

IN THE HIGH COURT OF NEW ZEALAND  
INVERCARGILL REGISTRY

B4/82

IN THE MATTER of the Insolvency  
 Act 1967

A N D

IN THE MATTER of N  
RANDELL of Invercargill,  
 a Bankrupt

BETWEEN J RANDELL  
 of Invercargill, Housewife

Appellant

A N D

THE OFFICIAL ASSIGNEE  
in the matter of  
N RANDELL  
 a bankrupt

Respondent

Hearing: 8 November 1983

Counsel: R.G.R. Eagles for Appellant  
 Scott for Respondent

Judgment: 8.3.84

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JUDGMENT OF HARDIE BOYS J.

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Mrs Randell appeals under s 86 of the Insolvency Act 1967 against a decision of the Official Assignee, the effect of which is that a 1974 motor car, registration number !, registered in her name, was in fact the property of Mr Randell, who was adjudicated bankrupt on 27 May 1982, and so vested in the Official Assignee pursuant to s 42 of the Act.

Mr and Mrs Randell have never been married but they lived together for some ten years between 1972 and 1982 and had two children. Mrs Randell had been married before this and in 1974 she received over \$7,700 in settlement of a matrimonial property claim against her former husband.

Also, in 1971 she received some \$1,800 from a deceased estate. Mr Randell on the other hand does not seem to have ever had much money. When the couple began living together, all he had of any consequence was a car. He later sold that in order to find the deposit for the purchase of a fishing vessel. Mrs Randell then with her own funds bought a car. It was registered in her name. In February 1973 it was traded in on the purchase of a which Mr Randell needed for his fishing business. It was bought in Mrs Randell's name. The balance of the price over and above the trade-in value, was secured on hire purchase, but Mr Randell failed to honour his undertaking to pay the instalments, the was repossessed, and the asset lost. In March 1974 Mrs Randell bought another car, a It cost \$2,395 and she used her own funds. It also was registered in her name. Twice she used it as security to borrow money to help Mr Randell pay his debts. Then later it was sold, for \$1,900, of which \$625 was applied as a deposit on the purchase of a caravan in March 1978. This too was in Mrs Randell's name, but again, although the understanding was that Mr Randell was to pay them, the hire purchase instalments were not maintained, and in May 1981 it was either repossessed, or sold to avoid repossession (the exact position is obscure).

Out of the moneys borrowed against the Vauxhall Victor, Mr Randell bought a utility, and this was registered in his name, as were three other vehicles bought successively as replacements. Mr Randell provided all the funds for these, except for the last, a It was bought late in 1981, partly, if not entirely, out of the proceeds of sale of the caravan. This was at a time when any moneys Mr Randell had were payable to his major creditor pursuant to an arrangement he had made, and its purchase was apparently in breach of that arrangement. It seems that for much of the time prior to this Mr Randell had largely been kept in business and out of insolvency

by Mrs Randell. She had been constantly fending off creditors, working hard to earn money for the family, and using her own resources, so that by 1975 they had been entirely expended.

By the end of 1981 the relationship between the couple had deteriorated badly and Mrs Randell left on 24 January 1982. By that time all she had was the acknowledged loan of \$3,300 made in connection with the fishing venture, and in respect of which the Official Assignee has since admitted her proof of debt in the bankruptcy.

There was considerable conflict in the evidence as to what happened after the separation. Mrs Randell's viva voce evidence differed in some respects from her earlier affidavit, and Mr Randell offered a different version again. Mrs Randell's affidavit was not very carefully prepared, but her oral evidence was clear, and it is that account I use where there was a difference between the two. She said that after she had left him, Mr Randell rang to say that he thought something was going to happen so far as his creditors were concerned and that he was going to sell the [redacted] and out of the proceeds buy her "a good little car" which, he said "will be your bit out of the relationship". "At least you'll get something out of it", he said. She queried how he would pay his debts, but he said he knew what he was doing. She said that it was only later that she found that he had purchased the Mazda car which is the subject matter of these proceedings, but that cannot be right, for she certainly knew it was to be bought in her name and that the registration papers were to be sent to her at an old address, for she arranged for them to be sent on to her at her current address. Although Mr Randell had put the car in her name he took possession of it from the vendor. But later he brought it to where she was living and said she could "have it for a time", but that he wanted to be able to continue using it as necessary until he had been able to purchase another vehicle for himself. In fact she

had it only two days and then he came and took it away. She did not have possession of it again. In due course it was sold by the Official Assignee, but he has retained the proceeds pending the outcome of this appeal.

This account seems to be mistaken as to dates, for there is an affidavit by the dealer from whom the car was purchased that that transaction took place on 1 December 1981. I do not regard that as significant, for if there was a mistake on Mrs Randell's part, Mr Randell shared it. The dealer went on to say, more significantly, that he understood Mrs Randell was to use the car. He also said that Mrs Randell, in the company of another woman, inspected it on two or three occasions. It seems unlikely however, in view of the evidence of the parties themselves, that the person to whom the dealer was referring was in fact Mrs Randell. It would thus be unsafe to place reliance on the dealer's belief that it was "Mrs Randell" who was to use the car. Mr Randell's domestic situation was such that two persons could be so described. I disregard too the evidence of a son, concerning conversations with the other of these two persons, for it was hearsay.

The Official Assignee told me that he had at first thought that Mr and Mrs Randell were married and that any claim Mrs Randell had to the car would be dealt with under the Matrimonial Property Act. When he found they were not, his decision to treat the car as belonging to Mr Randell resulted from the fact that Mr Randell at the meeting of creditors gave three different reasons why it was registered in Mrs Randell's name. The reason Mr Randell gave me was similar to that which Mrs Randell asserted, and it was summed up in these words in answer to a question from me at the end of his evidence: "I had an ill-advised conception that if I put it in her name and I went bankrupt at least she would share in some proceeds." His use of the word "some" is indicative of a certain equivocation in his evidence. For at the beginning of his evidence, having denied

telling Mrs Randell that the car was to be hers, he said "but I also felt that she should have some part of the business or whatever but not necessarily the whole car because of the situation I was in". He also mentioned the interests of the two children. But later, pressed in cross-examination as to why the car was registered in Mrs Randell's sole name, and being asked "So there was not in your mind at that time that the car was to be in shares was there?", he replied "Not exactly then no. It was not until a little while after I felt she should have no share in the car at all". It seems that this was after his adjudication, and acceptance of her proof for \$3,300, for he thought she should not have both the car and repayment of the loan.

I did not find Mr Randell a convincing witness at all. Having observed them both as they gave their evidence, and having reconsidered that evidence, I prefer that of Mrs Randell, who struck me as essentially frank and honest, even though still sharply resentful at the way in which she had been discarded by a man for whom she had battled hard. I am satisfied that before he bought the car Mr Randell told her it was to be hers, as some recompense for what she had done, and as some provision for the children. When he bought it, it was put in her name in order to carry out this purpose.

This appeal is limited to determining whether the Official Assignee was right in his conclusion that, to use his own words, "the car had been purchased from Mr Randell's funds and was therefore the property of the bankrupt passing to the Assignee on adjudication". Mr Scott told me that he relied alternatively on s 54 or s 56, which provide for the setting aside of dispositions - voidable gifts and voidable preferences respectively - by the procedure set out in s 58. But the Official Assignee has not acted under either of those sections and they cannot be invoked on this appeal, in which the sole issue is whether the vehicle in reality belonged to Mr Randell despite the fact that he put it into Mrs Randell's name. For that to be so, the

circumstances must have been such as to give rise to a resulting trust in Mr Randell's favour. If they were not, then full ownership passed to Mrs Randell, and the Official Assignee can recover the vehicle only if he can avoid the transaction under any relevant section of the Act. To do that, he must take the prescribed steps, for even if the transaction comes within the terms of one of these sections, it is not void but merely voidable.

A resulting trust arises when a person purchases property in the name of a stranger, without declaring any trusts, or declaring trusts which do not exhaust the whole beneficial interest. A trust is then presumed in favour of the person who provides the purchase money. This is done on the basis that in the absence of any expression of intention to the contrary, he did not intend the beneficial interest to pass to the nominal purchaser. But where there has been an expression of contrary intention, the presumption will be displaced.

"Since ... the trust results to the real purchaser by presumption of law which is merely an arbitrary implication in the absence of reasonable proof to the contrary, the nominal purchaser is at liberty to rebut the presumption by the production of parol evidence showing the intention of conferring the beneficial interest on him; and the evidence to rebut need not be as strong as evidence to create a trust."

(Lewin on Trusts 17th Ed p 132)

In the present case, there would have been a resulting trust had there been nothing more than the purchase in Mrs Randell's name from Mr Randell's funds. But there is in addition to that, as I have held, the clear evidence of an expressed intention by Mr Randell that Mrs Randell should have the beneficial interest. Accordingly the presumption is rebutted, and there can be no resulting trust. It follows that the Official

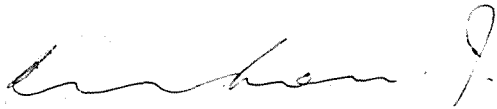
Assignee was in error in determining that the car was the bankrupt's property.

This of course is not necessarily the end of the matter for the parties, for it is still open to the Official Assignee to institute appropriate action under s 54 or s 56. It would be unsatisfactory if that resulted in a further appeal, in which the same issues as were canvassed before me were argued again. For this present appeal was argued around these sections, and Mrs Randell's rights generally, rather than upon the one single issue that was properly before the Court - and for that I must accept some of the responsibility. It therefore seems appropriate that I should say something, albeit brief, about these other matters, not by way of final adjudication of course, but by way of impression in the hope that further proceedings may be avoided.

If the Official Assignee is to succeed, it seems to me that it could only be under s 54, for I doubt very much that s 56 applies, if only because Mrs Randell was not preferred as a creditor. The car was not given to her to satisfy an acknowledged and provable debt. There was no attempt to give priority to the payment of one creditor at the expense of the others. The transaction bears rather the character of a gift. I cannot see that the assistance Mrs Randell gave over the years can properly be treated as past consideration so as to allow the use of subs(7) of s 54. The real question in the case is, I think, whether Mrs Randell had any beneficial interest in the money used to purchase the car, and consequently in the car itself, so as to exclude that interest from the scope of the gift. If Mr Randell was right in his statement that the \_\_\_\_\_ was bought (whether in whole or in part is not clear) from the proceeds of sale of the caravan, then it seems likely that as owner of the caravan Mrs Randell acquired an interest in the Caprice, and then in the \_\_\_\_\_ which was bought from the proceeds of sale of the \_\_\_\_\_ Neither the facts nor

the law in this regard were gone into in detail and therefore it is inappropriate for me to go further than mention it as a possible line of further inquiry and perhaps negotiation.

I therefore formally allow the appeal that is before me. The Official Assignee's decision is reversed. Mrs Randell is allowed out of the bankrupt estate costs of \$100 and disbursements as fixed by the Registrar.

A handwritten signature in cursive script, appearing to read "L. H. J.", is written in dark ink on the right side of the page.

Solicitors:

Eagles & Eagles, INVERCARGILL, for Appellant.