or in its own name, was determinable on payment to Compaq of the unpaid price of the Compaq products and the other sums owing. In that event, Abercorn would be entitled to the balance in the account. ... Thus, when the relevant contractual debts in respect of the various supply contracts of Compaq products were paid, the beneficial interest of Compaq in the proceeds of sale would determine and Abercorn's trading profit would be freed to it for its own use.<sup>12</sup>

In other words, the parties did not intend the seller to remain entitled to the proceeds even after they were paid. Any trust was therefore 'defeasible or destructible upon payment of such debt',<sup>13</sup> and so was a registrable charge. The alternative interpretation would see the seller as entitled to the entire proceeds, including those in excess of the amount actually owed, and still entitled to full payment under the contract as well. In *Modelboard Ltd v Outer Box Ltd (in liq)*, the judge said that a clause with this effect would be 'an astonishing provision'.<sup>14</sup>

---

9 *Associated Alloys* (2000) 202 CLR 588, 604-5, 608, 609-10.

10 *Ibid* 609-10. Cf *Stiassny v North Shore City Council* [2009] 1 NZLR 342, 347-8.

11 [1980] 1 Ch 228. I leave aside the point that the seller in that case sought to retain only equitable title.

12 [1991] BCC 484, 495.

13 *Re Bond Worth Ltd* [1980] 1 Ch 228, 248.

14 [1992] BCC 945, 949. See also *Clough Mill Ltd v Martin* [1985] 1 WLR 111, 120. Cf *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349, 364, where a proceeds trust of the entire receipts was upheld but Barker J concluded that any surplus 'could well' belong to the buyer. With respect, it is hard to see how such a device could be anything but a charge.

Given that the High Court of Australia allowed that a proceeds trust could exist, and that it would not amount to a registrable charge, *Associated Alloys* has been seen as inconsistent with these English cases.<sup>15</sup> However, this fails to appreciate the true scope of the decision. The High Court did not say that proceeds trusts could never be charges; indeed this question was expressly left open:

The present case is not an example of an arrangement whereby, upon its proper construction, proceeds subject to the trust in favour of the seller were defined otherwise than by reference to the state of indebtedness between the buyer and the seller, and the beneficial interest of the buyer in a greater sum might have been appropriated by the seller to give it a windfall. Equity favours the identification and protection of an equity of redemption and, in that regard, prefers substance to form. In a case such as that discussed above, this might have provided a footing for the treatment of the interest of the seller as no more than a charge upon the proceeds to secure the indebtedness of the buyer. It is unnecessary to express any concluded view upon the matter.<sup>16</sup>

Instead the High Court merely found that *some* proceeds trusts will not be charges. This is because a proceeds trust can be (but of course is not always) an alternative way of discharging the buyer's obligation. In such cases the trust will not be defeasible so it will not be a charge. The English cases had simply not considered this point so, as the High Court itself later commented, nothing in *Associated Alloys* cast doubt on what had earlier been said by the English courts.<sup>17</sup>

### B *Associated Alloys* and the PPSA

The crucial distinction is between analysing a proceeds trust as: (i) a charge for the seller with an equity of redemption in the buyer; or (ii) a trust for the seller coupled with an authority for the trustee (the buyer) to purchase the equitable interest of the beneficiary (the seller).<sup>18</sup> While the difference was important under the old securities regime, there might not appear to be a great deal of practical difference between the two, and the PPSA is expressly concerned with the *substance* of a transaction. Section 12 of the PPSA was certainly intended to catch 'trust of proceeds' clauses.<sup>19</sup> The analysis is apparently supposed to go:

15 See, eg, Dugald McWilliams, 'The Floating Charge and its Place within Article 9, PPSA Security Regimes and Australian Law' (2004) 22 *Company & Securities Law Journal* 481, 491; Sean Stevens, 'Quistclose Trusts in Lending – Trust or Security Interest?' (2005) 23 *Company & Securities Law Journal* 325, 330–2; Aidan Drinkwater, 'The Rise and Fall of Purchase Money Security Interests at General Law and under Article 9 Regimes' (2010) 21 *Journal of Banking and Finance Law and Practice* 5, 26.

16 *Associated Alloys* (2000) 202 CLR 588, 607 (citations omitted).

17 *General Motors Acceptance Corporation Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305, 311.

18 This would be what happened if a buyer then paid the seller in the normal way.

19 See, eg, Sandra Henderson-Kelly and Robert Patch (Personal Property Securities Branch, Australian Attorney-General's Department), 'Personal Property Securities Bill 2008: Retention of Title Arrangements' (Paper presented at the 9th Annual Insolvency Practice Symposium, Melbourne, 6 February 2009).

1. The agreement obliges the buyer to pay money to the seller.
2. The trust can be accessed by the seller if necessary (ie, because the buyer does not pay).
3. So the trust secures the payment of money by the buyer to the seller.
4. So the trust is a security interest within the meaning of section 12 of the *PPSA*.

This, however, is mistaken: the contract does not simply require the buyer to pay money to the seller; it requires the buyer to *fulfil its obligations under the contract*. Paying the price is no doubt the easiest way to do this, but it is not the only way. In *Associated Alloys* the constitution of the trust *discharged* the buyer's obligation under the contract.<sup>20</sup> This point is vital in the *PPSA* context for the simple reason that something which discharges an obligation cannot also be said to secure it. Orpin puts it well: 'the essence of a security interest ... is that the rights in the collateral and the obligation secured are distinct'.<sup>21</sup>

This article does not, of course, argue that every 'trust of proceeds' clause will fall outside of the *PPSA*. The *Associated Alloys* model will only work in situations where the constitution of the trust can be seen as a way of satisfying the original obligation.<sup>22</sup> In contrast, where the trust has a discrete existence then the device will indeed be caught by the section 12 definition.<sup>23</sup> This means that the analysis will only apply where the trust is confined to the amount of the relevant indebtedness rather than the entire proceeds of subsale. Such a restriction avoids the problem of deciding whether the parties genuinely intended the seller to take a windfall,<sup>24</sup> and in *Associated Alloys* the restriction also made it easier to imply the contractual term.<sup>25</sup> Most importantly, the restriction creates

---

20 This point is often overlooked, although some commentators have discussed it. The analysis is called 'artificial' in Joellen Riley, 'A Challenge to Commercial Certainty: "Retention of Title" Trusts' (2000) 14(3) *Commercial Law Quarterly* 13, 16, but defended in Tyrone Carlin, '*Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*: A Commentary and Analysis' (2002) 30 *Australian Business Law Review* 106, 111–112.

21 Jonathan Orpin, 'The Personal Property Securities Act 1999 and Trusts – When Is an Interest Under a Trust a Security Interest?' (2008) 14 *New Zealand Business Law Quarterly* 109, 120.

22 It seems that a later regime-recognised security interest over the same property would take priority over the beneficiary's interest. Under the general law, a legal interest taken for value without notice would take priority, but an equitable interest would probably not. However, two recent decisions of the Supreme Court of Canada confirm that all regime-recognised security interests have 'statutory blessing' and relevantly have the status of legal interests: *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3, [42]; *i Trade Finance Inc v Bank of Montreal* [2011] SCC 26, [61]. 'Statutory blessing' is from Michael Gedye, Ronald Cuming and Roderick Wood, *Personal Property Securities in New Zealand* (Brookers, 2002) 19. The general 'taking free' provisions would not apply to this question because they only concern the taking free of regime-recognised security interests: eg, *PPSA* pt 2.5.

23 The proceeds will then also be dealt with under the regime: see *PPSA* pt 2.4 div 2. Under s 31(1) those provisions only affect proceeds 'to which a security interest is (or is to be) attached'. See also *PPSA* s 32(1)(a)(ii). In short, determining whether an *Associated Alloys* proceeds trust is a security interest within *PPSA* s 12 also determines whether or not that trust is affected by *PPSA* pt 2.4.

24 See *Associated Alloys* (2000) 202 CLR 588, 607; see above n 16.

25 As mentioned in the Introduction, I argue that the importance of *Associated Alloys* lies in the judicial imprimatur given to express clauses.

the required equivalence between the obligation and the trust interest.<sup>26</sup> In short, such a device cannot be a security interest because there is no ‘collateral’. If there is anything that looks like collateral then there is no longer any obligation to secure.

### C Characterisation of the Relationship

Unlike the usual situation where a contract is discharged by the borrower paying money over to the lender, the model outlined above would leave an insolvent company holding money on trust for a former creditor. Could that trust then be caught by the *PPSA* regardless of whether it secured or discharged the obligation? In answering this question other overseas cases have asked whether the relationship between the parties is properly characterised as one of debtor/creditor or trustee/beneficiary. In *Graff v Bitz*,<sup>27</sup> Mr Graff had provided the funds for Mr Bitz to buy a car that the two intended to sell at a profit. Although Mr Bitz was a car dealer, Mr Graff did not deal with him on this basis. Justice Hunter held that Mr Bitz held the car on resulting trust for Mr Graff, and that there was no question of a security interest: ‘There is no evidence before me that Mr Graff was in the business of buying cars and reselling them for a profit. Mr Graff knew Mr Bitz as a friend of his son. There was no history of business transactions between them.’<sup>28</sup> In another Canadian case, *Re Skybridge Holidays Inc*, a travel agent went bankrupt while holding customer money on trust. The Supreme Court of British Columbia upheld Justice Mackenzie’s finding that the funds were outside the personal property securities regime because the travellers were only accidental creditors – they were ‘consumers not lenders’.<sup>29</sup> On appeal, Goldie JA said:

[Justice Mackenzie] looked at the purpose of the transaction; the role and relationship of the parties; the practicality and commercial reality; and the intention of the parties with respect to the transaction. ... I am satisfied the chambers judge’s analysis was principled and in accord with the law in this jurisdiction.<sup>30</sup>

In the recent New Zealand case of *Stiassny v North Shore City Council*,<sup>31</sup> a company had collected receipts out of which it expected to pay a debt to the Council, but the debt had not been paid at the time of the company’s insolvency. Justice Harrison held that there was no relevant agency relationship when the

---

26 A case where such equivalence did not exist is *Simpson v New Zealand Associated Refrigerated Food Distributors Ltd* [2007] 2 NZLR 130, where the proceeds to be held on trust were not referable to an amount owing. The leading authors agree that proceeds clauses fall within the relevant regimes: see Ronald Cuming and Roderick Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, 1994) 58–60; Gedye, Cuming and Wood, above n 22, 91–2; Ronald Cuming, Catherine Walsh and Roderick Wood, *Personal Property Security Law* (Irwin Law, 2005) 82–5. But they do not consider the possibility that a proceeds clause is actually a payment clause.

27 (1991) 86 DLR (4<sup>th</sup>) 184.

28 *Ibid* 192.

29 (1998) 13 PPSAC (2<sup>d</sup>) 387, [8].

30 *Re Skybridge Holidays Inc* (1999) 173 DLR (4<sup>th</sup>) 333, 342.

31 [2008] 1 NZLR 825, *affd* in [2009] 1 NZLR 342 (*‘Stiassny’*).

receipts were collected,<sup>32</sup> concluding that ‘all the relevant contractual provisions suggest that [the company] was entitled to use the fees as part of its normal cash flow, confirming the relationship of debtor and creditor’.<sup>33</sup> This disposed of the case, but the judge went on to consider the New Zealand personal property securities legislation in the event that he was wrong and the company did hold the receipts on trust for the Council. In that case his Honour found that the Council, properly characterised as a creditor, would have had an unperfected security interest caught by the *NZPPSA*.

In *Stiassny*, North Shore City Council came close to making the *Associated Alloys* point made here. The Council argued that it only claimed an equitable interest in the receipts, and noted that the company had an obligation to pay the receipts to it. However, in *Stiassny* there was no equivalence between trust interest and obligation owed. Importantly, the company did not have to pay all of its receipts to the Council but instead only a proportion of them. This meant that any trust of those receipts for the Council could not be seen as discharging the obligation itself, so it followed that any trust would indeed be a security interest. As the Court of Appeal said, dismissing the Council’s appeal, ‘the trust obligation of [the company] with respect to money received was not coterminous with its primary obligation to the North Shore City Council’.<sup>34</sup>

To conclude on this characterisation point: although the buyers and sellers in *Associated Alloys* were in a debtor/creditor relationship in one sense, that does not automatically mean their arrangement constituted a security interest. First, it may be noted that this characterisation approach, while utilised by courts, has no statutory basis in any actual personal property securities legislation.<sup>35</sup> Second, the approach is not always useful. Cuming, Walsh and Wood note that, unless the case clearly falls within a recognised category that does *not* involve a debtor/creditor relationship, the characterisation analysis may just beg the question.<sup>36</sup> Third, under the *Associated Alloys* model the analogue is not a current creditor holding a charge, it is a *former* creditor who has *been paid*. Put like this, there is no relevant relationship other than trustee/beneficiary anyway.

---

32 Ibid 833.

33 Ibid 834. In addition to the reliance on the debtor/creditor characterisation, Harrison J also explained *Graff v Bitz* and *Re Skybridge Holidays Inc* by saying that they involved resulting trusts that were outside the scope of the relevant personal property securities legislation because they arose by operation of law: ‘moneys were deposited by principals with an agent for a specific purpose, constituting what were in effect resulting trusts. The implication of a trust, whether of a resulting or constructive nature, arises by operation of law ... I infer that an implied trust falls outside the PPSA’s scope because it is non consensual’: at 836. See discussion, below, text to n 78.

34 *Stiassny v North Shore City Council* [2009] 1 NZLR 342, 349. The comments were obiter because, like Harrison J, the Court of Appeal found that no trust relationship existed on the facts.

35 This point is well made in Orpin, above n 21, 114.

36 Cuming, Walsh and Wood, above n 26, 82.

### III CONSTRUCTIVE TRUSTS

The personal property securities legislation in each jurisdiction contains a provision that identifies property interests to which those regimes do not apply. The Ontario legislation contains a narrow exclusion that relevantly covers ‘a lien given by statute or rule of law’.<sup>37</sup> The British Columbia wording is ‘a lien, charge or other interest given by a rule of law’.<sup>38</sup> The New Zealand version is ‘a lien ... charge, or other interest ... created ... by operation of any rule of law’.<sup>39</sup> In section 8(1)(c), the Australian *PPSA* has ‘a lien, charge, or any other interest ... that is created, arises or is provided for by operation of the general law’. These exemptions have been found to apply to what might be called remedial constructive trusts,<sup>40</sup> but the position of substantive or institutional constructive trusts is more difficult. This is because, under the general law, constructive trusts can exist in tandem with interests that are intentionally created; the two are not mutually exclusive.

#### A Institutional Constructive Trusts

On its face, section 8(1)(c) of the *PPSA* contains a very wide exemption. Equity, part of the general law, will often regard as done that which ought to be done and impose a constructive trust in cases where value has passed.<sup>41</sup> Indeed, the leading case on that point, *Tailby v Official Receiver*,<sup>42</sup> itself involved a security assignment of present and future book debts. Yet allowing these interests to fall outside the *PPSA* by virtue of section 8(1)(c) would make the regime redundant. Put simply, the subsection cannot mean what it says.

Some interests can be both provided for by a transaction and provided for by the operation of the general law. For example, the Canadian case of *356447 British Columbia Ltd v Canadian Imperial Bank of Commerce* concerned an equitable assignment of the right to profit from a joint venture scheme.<sup>43</sup> The assignment was intended to operate by way of security, and it was provided for by a transaction, so the court had little trouble in finding it to be a security interest under the *BCPPSA*. However, the point is that under the general law such

---

37 *Personal Property Security Act*, RSO 1990, c P-10 (*‘OPPSA’*) s 4(1)(a). On the width of ‘lien’ see Cuming, Walsh and Wood, above n 26, 97.

38 *BCPPSA* s 4(a).

39 *NZPPSA* s 23(b).

40 Although the exclusion of these devices could also be on the grounds that they do not secure payment or the performance of any obligation: see discussion on the interpretation of the exempting provisions below, text following n 51. See also *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd* (2000) 190 DLR (4<sup>th</sup>) 47, 59 (Donald JA): ‘I do not know how it could be said that a constructive trust secures a payment or the performance of an obligation; rather its purpose is to prevent an unjust outcome.’

41 See *Tailby v Official Receiver* (1888) LR 13 App Cas 523; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; cf *Holroyd v Marshall* (1862) 10 HL Cas 191. See also Joshua Getzler, ‘Assignment of Future Property and Preferences’ in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart, forthcoming). The *PPSA* only applies to transactions that secure obligations so the secured party will have provided value.

42 (1888) LR 13 App Cas 523.

43 (1998) 48 BCLR (3d) 1 (*‘356447 British Columbia Ltd’*).

an assignment would take effect as a constructive trust, at least until notice was given to the debtor/joint venture.<sup>44</sup> Another example involves future property.<sup>45</sup> Personal property securities legislation provides a foundation for a security interest in after-acquired property,<sup>46</sup> and naturally these provisions are seen as the basis of enforcement of such interests.<sup>47</sup> But future property is also assignable in equity for value and the mechanism that enforces the assignment there is a constructive trust, which arises by operation of law.<sup>48</sup> On a plain reading these interests seem to be included in the general definition of security interest, yet also excluded by section 8(1)(c).

We see an even more complicated case when the interest arising under the general law and the interest provided for by the agreement are not the same. It might be that an interest fails according to its terms,<sup>49</sup> but that another interest is recognised in equity. This interest is not strictly provided for by the transaction, even though it is clearly linked to the transaction. For example, a proceeds clause might require the debtor to pay proceeds into a trust account. If that is done then the analysis can move to the question of whether the trust in substance secures payment or performance. But what if the payments are not made into the trust account? In that case there would be no interest that was provided for by the transaction, but the creditor would still be the beneficiary under a constructive trust because such an interest would bind the proceeds as soon as they were received into the debtor's general account.<sup>50</sup> We might then see the bizarre result of creditors being in a better position if debtors sit on their hands, leave money in their general accounts, and do not complete the required 'express' trusts or assignments. This is intuitively wrong, but it is what the legislation strictly says.

The solution in other jurisdictions is to read the exempting provisions as only covering 'non-consensual' interests.<sup>51</sup> This is an exercise in statutory interpretation whereby the definition of a security interest is distilled into 'consensual' and then turned into a negative. The exempting provisions are then read as only excluding interests that are *not* linked to a consensual transaction.

---

44 Even then the assignor may remain in the picture if they held an equity of redemption. Although it seems odd to say that there might not be such an equity in the assignor, given that the assignment was by way of security, the concept of an equity of redemption has lost importance under the functional personal property securities regimes. It was not mentioned in the 356447 *British Columbia Ltd* case.

45 Indeed, the assignment in the 356447 *British Columbia Ltd* case actually referred to 'all funds derived' from the joint venture, which could have been construed as an assignment of future property.

46 *PPSA* s 18(2); *BCPPSA* s 13(1); *Sask PPSA* s 13(1); *NZPPSA* s 43.

47 See, eg, 674921 *BC Ltd v Advanced Wing Technologies Corp* (2005) 44 BCLR (4<sup>th</sup>) 376, [41]–[43], reversed on other grounds in (2006) 50 BCLR (4<sup>th</sup>) 201.

48 On future property generally, compare *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 and *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385.

49 All regimes provide that 'a security agreement is effective according to its terms': see, eg, *PPSA* s 18 (1); *BCPPSA* s 9; *NZPPSA* s 35.

50 See the discussion in *Associated Alloys* (2000) 202 CLR 588, 603–4.

51 See *i Trade Finance Inc v Bank of Montreal* [2011] SCC 26 (20 May 2011) [30]; *Stiassny v North Shore City Council* [2008] 1 NZLR 825, 836; *JS Brooksbank & Co (Australasia) Ltd v Exfix Ltd* [2007] NZHC 1293 (21 November 2007) [48]–[51]; Cuming, Walsh and Wood, above n 26, 85; Gedye, Cuming and Wood, above n 22, 85.

This is a very useful model, but perhaps it should not be automatically assumed that the High Court of Australia will take the same view. While the model works perfectly in Canada and New Zealand,<sup>52</sup> the Australian *PPSA* has slightly different wording. This means that treating the general definition of security interest as the overarching provision, and reading section 8(1)(c) as essentially restating that definition in negative terms, does not provide a complete solution in Australia. It solves the problem of interests that on a plain reading are both included and excluded, but it does not solve the problem of one interest being found by operation of law when the transaction provided for another.<sup>53</sup>

The Australian *PPSA* requires a security interest to be ‘provided for by’ a transaction that in substance secures payment or performance. The New Zealand definition is similar but allows a security interest to be ‘*created or provided for by*’ such a transaction. Under the Canadian statutes a security interest is an interest that secures payment or performance, and the legislation applies to transactions that in substance create such an interest.<sup>54</sup> Importantly in this context, the three do not say quite the same thing. The problem of a security interest that was not actually provided for by the transaction, but which did arise out of a transaction that in substance secured payment or performance, does not exist under the New Zealand or Canadian wording. There the consensual/non-consensual analysis excludes only those interests that were not *created by* a relevant transaction. In Australia the analysis would only exclude those interests not *provided for by* a transaction. An interest can be created by a transaction yet not be provided for by it.

This is, admittedly, a rather narrow point. As a guide, the consensual/non-consensual model is clearly the best way to interpret the literal overlap between the general definition of security interest in section 12 and the exemption provision in section 8(1)(c). Nonetheless, it should be noted that in Australia the interpretation of ‘provided for by a transaction’ (and therefore the definition of security interest) must be wide enough to include interests that were not expressly intended by the parties but which have their genesis in a security agreement under which the parties intended to create an interest that would in substance secure payment of performance of an obligation.<sup>55</sup>

## B Remedial Constructive Trusts

The question of parallel institutional constructive trusts has been neatly avoided in the other jurisdictions by the application of the consensual model. I

---

52 At least when it is applied properly: see Part IV below, *Quistclose*-type Trusts.

53 It may also be noted that, like the characterisation test discussed in the previous section, the legislation does not actually mention the terms ‘consensual’ or ‘non-consensual’. Second, s 8(1)(c) of the Australian *PPSA* is the widest version of the exempting clause. Third, in s 254 the Australian legislation has a more generous saving provision than the other jurisdictions. It expressly preserves the general law to the extent that it can operate ‘concurrently’, whereas in Canada the general law only ‘supplements’ the regime: see, eg, *BCPPSA* s 68(1).

54 See, eg, *BCPPSA* ss 1(1), 2(1)(a).

55 *PPSA* s 11 provides that the *Acts Interpretation Act 1901* (Cth) shall apply.

have not found any cases that even discuss the point that, on a plain reading, many interests would be both included and excluded. However, there is a little more jurisprudence dealing with the controversial area of remedial constructive trusts and their place in personal property securities regimes.<sup>56</sup>

The jurisdictions differ on the basis for finding remedial constructive trusts. In Canada the point is to prevent unjust enrichment;<sup>57</sup> in New Zealand and Australia the focus is more on whether it would be unconscionable for one party to deny beneficial rights in the other.<sup>58</sup> Nonetheless, while the first stage of the analysis may vary, the second stage – whether or not a trust is the appropriate remedy to grant – is essentially the same. All the jurisdictions recognise the interests of third parties as relevant here. A slightly different question is whether the abstract interests of the personal property securities system itself should also be considered. In England the integrity of the insolvency regime was seen as vitally important, if not determinative, when the Court of Appeal refused to allow remedial constructive trusts in *Re Polly Peck International (No 5)*.<sup>59</sup> In the leading Canadian case, *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd*,<sup>60</sup> Lambert JA said:

A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties.<sup>61</sup>

*Ellingsen* concerned the attempted purchase of a truck. The dealer allowed Mr Ellingsen to take away the truck and register it in his name even though he had not paid for it. Both parties expected the purchase to be financed by a bank loan made to Mr Ellingsen, but no loan was ever made and Mr Ellingsen became bankrupt. The trustee in bankruptcy sought an order that the truck was held free of any claims by the dealer, which was granted by the Supreme Court of British Columbia. The dealer successfully appealed to the Court of Appeal, which found by a majority that the truck was held on constructive trust and that this interest

---

56 For an argument that the institutional/remedial dichotomy is misleading, see Michael Bryan, 'Constructive Trusts: Understanding Remedialism' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart, forthcoming).

57 *Pettkus v Becker* [1980] 2 SCR 834; *Soulos v Korkontzilas* [1997] 2 SCR 217; *Garland v Consumers' Gas Co* [2004] 1 SCR 629.

58 New Zealand: *Gillies v Keogh* [1989] 2 NZLR 327; *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171; *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, 485. Australia: *Muschinski v Dodds* (1985) 160 CLR 583; *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Giumelli v Giumelli* (1999) 196 CLR 101. See also David Wright, *The Remedial Constructive Trust* (Butterworths, 1998) ch 2.

59 [1998] 3 All ER 812. See also *De Bruyne v De Bruyne* [2010] 2 FLR 1240.

60 (2000) 190 DLR (4<sup>th</sup>) (British Columbia Court of Appeal) 47 ('*Ellingsen*').

61 *Ibid* 70. To the same effect in Australia: *Giumelli v Giumelli* (1999) 196 CLR 101, 113–4, 125; in New Zealand: *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171, 175.

fell outside the *BCPPSA*. While Donald JA noted that there was never an intention to grant credit to Mr Ellingsen,<sup>62</sup> which meant that the parties could not have intended to create a security interest in the first place, Lambert JA seemed to view the integrity of the securities regime as an important factor in the analysis. That said, Lambert JA's comments may also be read as simply restating the normal consideration that will be given to third party interests:

The integrity of the Personal Property Security Act is maintained because this is not a case of a simple failure to register a financing statement in a timely way. ... There is no evidence of any party relying on the absence of registration to extend credit. If there had been such prejudice or any such reliance, then such prejudice or reliance might well have affected the question of whether a remedial constructive trust ought to be declared and, if so, on the terms and extent of the remedial constructive trust.<sup>63</sup>

In Canada, the first stage of the remedial constructive trust analysis requires a plaintiff to establish enrichment, corresponding deprivation, and a lack of juristic reason for the enrichment. However, even if these are proved the defendant may still show another reason to deny recovery. In *Garland v Consumers' Gas Co*, Iacobucci J said for the Court:

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.<sup>64</sup>

Given that the legislation itself excludes interests that arise by operation of law, and given the decision in *Ellingsen*, it is doubtful that the integrity of a personal property securities regime could itself constitute a 'new category' that would prevent the imposition of a constructive trust by justifying the debtor's enrichment. That is, it is doubtful that the other jurisdictions will now treat the remedial constructive trust in the way England does. Instead, as *Ellingsen*

---

62 Ibid 61; cf 64 (McEachern CJBC in dissent).

63 Ibid 72. Jacob Ziegel, 'The Unwelcome Intrusion of the Remedial Constructive Trust in Personal Property Security Law: *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd*' (2001) 34 *Canadian Business Law Journal* 460, 464, points out that actual reliance is not necessary to defeat an unperfected security interest. Justice of Appeal Lambert was in fact speaking to the slightly different point that actual reliance would be considered by the court in deciding to impose a remedial constructive trust (which is not a security interest). Notwithstanding this, Ziegel makes a compelling case that, once the British Columbia Court of Appeal had found that there was no relevant contract, there was no need to find a constructive trust to take the truck outside of the *BCPPSA* regime. The Court could simply have ordered the trustee to give it back.

64 [2004] 1 SCR 629, [44]–[46] (citations omitted). This was not a personal property security case itself, but the analysis was cited in *Caterpillar Financial Services Ltd v 360networks Corp* (2007) 279 DLR (4<sup>th</sup>) 701 (British Columbia Court of Appeal) 722–4.

suggests, the issue will be addressed on a case-by-case basis, taking into account the effect on other parties.

The specific relationship between remedial constructive trusts and the securities regime does not appear to have been discussed in New Zealand, although the leading text sounds a note of caution.<sup>65</sup> Caution but not prohibition should be the approach in Australia too. In many cases the effect on other parties will be substantial, which will provide a reason to deny a constructive trust. The integrity of the *PPSA* system will also be relevant. It might be quite rare to find a case where a remedial constructive trust is appropriate, but the argument should be capable of being made.

#### IV *QUISTCLOSE*-TYPE TRUSTS

Section 8(1)(h) of the *PPSA* also exempts the following devices: ‘a trust over some or all of an amount provided by way of financial accommodation, if the person to whom the financial accommodation is provided is required to use the amount in accordance with a condition under which the financial accommodation is provided.’ This express exemption, which is not found in the Canadian or New Zealand statutes, means that there is no need in Australia to decide if a *Quistclose*-type trust secures payment or the performance of an obligation, if it is a purchase money security interest (‘PMSI’),<sup>66</sup> or if it is exempted anyway by being a trust that arises by operation of law.

I say ‘*Quistclose*-type’ because there is nothing unique about *Quistclose* trusts, and they cannot be sharply demarcated from other trusts. As Lord Millett said: ‘It depends on how widely or narrowly you choose to define the *Quistclose* trust.’<sup>67</sup> As the subsection implies, the key characteristic is that the recipient is required to use the property in accordance with a condition of the transfer. In other words, the transfer must be made for a specific purpose. However, the court must additionally be satisfied that the transferor was intended to be the beneficiary of a trust. This point is important because section 8(1)(h) only applies to devices that are considered trusts under the general law.

First, it should be noted that any arrangement that uses the word ‘trust’ in addition to containing a relevant condition will fall within the exemption. The recent High Court case of *Byrnes v Kendle* confirms that the parol evidence rule

---

65 Gedye, Cuming and Wood, above n 22, 18-9. See also Charles Rickett, ‘Trusts and Insolvency: The Nature and Place of the *Quistclose* Trust’ in Donovan Waters (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, 1993) 325, 328-9.

66 This will depend on what the money is being advanced for: see Law Commission (England and Wales), ‘Registration of Security Interests’ (Consultation Paper No 164, 14 June 2002) [4.159]; Jamie Glistler, ‘Trusts as Quasi-Securities? The Law Commission’s Proposals for the Registration of Security Interests’ (2004) 63 *Lloyd’s Maritime and Commercial Law Quarterly* 453, 481-2; Dennis Klinck, ‘The *Quistclose* Trust in Canada’ (1994) 23 *Canadian Business Law Journal* 45, 73-4.

67 *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 192. See also *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 (Gummow J).

applies to declarations of trust,<sup>68</sup> and *Associated Alloys* provides that matters of segregation and identification are to be treated as questions relating to the performance (rather than existence) of a trust.<sup>69</sup> Put together, this means that any use of the word ‘trust’ will be determinative. The device will then be an express trust that is immune from the *PPSA* by virtue of section 8(1)(h).

In cases that do not involve such clear wording the existence of a requirement to segregate will be important evidence that a trust was intended.<sup>70</sup> Under the English analysis, courts will find a resulting trust if it can be established that the parties did not intend the money to be at the free disposal of the recipient;<sup>71</sup> and a specific purpose and a requirement to segregate are each seen as strong evidence of that lack of intention. Australian courts, in contrast, prefer the view that those factors may establish an informally-expressed express trust.<sup>72</sup> In practice there is probably little difference between the two approaches, but either way a trust must be found before the exempting provision can apply.

It is fortunate that the Australian *PPSA* contains section 8(1)(h) because the position of *Quistclose*-type trusts has not been confirmed in the other jurisdictions. The weight of obiter dicta comments and academic opinion suggests that the devices do not fall within the other personal property securities regimes, but there has not been a case directly on the point and two different reasons have been given for this apparent exclusion. First, it is argued that the borrower’s loan obligations are not secured by the lender’s interest under the trust; second, that the devices are excluded because they are resulting trusts arising by operation of law.<sup>73</sup> Stevens puts the first ground like this:

---

68 [2011] HCA 26 (13 August 2011) [13]–[18], [61]–[65], [116]. To the extent that the majority’s decision in *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 said differently, that case was wrong.

69 (2000) 202 CLR 588, 605.

70 *Ibid*, citing *Cohen v Cohen* (1929) 42 CLR 91, 100–101; *Puma Australia Pty Ltd v Sportsman’s Australia Ltd [No 2]* [1994] 2 Qd R 159, 162.

71 *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 185–6, citing *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100.

72 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491. See James Penner, ‘Lord Millett’s Analysis’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 41.

73 The same two reasons were also given by the Law Commission of England and Wales when it initially recommended that *Quistclose* trusts should be outside its proposed securities regime: above n 66, [7.54]. The recommendation was subsequently withdrawn in Law Commission (England and Wales), ‘Company Security Interests’ (Consultation Paper No 176, 13 August 2004) [3.61]. *Quistclose* trusts were therefore not mentioned in the final report: Law Commission (England and Wales), ‘Company Security Interests’ (Report No 296, 31 August 2005).

When the lender transfers the money to the borrower, the borrower does not owe the lender this sum. Only if he uses the sum for the designated purpose does the obligation arise. The lender's assertion is not 'that is mine to the extent that I remain unpaid' but rather 'that is mine to the extent that you have not used it for the designated purpose'.<sup>74</sup>

The point is made with characteristic precision, but it might deserve some further comment. It may seem odd to say that no personal obligation arises until the money has been spent on the purpose: after all, what is wrong with the first repayment falling due before the dissipation has started? Of course there is nothing wrong with this, and indeed there is a simple answer: like the discussion above in relation to *Associated Alloys*, in such a situation the repayment under the loan amounts to an authorised purchase of trust property by the borrower/trustee. A repayment of \$10 000 would not involve purchasing exactly that amount of trust property because the repayment will include an interest component. But this changes nothing because the existence of the trust does not secure the payment of that interest component. In short, *Quistclose*-type trusts do not secure the performance of the accompanying loan obligation. This reason for excluding the devices from the personal property securities regimes is therefore sound, and it also applies whether one characterises the trusts as express or resulting. The second reason for exclusion, on the other hand, is much less convincing – and unfortunately that reason is more prominent in the case law.

It may be doubted whether resulting trusts in general arise by operation of law,<sup>75</sup> but, putting that to one side, *Quistclose*-type trusts are certainly provided for by a transaction. Most often a trust will be accompanied by a loan obligation, but this is not necessary. For example, in *Graff v Bitz* there was no loan contract; there was only a deposit of money on a specified condition.<sup>76</sup> A trust was found,

---

74 Robert Stevens, 'Insolvency' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 153, 165–6. Also see the explanation by Orpin, above n 21, 125–6. Cf my earlier views, which can no longer be supported on this point: Glister, above n 66, note 94 and accompanying text. See also Klinck, above n 66, 70 ff; Michael Bridge, 'The *Quistclose* Trust in a World of Secured Transactions' (1992) 12 *Oxford Journal of Legal Studies* 333, 345 ff. Even if *Quistclose* trusts did secure performance of the obligation there may still be good policy reasons to exclude them: Glister, above n 66, 480–1.

75 See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708; William Swadling, 'A New Role for Resulting Trusts?' (1996) 16 *Legal Studies* 110 and William Swadling 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72; cf Robert Chambers, *Resulting Trusts* (Clarendon Press, 1997) and Robert Chambers 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart, 2010) 267.

76 (1991) 86 DLR (4<sup>th</sup>) 184 (Saskatchewan Court of Queen's Bench). *Re Skybridge Holidays Inc* (1999) 173 DLR (4<sup>th</sup>) 333 may also be seen as such a case, although it requires some explanation. The travel agent's trustee in bankruptcy recognised that each customer's situation would be different and that it would be time-consuming to 'establish whether it was the intention of any particular customer that his or her funds be held in trust': see (1999) 173 DLR (4<sup>th</sup>) 333, 337. The trustee asked the Court to assume the existence of a trust and then asked whether that trust would be caught by the securities regime: if the answer was 'yes' there would be no point in establishing whether any trusts existed in the first place. The answer was 'no', but that did not automatically mean that all the customers were indeed trust beneficiaries. Of those that were, it is conceivable that some parted with their money on the express understanding that the agent would hold it on trust for them. However, it is far more likely that any successful customers would demonstrate a trust entitlement by establishing that the funds had been transferred for a specific purpose only, and that the travel agent was only authorised to apply the funds to that purpose (ie, a *Quistclose*-type analysis, whether in pursuit of a resulting or an express trust).

which was outside the Saskatchewan statute. As we have seen, in Australia the preferred view is that these are express trusts anyway, but even if we call them resulting trusts they still arise because of agreement between the parties. Their name alone should not be enough to exclude them from the other personal property securities regimes. If their classification as resulting trusts means that they fall outside those systems then it appears that here the exempting provision is trumping the general definition, rather than the other way around.

Canadian law has recently arrived at the rather tortured position that: (i) a *Quistclose* trust requires the three certainties; (ii) despite this it is called a resulting trust; and (iii) as a resulting trust it may then be outside the scope of the personal property securities regimes.<sup>77</sup> The law in New Zealand is similarly problematic: in *Stiassny*, when explaining the Canadian cases, Harrison J said that a resulting (and therefore non-consensual and excluded) trust arose where a principal deposited money with an agent on specific terms.<sup>78</sup> Of course, it is simply wrong to say that a trust requiring the three certainties is not a consensual device. Equally, anything requiring the three certainties must be provided for by an agreement. If these clearly-consensual *Quistclose*-type trusts are going to be excluded because they arise by operation of law then those concurrent constructive trusts mentioned in Part III should be similarly excluded. Yet, as argued above, this would make the whole scheme redundant. It is far more persuasive to exclude *Quistclose* trusts on the grounds that they do not secure the performance of a relevant obligation.

## V CONCLUSION

This article has discussed the position of trusts under the *PPSA* in three distinct areas: proceeds trust clauses that discharge the initial debt, constructive trusts and *Quistclose*-type trusts. In relation to the latter two I have argued that the role of constructive trusts needs to be confined in order not to frustrate the purpose of the Act, and that the explicit exclusion of *Quistclose* trusts is to be welcomed. While I do not imagine that either of these will provoke much disagreement, I think the discussion of *Associated Alloys* may be more controversial.

Other contributors to this journal volume would disagree with me. In an article published in 2001, soon after the *Associated Alloys* decision, Duggan wrote:

---

77 In *Re Westar Mining Ltd* [2003] 9 BCLR (4<sup>th</sup>) 61, Mackenzie JA found that *Quistclose* trusts needed the three certainties and seemed to treat them as express trusts. This, it is submitted, makes sense (and is essentially the Australian position). However, in *Re Cliffs Over Maple Bay Investments Ltd* [2010] BCSC 389, Groves J at trial found 'a mutual intention between Century and the Cliffs to create a *Quistclose* trust' at [110], called it a resulting trust at [117], then preferred the view that as a resulting trust in fell outside the *BCPPSA* at [121] (although the case was actually decided on other grounds). On this point the Court of Appeal disagreed with Justice Groves' interpretation of the facts but not the structure of the reasoning: [2011] BCCA 180.

78 [2008] 1 NZLR 825, 836. The Court of Appeal did not comment on this point.

If the *Associated Alloys* case had arisen under an Art 9-type statute, it would have been easily disposed of. It would probably not even have got to court, and it would certainly not have run the whole gamut of the appeal process. ... Detailed questions of trust law and equity would not have entered into the matter.<sup>79</sup>

This would be true of one of the English cases, like *Re Bond Worth* or *Compaq v Abercorn*, but it is not true of *Associated Alloys*. At least, it is not true once we appreciate the importance of the High Court's implied term analysis. On my reading the case was primarily about contractual interpretation; any detailed questions of trust law or equity were a secondary consideration. The case should not be read as deciding that: proceeds clauses can create valid trusts; trusts are not registrable charges; and proceeds trusts are therefore not registrable charges.<sup>80</sup> As explained above, the majority only decided that *some* proceeds trusts *can* count as payment devices.

I have not discussed whether it was appropriate or not for the High Court to imply the relevant term in the *Associated Alloys* contract. I tend to agree with Riley that it was a rather artificial exercise and it is doubtful that the parties did think it 'went without saying'.<sup>81</sup> But either way the point is immaterial because the majority's decision allows drafters to include *express* clauses to the effect that constituting a proceeds trust of the sum owed will amount to discharge,<sup>82</sup> and that any subsequent 'payment' will in fact be an authorised purchase of that trust property. Indeed, I think drafters would be well advised to do so because it is a no-lose option. If the whole retention of title agreement is properly registered under the *PPSA* then the point will not arise, and if it is not then such a clause will give the seller a second bite of the cherry. A clause creating a trust over the entire proceeds does not fit this analysis, but such a clause is no more attractive than my suggestion because recovery would not be allowed in an amount greater than the sum owed anyway. This is because any retention of title agreement that includes such a clause will certainly amount to a security interest under the *PPSA*, which means that any interest in the proceeds will then be analysed as taking effect under the *PPSA*'s provisions on the proceeds of security interests. Putting the *PPSA* to one side, the same recovery point would also be true under

---

79 Anthony Duggan, 'Globalisation of Secured Lending Law: Australian Developments' (2001) 12 *Journal of Banking and Finance Law and Practice* 85, 95.

80 See *Associated Alloys* (2000) 202 CLR 588, 607.

81 See Riley, above n 20.

82 It has been suggested that the evidential difficulties in *Associated Alloys*, which concerned whether the buyer's receipts could be linked to steel supplied under individual contracts, may have been overcome by the use of an 'all-monies' retention of title clause: Justice Ralph Simmonds, 'A User's Guide to *Associated Alloys*' (Paper presented at the Business Law Section of the Law Council of Australia, Perth, 9 November 2001). I acknowledge that an express, all-monies, payment trust clause sounds a little odd, but the all-monies part does not change the analysis. All-monies clauses already operate to, relevantly, convert a series of contracts into one contract with staggered delivery and payment by instalments. The payment trust analysis would apply here.

the general law.<sup>83</sup> Even in *Len Vidgen*, where Barker J allowed the sellers to access an entire proceeds trust despite it not having been registered as a charge, the judge commented that any surplus in excess of the amount owed would probably belong to the buyer.<sup>84</sup> In short, nothing is lost if this analysis is wrong and registration is required.

Finally, some might still say this argument smacks of a failure to put aside old learning,<sup>85</sup> and of a failure to appreciate just how important the substance of a transaction is under the *PPSA* system. This may be so, but I would repeat that, however important substance is, it is a logical impossibility to say that something which discharges an obligation also secures that obligation. As one New Zealand judge said, admittedly in a different context, '[t]he directive [in the *NZPPSA*] to have regard to substance rather than form does not mandate a casting aside of all legal form'.<sup>86</sup>

---

83 A trust over the entire proceeds could exist, if that was what the agreement provided for: *Byrnes v Kendle* [2011] HCA 26 (3 August 2011). But equity would favour the identification of an equity of redemption, and if the proceeds exceeded the sum owed then redemption would be the cheaper option for the controllers of the insolvent buyer: see *Associated Alloys* (2000) 202 CLR 588, 607.

84 *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349, 364. In *Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd (in liq)* (1992) 28 NSWLR 338, a case involving effectively the same clause, Cohen J declined to follow *Len Vidgen*. However, that was because Cohen J did not think that a trust could exist without segregation and *Associated Alloys* has since confirmed that it can.

85 See the warning in *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629, 634.

86 *New Zealand Bloodstock Leasing Ltd v Jenkins* [2007] NZHC 336 (19 April 2007) [90] (Winkelmann J).