CASE NOTES AND COMMENT

THE HIT AND MISS OF STATUTORY INTERPRETATION

PALGO HOLDINGS PTY LTD V GOWANS (2005) 221 CLR 249

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INTRODUCTION

The recent High Court decision in *Palgo Holdings Pty Ltd v Gowans*[1] considers the long standing distinction between a security in the form of a pledge or pawn and a security in the form of a chattel mortgage. The decision in *Palgo* demonstrates that, despite the purposive approach to statutory interpretation, general law definitions may be adopted by the courts unless a different definition is included in the relevant statute. *Palgo* may represent a case where the court, as Lord Diplock described it, declares that Parliament has missed its target.[2]

I. THE FACTS

Palgo Holdings Pty Ltd, the appellant, carried on a business of money lending in Byron Bay, New South Wales under the trading name of 'Cash Counters Byron'. Palgo Holdings was charged under the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) (the 1996 Pawnbrokers Act) with carrying on a business of lending money on the security of pawned goods whilst not holding a licence. Palgo Holdings was prosecuted by Kelvin Gowans, a public officer on behalf of the Director

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1 (2005) 221 CLR 249 (hereafter *Palgo*).

2 Lord Diplock, 'The Courts as Legislators', (1978) *The Lawyer and Justice* 263 at 274.

General of the Department of Fair Trading. Palgo Holdings was convicted in the Local Court of New South Wales at Lismore and fined $6000. An appeal by Palgo Holdings to the Supreme Court failed[3] as did a further appeal to the New South Wales Court of Appeal.[4]

Palgo Holdings used two documents as part of its money lending business. The first was a secured loan agreement and the second was a schedule of terms. The schedule of terms included a clause stating that the borrower was transferring title in the mortgaged goods to the lender as security for the loan. The schedule of terms also provided that the borrower was required to insure the goods, although there was no evidence that Palgo Holdings ever enforced this obligation. If a borrower defaulted under the loan agreement Palgo Holdings had the right to repossess and sell the goods and apply the proceeds towards repayment of the loan. The schedule of terms also stated that the goods were to be retained by Palgo Holdings at the mortgagor's request.

II. THE LEGISLATIVE REGIME

The 1996 Pawnbrokers Act repealed the *Pawnbrokers Act 1902* (NSW) (the 1902 Pawnbrokers Act), the *Second-hand Dealers and Collectors Act 1906* (NSW) and the *Hawkers Act 1974* (NSW). The 1902 Pawnbrokers Act extended its reach beyond transactions of pawn and pledge. Section 3 extended the operation of the 1902 Pawnbrokers Act to transactions where money was advanced 'upon interest, or for or in expectation of profit, gain, or reward … upon security, whether collateral or otherwise, of any article taken … by way of pawn, pledge, or security'. This definition was not used in the 1996 Pawnbrokers Act.

Section 6 of the 1996 Pawnbrokers Act provided that a 'person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person'. Section 3 defined a pawnbroker as 'a person who carries on a business of lending money on the security of pawned goods'. The 1996 Pawnbrokers Act provided no definition of

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3 *Palgo Holdings Pty Ltd v Gowans* [2002] NSWSC 894.

4 *Palgo Holdings Pty Ltd v Gowans* [2003] NSWCA 204.

'pawned' or 'pawned goods' and this unfortunate omission was to become the significant issue in the case.[5]

III. THE MAJORITY DECISION IN *PALGO*

This critical difference between the 1996 Pawnbrokers Act and the 1902 Pawnbrokers Act was decisive in the majority judgment of McHugh, Gummow, Hayne and Heydon JJ. The majority noted that a pawn or pledge is one class of bailment of goods used as a form of security for a debt or other obligation.[6] A pawn or pledge requires the delivery of goods so that the lender acquires actual possession. As such, a pawn or pledge is distinct from a chattel mortgage. Under a chattel mortgage the borrower's legal title to the goods passes to the lender and the passing of title is not dependent upon delivery of possession; the 'right of property passes by the conveyance'.[7] Pawns, pledges and chattel mortgages must also be distinguished from a lien.[8] A lien is a right to detain goods until the money owing is paid; it is only a personal right and does not carry with it the right of sale.[9]

On this basis a borrower who provides their goods as security under a chattel mortgage is entitled to keep possession of the goods unless the lender requires that the goods be delivered to them. If the borrower does retain the goods after entering into the chattel mortgage then the lender, as owner of the goods, would have a right to possession despite the borrower retaining actual possession of the goods. The circumstances under which a lender can exercise this right to possession will usually be agreed between the parties. Typically, the lender will be entitled to take possession in the event of a default by the borrower. If the borrower does retain actual possession of the goods they would do so under a bailment; after transferring title to the goods to the lender they become a bailee of the lender's goods. By contrast a

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5 The 1996 Pawnbrokers Act has since been amended in a number of respects: see *Pawnbrokers and Second-hand Dealers Amendment Act 2002* (NSW).

6 *Palgo*, above n 1, 257–8.

7 Ibid 258.

8 Ibid.

9 Ibid citing *In re Rollason; Rollason v Rollason; Halse's Claim* (1887) 34 Ch D 495; Paton, *Bailment in the Common Law* (1952).

borrower providing security by way of a pawn or pledge must deliver possession to the lender. Under a pawn or pledge the lender is the bailee of the borrower's goods. Accordingly the property rights created and the rights of the lender and borrower are fundamentally different between the two types of security.

Sperling J who decided the appeal from the Local Court and the three judges in the Court of Appeal all recognised the distinction between a pawn or pledge and a mortgage.[10] However, Sperling J concluded that a transaction could be both a mortgage and a pawnbroking transaction.[11] Likewise, in the Court of Appeal, Handley JA held that if the lender had actual possession of the mortgaged goods and 'all the rights of a pledgee' then the transaction can 'be characterised as a combined pledge and mortgage'.[12] However, the majority in *Palgo* concluded that if pawn and pledge are given their accepted legal meaning then the reasoning of Sperling J and the Court of Appeal was 'necessarily flawed'.[13] The pawn or pledge on the one hand, and the chattel mortgage on the other, are mutually exclusive security interests. All of the courts below had found that the legal nature of the transactions between Palgo Holdings as lender and the various borrowers were chattel mortgages.[14] Accordingly they could not also be characterised as pawns or pledges. Given that the 1996 Pawnbrokers Act only regulated transactions involving pawns and pledges the transactions entered into by Palgo Holdings did not require a licence under the 1996 Pawnbrokers Act. Palgo Holdings only lent money on the security of chattel mortgages and accordingly the conviction of Palgo Holdings was quashed.[15]

IV. KIRBY J'S DISSENT IN *PALGO*

In his dissenting judgment Kirby J focused on the appropriate approach to interpreting the statute in question. He outlined three interpretative principles: purposive interpretation, contextual

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10 Ibid 260.

11 [2002] NSWSC 894 at [37].

12 [2003] NSWCA 204 at [7].

13 *Palgo,* above n 1, 261.

14 Ibid.

15 Ibid 263–4.

interpretation and access to extrinsic material.[16] In relation to purposive interpretation Kirby J noted that courts 'are no longer satisfied with a literal or grammatical meaning of words that does not conform to the presumed legislative intention, including the policy that can be discerned from the law in question'.[17] He quoted with approval an extra-judicial comment by Lord Diplock that if 'the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit; not merely record that it has missed'.[18] In relation to contextual interpretation Kirby J rejected an approach that afforded a meaning to a word such as 'pawn' by interpreting the word independently of its context.[19]

Kirby J also relied on the evidence given by a number of borrowers who entered into transactions with Palgo Holdings. Given that the precise legal nature of the security was a chattel mortgage these borrowers should have been entitled to retain possession of their goods. However, in most cases the borrowers left their goods with Palgo Holdings. There was evidence of only one transaction where a borrower retained possession of his car after entering into a chattel mortgage with Palgo Holdings. Kirby J outlined examples of borrowers who had mortgaged portable radios, mobile phones and jewellery and had simply assumed that they were required to give possession to Palgo Holdings.[20] But because the transaction was a chattel mortgage they were not required by law to give possession to Palgo Holdings. It was however clearly in Palgo Holdings' interest to have possession of the goods so that it did not have to rely on its right to repossess the goods in the event of default. Palgo Holdings overcame this difficulty by including a provision in the documentation that the mortgagors had 'requested' that Palgo Holdings store the goods. The particular security structure and documentation adopted by Palgo Holdings therefore gave them full legal title to the goods, including immediate possession of the goods, and the ability to sell the goods without having to be licensed under the 1996 Pawnbrokers Act.

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16 Ibid 264–5.

17 Ibid 264.

18 Lord Diplock, 'The Courts as Legislators', above n 2 at 274, cited by Kirby J in *Palgo,* above n 1, 264.

19 *Palgo,* above n 1, 264–5.

20 Ibid 270.

Kirby J agreed with the majority that there is a common law distinction between a pawn or pledge and a chattel mortgage.[21] However, he concluded that the common law meaning could not be determinative of the issue which concerns the construction of an Act of the New South Wales Parliament.[22] Kirby J favoured an approach that gave the term 'pawned goods' its common meaning in everyday speech in Australia and not its technical common law meaning.[23] To the extent that the majority judgment might represent a 'turning back to literalism' Kirby J disagreed with it.[24] The interpretation of the majority rewarded the 'clever legal drafting of the appellant's document'.[25] For Kirby J the purpose of the legislation was clear and the courts should give effect to that purpose.

V. CONCLUSION

The majority judgment in *Palgo* does not represent a rejection of the purposive approach to statutory interpretation. But it does place a limit on the purposive approach. That limit is reflected in the notion that if words used in a statute have a general common law meaning they may be given that meaning if the statute does not provide an alternative definition. The majority in *Palgo,* after noting that 'pawn' had a long-established legal meaning, nevertheless expressly stated that the place to begin the interpretation of the statute was the legislative text itself.[26] The majority declined to accept the argument that the word 'pawn' could be taken, in the context in which it was used, to include two forms of security that are mutually exclusive. The purposive approach can not override the clear words of a statute. As Geddes has observed, the interpreter of a statute 'must attempt to discover the purpose or object underlying the Act and, *if possible,* adopt an interpretation furthering that purpose or

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21 Ibid 276–7.

22 Ibid 276.

23 Ibid 280.

24 Ibid 285.

25 Ibid.

26 Ibid 254–5.

object'.[27] If a statute is poorly drafted it may simply not achieve its intended purpose.

It is submitted that this is a sound approach to statutory interpretation. Parliament should be taken to be well aware of words that have a long-established legal meaning. If parliament intends to depart from established legal meanings in any particular context, then that departure is easily reflected in the relevant legislation by the use of a definition that is appropriate to that context.

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[27] Robert Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5, 42 (emphasis added).