A DECISION ON THE INTERPRETATION OF THE HIRE PURCHASE REGULATIONS

PROVIDENT LIFE ASSURANCE CO. LTD. v. OFFICIAL ASSIGNEE [1963] N.Z.L.R. 961

The case of *Provident Life Assurance Co. Ltd.* v. *Official Assignee* [1963] N.Z.L.R. 961 is of interest from several points of view. In the first place, a majority of the members of the Court of Appeal allowed the appeal on a preliminary point of interpretation, which is interesting, not only as regards the result, but also in that the precise point on which the appeal turned was not considered by the learned Judge in the lower Court and was not taken by either counsel until brought to their attention after the hearing in the Court of Appeal. Secondly, the majority judgment in the Court of Appeal made no more than passing reference to the substantive point of law decided in the Supreme Court, with the result that that judgment's value remains unclear, even though supported by McCarthy J. in the appellate Court. As a result the main question, which is of considerable practical importance, remains unsolved. Thirdly, the Court of Appeal seems to have adopted an unduly restrictive interpretation of the purpose of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 (S.R. 1957/170).

In this case the Official Assignee claimed a declaration that a certain instrument by way of security was void, and an order for possession of a Morris motor car, or alternatively, judgment for its value. The bankrupt, an insurance agent employed by the defendant, had executed an instrument by way of security which was duly registered. By this instrument the bankrupt purported to assign to the defendant by way of mortgage the motor car in question to secure repayment of the sum of £685 with interest. It was expressly stated in the instrument that it was given as security for a loan to be expended wholly or in part in the purchase of the motor car. The security being subject to the terms implied by the Chattels Transfer Act 1924, the bankrupt was entitled to retain possession and use of the motor car "until the grantor becomes bankrupt". [1] Likewise the defendant was entitled in the event of M. (the bankrupt) becoming bankrupt, immediately to take possession of the car and sell and dispose of it. The moneys advanced by the defendant were used by M. to purchase the car, the amount of the advance representing the full purchase price.

On 31 July 1958, M. was adjudged bankrupt on his own petition. There was no evidence of any earlier act of bankruptcy which might have brought the doctrine of

1. Fourth Schedule, Chattels Transfer Act 1924.

relation back into operation. At that date M. was in possession of the motor car. On 14 August 1958, the defendant, purporting to act under the powers conferred on it by the chattel security, seized the motor car and later sold it to another insurance agent employed by it.

The substantive point raised by the case under discussion was the effect of supervening bankruptcy on contracts which are both void and illegal by the operation of the regulations. In the Supreme Court (reported sub. nom. *Official Assignee* v. *Provident Life Assurance Company Limited* [1962] N.Z.L.R. 166) Richmond J. held that at the date of the bankrupt's adjudication he had the full and unfettered legal title to the motor car which was the subject-matter of the contract and that, since, as against the statutory title of the Official Assignee, the defendant had no legally recognised right, he was in no better position than anyone else who, without authority, had taken and sold the car. The majority of the Court of Appeal allowed an appeal against this decision, and decided that the regulations did not apply. The contract was therefore unaffected by the regulations and the Official Assignee could not set aside the defendant's title.

In the Supreme Court, the learned Judge considered first the question whether the instrument was void as being in contravention of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. Regulation 6 provides that, unless certain requirements set out in the Regulations are observed;

> A ... lender shall not ... make a loan on the security of any goods which are to be purchased by the borrower and of which the purchase price or any part thereof is to be paid out of the proceeds of the loan.

It was common ground that the requirements of the Regulations had not been observed. It was clso agreed by the parties that the question under discussion depended solely on whether or not the defendant was at the material time a "lender" within the meaning of the regulations. Counsel for the defendant submitted that the definition of "lender" in the regulations, namely, "a person who is engaged in the business or makes a practice of lending money,"[2] should receive a restricted construction by the addition of the words "on goods" at the end of the definition. Richmond J. rejected such an interpretation. He considered that the regulations were for the economic stability of New Zealand by the restriction of inflation and this object would be better achieved by not giving "lender" a restricted meaning.

Evidence showed that loans made by the defendant company over a period of

2. Reg. 2 (1) Hire Purchase and Credit Sales Stabilisation Regulations 1957.

5 years on agents' cars comprised approximately 0.3[3] per cent of the total amount of money lent by the defendant. Nevertheless the amount averaged over £10,000 annually. The learned Judge held that these loans were sufficient to bring the regulations into operation. His Honour held consequently that the transaction between the bankrupt and the defendant contravened the Hire Purchase and Credit Sales Stabilisation Regulations. By virtue of Reg. 10 of these Regulations, in his Honour's view, both the contractual obligation of the bankrupt to repay such a loan and the security given were not only void, as expressly stated in Reg. 10, but also illegal on the authority of *Luhrs* v. *Baird Investments Ltd.* [1958] N.Z.L.R. 663 and *Stenning* v. *Radio and Domestic Finance Ltd.* [1961] N.Z.L.R. 7 (the latter a decision of Richmond J.).

His Honour then turned to the second question, the effect of the contract's illegality on the right of M. before the bankruptcy to claim possession of the motor car if the defendant had exercised its rights under the instrument and had seized the car. To claim possession it would be necessary to prove and rely on the existence of the agreement. 'The maxim *in pari delicto potior est conditio possidenti* applied. The learned Judge stated, at p. 172:

> I am therefore of the opinion that if the defendant company consequent upon a default by M. had repossessed the car and resold it, M. himself would not have been able to recover the car or its value from the defendant.

In support of this conclusion the learned Judge distinguished the case of *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* [1945] K.B. 65; [1944] 2 All E.R. 579, on the ground that in the present case the defendant could justify its action in seizing the car as being founded on a prima facie claim of right, viz. its power under the chattel security. Hence, if acting under those powers, the defendant had taken possession of the car before the bankruptcy any claim by M. would have been met by the defence of illegality. [4]

However, that conclusion did not solve the problem in the present case. For M. had been adjudicated bankrupt before the defendant seized the car. What was the effect of bankruptcy on the Official Assignee's title to the car?

The learned Judge turned first to s. 61 Bankruptcy Act 1908 which provides:

> The property of the bankrupt passing to the Assignee and divisible amongst his creditors shall comprise the following particulars:

3. This figure is the writer's own calculation based on the evidence reproduced at [1963] N.Z.L.R. 168.

4. For another recent discussion of the terms "illegal" and "void" (as used in the Land Settlement Promotion Act 1952, s. 25 (4)) see *Joe* v. *Young* [1964] N.Z.L.R. 24.

(a) All property belonging to or vested in the bankrupt at the commencement of the bankruptcy, or acquired by or devolving upon him before his discharge.

It was clear from the decision in *Ward* v. *Fry* (1901) 85 L.T. 394 that the title of the Official Assignee could not be prejudiced by any illegal disposition which the bankrupt might purport to have made of his property after commencement of the bankruptcy – or, in this case, after adjudication. A similar conclusion was reached on slightly different facts in *Ex parte Wolverhampton and Staffordshire Banking Co; In re Campbell* (1884) 14 Q.B.D. 32. On the other hand, if, prior to the commencement of the bankruptcy, the bankrupt had parted with property under circumstances whereby some other person obtained the right to retain such property as against the bankrupt, then the Official Assignee would stand in no better position than the bankrupt in seeking to recover possession of that property: *8 Halsbury's Laws of England* (3rd ed.,) 151. The learned author of *Halsbury* cites *In re Mapleback; Ex parte Caldecott* (1876) 4 Ch. D. 150, as authority for this statement. His Honour discussed *In re Mapleback* (supra) at some length and concluded that he could not safely apply the case to the present type of situation.

The case thus became a contest between the statutory title of the Official Assignee and whatever rights the defendant might have under an illegal and void instrument by way of security. Under s. 61 Bankruptcy Act 1908 the interest of M. in the motor car passed to the Official Assignee at the moment of adjudication. The only matter the defendant could raise to detract from the Official Assignee's statutory title was that, although admittedly the transaction was illegal and void, it still transferred a right of ownership or some more limited interest in property: see *Sajan Singh* v. *Sardara Ali* [1960] A.C. 167, 176 (P.C.); [1960] 1 All E.R. 269, 272. However, his Honour considered it impossible to apply the principles explained by Lord Denning, in that case, because the Hire Purchase and Credit Sales Stabilisation Regulations expressly declared that the bill of sale was void. Execution of the instrument was of no effect in divesting from M. any interest in the car. The defendant company had no legally enforceable right in the car – at most it enjoyed a kind of *spes* that if it could obtain possession of the car it would be able to retain that possession as against all the world because of the bankrupt's inability to reclaim possession without setting up a plea of illegality. His Honour had little difficulty in holding that an inchoate possibility put the defendant in no better position than anyone else who had without authority removed and sold the car. Accordingly judgment was given for the plaintiff.

From this decision the plaintiff appealed, and one of the interesting matters in the Court of Appeal was the sequence of events. After argument (no new arguments

were put to the Court), judgment was reserved. Later, however, the Court called for further written submissions on a point which had not been argued in either Court and had escaped the notice of the Judge in the lower Court: the effect of Reg. 2(3) Hire Purchase and Credit Sales Stabilisation Regulations 1957. As McCarthy J. noted (p.966) counsel for the appellant was unable to advance any forceful reasoning to support a submission that that Regulation removed the particular loan from the scope of the Regulations generally, whereas counsel for the respondent took an emphatic stand against the proposition.

The majority judgment of North P. and Turner J. dealt only with the point just referred to, namely the application of the Regulations to the transaction in question in view of this provision in Reg. 2(3):–

> Nothing in these regulations shall apply in respect of or in connection with the purchase or sale or disposal of any goods:
> (a) Otherwise than at retail; or
> (b) . . . .
>
> Provided that, notwithstanding paragraph (a) of this subclause, these regulations shall apply in every case where the buyer is employed by the seller, whether the seller is a wholesaler or a retailer.

The term "at retail" said the majority, presupposed a trading or a commercial transaction and was in contradistinction to the term "wholesale". A wholesaler was to their mind, a person who, by way of business, deals only with persons who buy to sell again, while a retailer is one who deals with consumers.

The majority said it would be a misuse of language to speak of a sale between two private individuals as being a sale either at wholesale or at retail. While selling at retail was not defined in the Regulations, the term "seller" was defined as "a person who is engaged in the business of selling goods at retail". It was against that class of seller that the Regulations were aimed.

The evidence showed that the bankrupt purchased the car from a fellow employee. The security which was attacked in the action did not commence with a sale "at retail". Consequently the appellant company was not a "lender" within the meaning of the Regulations and hence the Regulations did not apply.

McCarthy J. disagreed. He thought that it was not fairly open to the appellant to have the advantage of Reg. 2(3). In the Supreme Court the respondent contended that the instrument was void as being contrary to the Regulations. The appellant, in its statement of defence, said it was not a "lender" within the meaning of the Regulations. The proper reading to put upon the statement of defence was that the appellant

did not contest the application of the Regulations generally, provided it were held to be a "lender" within Reg. 2(1). Accordingly the issue whether or not the sale was a retail one was not debated and evidence concerning it was of the very sketchiest. In his Honour's opinion there was real possibility that the facts, if carefully examined, could have an important bearing upon the construction to be put upon Reg. 2(3).

Regulation 2(3) apart, McCarthy J. was of opinion that the appellant was a "lender"; and that it was open to the respondent to raise and rely on a breach of the regulations because, on adjudication, the legal estate in, and right to possession of, the vehicle passes to him. The appellant was thus compelled to rely on the instrument by way of security to justify seizure of the car. It was then open to the respondent to raise the illegal character of the instrument. On this basis his Honour would have dismissed the appeal.

Dealing with the various questions raised by this case, it is respectfully submitted that the view propounded by Richmond J. in the Supreme Court, and McCarthy J. in the Court of Appeal, that the term "lender" in Reg. 2(1) is not limited to a lender on goods is preferable. The definitions of other terms contained in Reg. 2(1) are explicit when they delimit the scope of the definition e.g. the definition of "seller" (applies only to "goods at retail"). It would thus seem that if the legislature had intended the term "lender" to be similarly construed, the definition would have been similarly worded to give effect to such an intention.

Further it is submitted that the reasoning of Richmond J. at pp. 169 – 170, that the regulations were intended to catch the investor who would vary the type of his investment from time to time according to circumstances and so tend to cause inflation, is valid.

No reference appears to have been made to s. 5(j) Acts Interpretation 1924 which, it is suggested, applies to several facets of the present case. This paragraph provides that regulations should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the regulations. The object of the Regulations in question in this case, is generally to promote the economic stability of New Zealand, mainly by regulating the growth of inflation. Such an object would be better achieved, it is submitted, by limiting the amount of lending done under conditions which are likely to produce inflation, and by applying this restriction to as wide a field as possible. Moreover the object of the Regulations was intended to be achieved in a number of ways, one of which, (as the Regulations then stood) was by preventing the sale of motor vehicles, in circumstances in which the buyer paid only a small or no deposit and was given an extended period of credit. The purpose of Reg. 2(3), it is submitted, is to exclude from the Regulations, sales by a wholesaler to a retailer which are not normally the subject of either a small deposit

or an extended period of credit, unless the sale is to an employee, whether of a wholesaler or retailer, in which case the Regulations apply. Why should not a sale on credit of a motor car by a private seller to a private buyer come within the scope of the Regulations, especially when, as frequently happens, the sale is financed by a motor vehicle finance corporation?

Provident Life Assurance Co. Ltd. v. *Official Assignee* [1963] N.Z.L.R. 961 is of considerable importance and it is to be regretted that the learned members of the majority did not see fit to pronounce on the law generally on this topic, to act as a guide to lower courts on subsequent occasions. The difficulty which Richmond J. experienced in dealing with *In re Mapleback* (supra) is illustrative of the problems that may arise: [1962] N.Z.L.R. 173 - 175.

How has the judgment of Richmond J. come through all this? Is it an empty shell devoid of any value? Or is it of some assistance as a non-binding precedent? There are conflicting dicta on the efficacy of a judgment reversed by an appellate court on a quite different point from that on which the decision in the lower court was based. In *Hack* v. *London Provident Society* (1883) 23 Ch. 102, 112, Jessel M. R. said that in such a situation the previous decision will be "of no effect at all". On the other hand, Maugham J. in *Curtis Moffatt* v. *Wheeler* [1929] 2 Ch. 224 considered that the first judgment remained fully binding. It is submitted that neither view is completely right, but each has some merit, and a later court has a great deal of freesom in such a situation: see Dias and Hughes, *Jurisprudence* (1957) 85, 86.

It is submitted then that although the proper interpretation of Reg. 2(3) Hire Purchase and Credit Sales Stabilisation Regulations 1957 may now be taken as settled by *Provident Life Assurance Co. Ltd.* v. *Official Assignee* (supra) the majority judgment gives no guide to future courts as to the merit of Richmond J.'s approach to the substantive question, and as a result it leaves in uncertainty the value of Richmond J.'s judgment as a precedent.