Privy Council Appeal No. 43 *of* 1964

Pacific Motor Auctions Pty. Limited – – – – – *Appellant*

v.

Motor Credits (Hire Finance) Limited – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH 1965

Present at the Hearing:
LORD REID
LORD HODSON
LORD PEARCE
LORD UPJOHN
LORD WILBERFORCE
(*Delivered by* LORD PEARCE)

The present case is concerned with the title to certain motor-cars which were sold to each party in turn by a dealer who became insolvent.

In 1960 one Webb was carrying on a large, vigorous, and apparently thriving business as a dealer in motor-cars under the style of Motordom. The business was turned into a limited company in June 1960; but this has no relevance to the issues and at all times the dominant personality was Webb. The respondent carries on the business of a hire purchase finance house. In February 1960 the respondent and Motordom made a written agreement called a " display agreement " (and referred to in evidence as a " floor plan "). The purpose of Motordom in making the agreement was to obtain cash to finance some of the stock which it had to buy from time to time; and the purpose of the finance house was to obtain hire purchase contracts with Motordom's customers. The subsequent course of dealing changed the operation of the written agreement in important respects and superseded it. Under the original agreement in writing Motordom, described as the agent, was *inter alia* to buy such used vehicles as the respondent might authorise in writing, but it might do so in its own name without disclosing its agency; and the respondent was to pay to Motordom 90% of the purchase price of such cars. Cars so bought were to be on hire to Motordom who was to be in possession of them as bailee only, and must keep them in good condition. Motordom was however to be at liberty to sell them on behalf of the respondent and must in that case account to the respondent immediately, retaining for itself as commission any surplus obtained on the sale over and above certain sums. During the period in which it held the goods before selling them it had to pay a certain rental. The respondent was entitled without notice to take possession of any cars so bought.

The agreement in practice as found by the learned trial Judge was as follows. Motordom without any prior written authority from the respondent bought used cars in its own name and on its own account, so that the title in the cars passed to Motordom. It then got in touch with the respondent, (as a rule by telephone) and asked that the cars so purchased should be " put on display plan ". If they were accepted, a cheque for 90% of the price which Motordom had paid for them was sent to it by the respondent with a list of the cars accepted. This procedure constituted an offer by Motordom to sell the cars to the respondent and on acceptance the respondent acquired the

title to the cars. Motordom then had the right to retain the cars in its possession and had a general authority to resell them in its own name and at such price as it should decide; it also had a right to receive the purchase money and retain it subject only to its obligation to account to the respondent.

The general effect of this course of dealing was that Motordom would receive in cash 90% of the price of stock purchased; and after disposal of the stock would repay the cash. If Motordom's customer bought the car on hire purchase from the respondent, the money would be repaid without interest, but otherwise certain interest was payable.

Motordom of its own volition decided what cars it would place " on floor plan " with the respondent and only a proportion of its stock was so placed. On the 2nd November 1960, the date of the transaction with which this appeal is concerned, about 20 cars were " on floor plan " out of a total stock of about 80 cars.

The appellant is an auctioneer and dealer in used motor-cars. During 1960 it had various dealings with Motordom both in selling to it and buying from it used cars. In that year up to October 31st it sold to Motordom 264 cars in all at a total price of £143,854 and bought from Motordom 173 cars at a total price of £58,910.

Early in November 1960 Motordom was in financial difficulties. In the afternoon of November 2nd the respondent told it that Motordom's authority to handle the respondent's cars, (that is to say any of Motordom's stock which was " on floor plan ") was withdrawn. No notification of this withdrawal was given to the appellant or any other person with whom Motordom had dealings.

The appellant also was having trouble with Motordom. A few days before 2nd November Motordom's cheques drawn in favour of the appellant for £6,965, £2,535 and £3,790 in respect of cars which it had bought from the appellant had been dishonoured. Motordom assured the appellant that this difficulty was temporary and could be surmounted. On the evening of 2nd November after ordinary working hours the appellant's manager went to Motordom's premises and bought 29 cars at specific prices which made a total of £16,510. In respect of each car Webb on behalf of Motordom signed a declaration that the car was the seller's sole property, free from any other interest and that the seller had good right and title to sell it. It was arranged that the appellant would sell them back to Motordom if within seven days Motordom had paid off the dishonoured cheques. The appellant made out a cheque to Motordom for £16,510 which Motordom endorsed on the back in favour of the appellant. The appellant kept the cheque and took away the cars. Of the 29 cars thus sold, 19 had been purchased from the appellant shortly before, and only 2 had been paid for. Out of the 29 there were 16 which had been " put on floor plan " and paid for by the respondent, and which were thus the property of the respondent. These 16 cars are the subject matter of the present dispute.

Motordom did not surmount its financial difficulties. The respondent demanded the return of its cars. On refusal it started these proceedings claiming return of the cars and damages for detention.

At the trial there was much controversy over the details of the complicated events which led up to the situation in which one or other of the parties, by reason of Motordom's misbehaviour, must lose its money. It was clear that, unless the appellant could establish that it bought the cars on 2nd November *bona fide* in the belief that the cars belonged to Motordom, it had no case. For *bona fides* and ignorance of the former sale to the respondent were essential to any defence which it could raise against the respondent who was the true owner at the time of the transaction. The appellant's general manager maintained that Webb had told him nothing about the " floor plan ", and that he believed that Motordom owned the cars. This was not challenged directly but he was naturally cross-examined on his knowledge of " floor plans " in order to show that he must have had some knowledge or suspicion that the cars did not belong to Motordom. The learned judge who heard his

evidence did not accept it on all points. For instance he disbelieved his denial of a visit paid to the appellant's premises by an agent of the respondent who was checking Motordom's statement that it had sold seven cars to the appellant shortly before and who accepted without any query the appellant's assurance that it had purchased them,—a visit which would show the appellant that some of Motordom's cars were " on floor plan ". But the learned judge did not deduce that the appellant knew that the particular cars in dispute were " on floor plan ": and he held that since the appellant's previous dealings with Motordom had been in the belief and on the basis that Motordom had the right to dispose of the cars in its own name (which up to that time was in truth the position) the agent's visit " would serve to confirm the belief " if the appellant " entertained any doubts about it ". The trial judge accepted that the transaction on the appellant's part was done in good faith. He also held that in spite of the unusual features of the transaction it must be regarded as one of the sale and purchase of the cars in question.

Further the trial judge considered that it was not material if the transaction was not one " in the ordinary course of business ", since " that is a limitation applicable where the only basis of the apparent authority is the possession of the goods and where the Factors Act is applicable ". Had that question been relevant, their Lordships deduce that he would have held (and rightly held) that the transaction was not in the ordinary course of business.

The Sale of Goods Act 1923 provides as follows:—

> " 26.(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

and

> " 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."

The appellant relied on each of these sections. His Honour having considered section 26(1) and the question of estoppel and the case of *Eastern Distributors Ltd. v. Goldring* [1957] 2 Q.B.600, came to the conclusion that the respondent was, by its conduct in clothing Motordom with apparent ownership or apparent authority to sell, precluded from denying Motordom's authority to sell. It was therefore not necessary for him to deal with the contention that the appellant had acquired a good title under section 28(1). He accordingly dismissed the respondent's claim.

On appeal to the High Court of Australia the respondent succeeded by a majority. McTiernan J. agreed with the learned trial judge. Taylor J. however distinguished the facts from *Eastern Distributors Ltd. v. Goldring* on the ground that the transaction here was not in the ordinary course of the dealers business and that the present case was not one of ostensible ownership since the appellant was aware of the fact that Motordom was receiving " floor plan " finance from the respondent. In his Honour's view Motordom's authority, even had it not been revoked, would not have covered the present transaction. On the point under section 28(1) of the Sale of Goods Act he took the view that Motordom did not continue in possession since the character of its possession had changed from that of a seller to that of a bailee (following *Staffs Motor Guarantee Ltd. v. British Waggon Company Ltd.* [1934] 2 K.B.305 and *Eastern Distributors Ltd. v. Goldring* supra).

Owen J. took the view that " there can be no doubt that had Motordom sold the cars in the ordinary course of its business the defendant would have got a good title to them notwithstanding the fact that the plaintiff had revoked Motordom's authority to sell ", since the Factors Act would have applied.

He also considered that the respondent held Motordom out as having authority to sell in the ordinary course of business but that it had not held out Motordom as having authority to sell otherwise. For that reason he held that the respondent was not precluded from denying Motordom's authority to sell the cars under the circumstances in question. As to section 28(1) he held the same view as Taylor J.

The appellant contended before their Lordships both that the respondent was estopped or precluded from denying Motordom's authority as the learned trial Judge had found, and also that the appellant obtained a good title under section 28(1) of the Sale of Goods Act 1923 of New South Wales. Owing to the view taken by their Lordships on the effect of section 28(1), it became unnecessary to consider the difficult question of estoppel.

The point under section 28(1) turns on the construction of the words " where a person having sold goods continues or is in possession of the goods ". Are those words to be construed in their full sense so that wherever a person is found to be in possession of goods which he has previously sold he can, whatever be the capacity in which he has possession, pass a good title? Or is some, and if so what, limitation to be placed on them by considering the quality and title of the seller's possession at the time when he sells them again to an innocent purchaser?

Section 28(1) does not limit its effect to a sale " made in the ordinary course of business " as does section 5 of the Factors (Mercantile Agents) Act 1923 and the corresponding English provision. But Mr. Newton for the respondent urged their Lordships to limit the application of section 28(1) in a like manner, since Motordom was in fact a mercantile agent and therefore it was not right to attribute to it a wider authority than was provided by the section particularly directed to its activity. Their Lordships are unable to accept this view. Section 28(1) is not limited to any particular class of seller; it applies to a purchase from any kind of seller made in good faith and without notice of the previous sale.

The English statutory provision which was the origin of section 28(1) was introduced in 1877 with the object of mitigating the asperity of the common law towards an innocent party purchasing goods from a person who has all the trappings of ownership but in truth has no proper title to the goods. *Nemo dat quod non habet*. The purchaser had no defence at common law against the true owner, subject to certain exceptions which are set out by Willes J. in *Fuentes v. Montis* 3 C.P. 268 at 276–7.

In *Johnson v. Credit Lyonnais Co.* (1877) 2 C.P.D.224 an innocent purchaser attempted to establish that the true owner had " so conducted himself as to have lost the right to follow his own goods into the hands of the purchaser or pledgee ". The true owner had in that case left in the hands of the seller the documents of title to the goods which he had bought and had failed to have an entry made in the books of the dock company which had custody of the goods, thus facilitating the fraudulent second sale. Denman J. held that there was no estoppel. As a direct consequence statutory protection was given to purchasers by section 3 of the Factors Act 1877 (40 and 41, Vict. Cap 39).

When Johnson's case was dismissed on appeal (3 C.P.D.32) Cockburn C. J. said (at p. 36):

> " And I am strongly fortified in this view by the fact that as soon as the decisions here appealed from had been made public, the legislature by statute (40 & 41 Vict. c.39) at once proceeded to settle the question in that view in the future by applying the protection given by the Factors Acts to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present. Whether prior to and independently of such legislation, the law as it stood would have afforded protection is a different matter."

There is thus no doubt about the general intention of the original provision and the general mischief at which it was aimed. It was intended as a protection to innocent purchasers in cases where estoppel gave insufficient protection.

Section 3 of the Factors Act 1877 dealt only with sellers who continue in possession of documents of title, but later Section 8 of the Factors Act 1889, which took its place, dealt with the seller's continued possession both of goods and of documents of title. The wording of this latter section was included in identical terms in the Sale of Goods Act 1893 (section 25(1)). In the Sale of Goods Act 1923, New South Wales adopted the same form of words as that contained in the two English sections.

The first reported question that arose about the construction of those same words is to be found in *Mitchell v. Jones* (1905) 24 N.Z.L.R. 932, a case under the New Zealand Sale of Goods Act 1895. There the owner of a horse sold it to a buyer and some days later obtained it back from him on lease. Then, having possession of the horse in the capacity of lessee, he sold it a second time to an innocent purchaser. The full Court held that the innocent purchaser was not protected. Stout C. J. said (at p. 935):

> " The point turns on how the words ' or is in possession of the goods ' . . . are to be construed. . . . . The meaning is—first, that if a person sells goods and continues in possession, even though he has made a valid contract of sale, provided that he has not delivered them, he may to a *bona fide* buyer make a good title; and, secondly, the putting-in of the words ' or is in possession of the goods ' was meant to apply to a case of this character. If a vendor had not the goods when he sold them, but they came into his possession afterwards, then he would have possession of the goods, and if he sold them to a *bona fide* purchaser he could make a good title to them. He would be in the same position as if he had continued in possession of the goods when he made his first sale. In such a case as that he could make a good title to a *bona fide* purchaser.
>
> That is not this case. In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship, therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the buyer, and as the bailee he had no warrant, in my opinion, to sell the goods again, nor could he make a good title to them to even a *bona fide* purchaser."
>
> And Williams J. said that the section " does not apply where a sale has been absolutely final by delivery and possession has been obtained by the vendee."

It has not been doubted in argument nor do their Lordships doubt that that case was rightly decided.

In 1934, however, Mackinnon J., founding on that case, put a further gloss on the statutory provision in *Staffs Motor Guarantee Ltd. v. British Waggon Co.* [1934] 2 K.B.305. In April one Heap agreed with a finance company to sell his lorry to it and then to hire it from the company on hire purchase terms. He filled up a proposal form which was accepted, and a hire purchase agreement dated May 2nd was signed. During the term of the hiring he sold it to an innocent purchaser. It seems that there was an interval between the agreement to sell and the hire purchase agreement, but it does not appear from the report that there was any physical delivery or interruption of Heap's physical possession. Mackinnon J. held that " Heap's possession of the lorry " (at the time of the second sale) " was not the possession of a seller who had not yet delivered the article sold to the buyer but was the possession of a bailee under the hire purchase agreement " . . . . Although the sale had not been completed by physical delivery nor had there been interruption of the seller's physical possession, he held that the case was covered by the principle in *Mitchell v. Jones*.

In *Union Transport Finance Ltd. v. Ballardie* [1937] 1 K.B. 510, Du Parcq J. while not doubting the correctness of the decision of Mackinnon J. came to a contrary conclusion in slightly different circumstances. One Clark sold his car to a finance house with a view to its being let on hire purchase to his employee. The employee signed the agreement but the whole transaction was colourable and Clark at all times was intended to keep possession of the car. The learned Judge held that at different stages the finance house and the

employee had a right to the possession of the car but neither had exercised the right at the date of delivery of the car to the innocent purchaser. Clark had never attorned to the employee so as to make his possession a bailment under the hire purchase. The section therefore applied. This conclusion is in their Lordships' opinion correct.

In *Olds Discount Co. v. Krett* [1940] 2 K.B. 117 Stable J. accepted the decision of Mackinnon J. There a finance house agreed with Goldstein that it would buy his goods whenever he could negotiate a contract with somebody who would hire the goods on hire purchase from the finance house. He did so. The finance house bought the goods from Goldstein and the hirer took possession of them. He defaulted, however, and Goldstein as agent for the finance house took possession and then dishonestly sold them to an innocent purchaser. Stable J. rightly held that it was a mere accident that the agent to whom the finance house subsequently gave their mandate to hold the goods was the person who had sold them to the finance house. That decision in their Lordships' opinion is clearly maintainable on the principle of *Mitchell v. Jones.*

Finally a judgment of the Court of Appeal delivered by Devlin J. in *Eastern Distributors Ltd. v. Goldring* [1957] 2 Q.B. 600 on one point in a complicated case accepted and followed the decision in *Staffs Motor Guarantee Ltd. v. British Waggon Ltd.* without discussing it or questioning its validity.

There is thus no case which holds that the section does not apply where after the sale the seller simply attorns to the buyer and holds the goods as his bailee.

It is plainly right to read the section as inapplicable to cases where there has been a break in the continuity of the physical possession. On this point their Lordships accept the observations of the learned Judges in *Mitchell v. Jones* as to the words " or is " which are the sole grounds for any doubt on this point. But what is the justification for saying that a person does not continue in possession where his physical possession does continue although the title under or by virtue of which he is in possession has changed? The fact that a person having sold goods is described as *continuing* in possession would seem to indicate that the section is not contemplating as relevant a change in the legal title under which he possesses. For the legal title by which he is in possession *cannot* continue. Before the sale he is in possession as an owner, whereas after the sale he is in possession as a bailee holding goods for the new owner. The possession continues unchanged but the title under which he possesses has changed. One may perhaps say in loose terms that a person having sold goods continues in possession as long as he is holding because of and only because of the sale; but what justification is there for imposing such an elaborate and artificial construction on the natural meaning of the words? The object of the section is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose. Where a vendor retains uninterrupted physical possession of the goods why should an unknown arrangement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is admittedly intended to protect him?

Since the original provision under the Factors Act 1877 (section 3) dealt only with the continuing in possession of documents of title to goods, it seems clear that it was intending merely to deal with the physical possession of the documents and it did not intend that a consideration of the legal quality of the possession of the documents should have any relevance. When the Factors Act 1889 (section 8) added continuance in possession of the goods themselves to continuance in possession of the documents, it can hardly be suggested that the word " possession " was intended to have any more esoteric meaning in relation to goods than it had in relation to documents of title. Moreover such a construction would be in direct conflict with the definition (section 1(2) of the Factors Act 1889) whereby " a person shall be deemed to be in possession of goods or of the documents of title

to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or his benefit ". When section 8 of the Factors Act 1889 came to be enacted again as section 25(1) of the Sale of Goods Act 1893, the identical words cannot have been intended to bear a different meaning from that which by definition they bore under the 1889 Act.

Further sub-section (1) of section 25 of the Sale of Goods Act 1893 was accompanied by sub-section (2) which was in identical terms with section 9 of the Factors Act 1889 (originally section 4 of the Factors Act 1877), and dealt with a person who having bought or agreed to buy goods obtains possession of the goods. Possession under sub-section (1) must surely mean the same as possession under sub-section (2), which has been held to mean actual custody. In sub-section (2) there is a reference to " mercantile agent " which by sub-section (3) " has the same meaning as in the Factors Acts ".

In *Hugill v. Masker* 22 Q.B.D. 364, Lord Esher M.R. said of sub-section 2 (at p. 370) " It is to be observed that the section is not dealing with the rights of the parties to that contract as against each other, but with the rights of third persons who enter into another transaction on the faith of the possession which the vendee under that contract has obtained of the documents of title ".

Again in *Cahn v. Pocketts Bristol Channel Steam Packet Company* [1899] 1 Q.B. 643 Collins L.J. with reference to sub-section (2) said " Possession by the Factors Act 1889 section 1(2) means actual custody. The Factors Act 1889 which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title but without property therein, to pass the property in goods to bona fide purchasers. Possession of, not property in the thing disposed of is the cardinal fact. From the point of view of the bona fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing or authority to deal with it in the person in possession at the time of the disposition or not."

The climate of legislative opinion was at the time of the passing of the 1877 and 1889 Factors Acts favourable to legislation which would prevent the buyers or others from being misled by an apparent possession of goods which was belied by legal transactions which were unknown to the world at large. In 1878 the Bills of Sale Act destroyed the validity of assignments and the like without delivery unless registered and in 1883 the Bills of Sale (Amendment) Act made similar provisions in respect of agreements to secure money on goods remaining in the apparent possession of the borrower.

The heredity of the section which their Lordships are now considering can therefore be summed up as follows. Its words are identical with those of section 8 of the Factors Act 1889 where they first appeared in this exact form. In that Act it was expressly deemed that " actual custody " should constitute possession. In the Sale of Goods Act 1893 section 25 the same form of words was again enacted. Part of that section (namely 25(2)) contains an implicit reference and part of it (namely 25(3)) an explicit reference to the Factors Acts. There was strong authority for saying that in part of the section (namely 25(2)) " actual custody " constitutes possession. It had never been suggested by 1923, when the same form of words was first enacted in New South Wales, that there could be written into another part of section 25 (namely 25(1)) an implied proviso that actual custody should *not* constitute possession if the possession though continuous became attributable to a bailment—thus giving to possession a meaning different from that which it had under the rest of the section and different from that which it had under a previous and co-existing section in identical terms (Factors Act 1889 section 8).

There is therefore the strongest reason for supposing that the words " continues in possession " were intended to refer to the continuity of

physical possession regardless of any private transactions between the seller and purchaser which might alter the legal title under which the possession was held.

Their Lordships do not think that such a view of the law which they believe Parliament to have intended could in practice create any adverse effect. It would mean that when a person sells a car to a finance house in order to take it back on hire purchase the finance house must take physical delivery if it is to avoid the risk of an innocent purchaser acquiring title to it. But in any event such arrangements where there is no delivery are not without some jeopardy owing to the Bills of Sale Acts.

It seems to their Lordships that *Staffs Motor Guarantee Ltd. v. British Waggon Co. Ltd.* (and *Eastern Distributors Ltd. v. Goldring* in so far as it followed it), was wrongly decided. Even if it were rightly decided, it would not cover the facts of this case. For even assuming that a separate agreement of bailment, following a sale, without any break in the seller's physical possession, were sufficient to break its continuity for the purposes of the section, here there was no such separate bailment. Motordom's continued physical possession was solely attributable to the arrangement which constituted the sale. It was a term of the sale by Motordom to the respondent that Motordom should be entitled to retain possession of the cars for the purpose of selling them to customers. Motordom only received 90% of the price on the sale to the respondent, and it cannot be argued that the sale ended at that stage. It would be absurd to suppose that either party intended Motordom to sell its stock for 90% of its value without getting a right to any further benefit. The transaction by which Motordom sold the cars to the respondent was inextricably mixed with Motordom's right to keep the cars for display at its premises. In their Lordships' opinion Motordom, having sold the goods whose ownership is disputed, continued in possession of them.

In spite of Mr. Newton's arguments their Lordships cannot question the learned trial Judge's conclusions as to the bona fides of the appellant and its lack of notice of the previous sale. No doubt those arguments were put to him at the trial, but having heard and seen the witnesses he did not accept the arguments.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, the Order of the High Court dated the 28th August 1963 set aside with costs and the Order of the Supreme Court of New South Wales dated the 25th July 1962 restored. The respondent must pay the costs of this appeal.

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In the Privy Council

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LORD PEARCE

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