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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.294/83

380

BETWEEN RICHARD GORDON RIGG

Appellant

A N D MARAC FINANCE LIMITED

Respondent

NO. M.295/83

BETWEEN KERRY ROBIN CORKRAN

Appellant

A N D MARAC FINANCE LIMITED

Respondent

Hearing: 14 February 1984

Counsel: Dr W.G.G.A. Young for Appellants
H.D.P. Van Schreven for Respondents

Submissions Received: 2nd March 1984, 3rd April 1984

Judgment: 10 APR 1984

JUDGMENT OF COOK J.

The two claims from which these appeals arise were heard together in the District Court as the facts are not dissimilar and the same questions of law had to be considered. For the same reason, the appeals have been heard together also.

I take the facts in relation to the Rigg claim as

the basis for consideration of the questions of law which have to be determined.

On 6th January 1982, Mr Rigg had purchased from Harris Marine Limited one used Ambassador cabin boat, a trailer and a 135 H.P. Johnson motor, also a 7 horse power Mercury motor. Later in 1982, having decided to sell these items (other than the Mercury motor), he selected Magnum Marine Centre ("Magnum") to act as his agent and dealt there with a Mr Liddy, an employee of that company. The arrangement made was that, should a sale be arranged, Mr Rigg was to receive $8,700 clear and any excess over that sum to be retained by Magnum as its commission on the sale. A purchaser was found but, as must be the case so often with such transactions, he wished to trade in another boat and borrow sufficient money to make up the full purchase price. As Mr Rigg said in his evidence:-

> "Some little time after I delivered the boat to Mr Liddy I received a telephone call as to a sale. I was told that he had a buyer for the Ambassador but he had to take another boat in part exchange and if I agreed to the sale the other boat would then become my property and the balance he would give me a cheque for $4000 and the balance of $4700 would remain in the equity of the other boat. The other boat was a Plylite Fisherman. The boat was on a trailer and it had an engine. I accepted that arrangement."

Produced at the District Court hearing was a copy of a conditional purchase agreement, expressed to be made between Magnum as vendor and one, Stevenson as purchaser, recording the sale of the boat, motor and trailer in question and showing a gross cost of $9,100, a trade-in allowance of $4,300 and an amount financed, $4,800. That agreement was dated 23rd May 1982. Mr Rigg received a cheque for $4,000 which he banked on 27th May 1982. When he collected his cheque, he saw the boat which had been accepted in part exchange. He subsequently advised that there was a purchaser interested in the second boat, but nothing came of that. A deal was then arranged whereby a 50 horse power outboard motor which had come with

the Plylite boat, was exchanged for a 40 horse power outboard motor, plus $700. This latter sum was paid to him and banked on 14th June and he subsequently saw a 40 horse power motor on the boat which was still in the Magnum yard awaiting sale. Some time after this, Magnum ceased trading.

If there was no more to it than that, I do not understand it to be disputed that Mr Rigg, upon completion of the first transaction, had become the owner of the Plylite boat and 50 h.p. outboard motor taken in part exchange for his own boat, motor and trailer and then of the 40 horse power motor which was taken in part exchange for the larger one; that these were in the hands of Magnum for sale upon the terms that, having received first $4,000 and then $700 of the stipulated sale price, any sale of the assets which he then owned must provide a further $4,000 for him. Had he decided to remove his property at any time, he would have been entitled to do so, possibly with an obligation to make some payment to Magnum for acting on his behalf, though one notes that that company appears to have done well out of the first transaction with Stevenson. There is another side to the coin, however.

Magnum had an arrangement with Marac Finance Limited called a Wholesale Display Plan (Bailment) contained in a document dated 9th March 1982. I do not understand that the terms of that particular contract are material, however, as the Credit Contracts Act 1981 came into force on 1st June 1982 and, on that date, Marac having recognised that the arrangement evidenced by the contract came within the definition of a "revolving credit contract" within the meaning of that expression in the Act, a fresh contract was entered into.

Included in the recitals to the deed is the statement:-

> "WHEREAS Marac is prepared to purchase and bail Goods in favour of the Dealer from time to time and to give the Dealer an option to purchase such Goods pursuant to the terms hereinafter appearing and

requires therefor a return on funds outlaid as hereinafter specified."

Then, of the many clauses contained in the printed form of agreement, the following set out the main terms of the arrangement:-

"2. (a) THE parties acknowledge that Marac will provide and the Dealer will accept the Facility herein specified pursuant to which Marac will from time to time acquire Goods up to the Maximum Amount of Credit specified on page one hereof, as the same may from time to time be varied by agreement in writing between the parties, and will forthwith grant possession thereof to the Dealer to hold the same paying the rental and other moneys and performing the obligations herein contained.

(b) AT the time of or before taking delivery of any Goods the Dealer or an Authorised Signatory shall sign a Bailment Acknowledgement in respect of the Goods and the signing of such Bailment Acknowledgement shall be deemed to mean that the Dealer shall hold the Goods as bailee pursuant to the provisions hereof not only for the initial term but also for any extension of such term and the Dealer shall pay the rent set out in the Statement and it shall be conclusive evidence against the Dealer that he has received and is holding the Goods on hire on the terms and conditions of this Facility.

(c) THE Dealer may with the approval of Marac order any Goods required by him for display and if Marac approves shall order the Goods on behalf of and as agent for Marac (but without necessarily disclosing the fact of agency) subject to the conditions set out hereunder. All display Goods so required shall be purchased from the manufacturer or vendor either by the Dealer in the name and on behalf of Marac or by assigning any invoice for the Goods to Marac or by Marac itself and in either case satisfactory arrangements shall be made between Marac and the manufacturer or vendor and Her

Majesty's Customs in respect of sales tax or other duties before delivery to the Dealer for display by it. All new Goods may be paid for either directly by Marac or by the Dealer, and in the latter event Marac shall forthwith reimburse the Dealer for the amount paid by it.

(d) THE Dealer will take delivery of any Goods hired hereunder ex the premises of the manufacturer or vendor (being deemed thereupon to have taken such Goods on hire on the terms and conditions of this Facility so far as they apply to that class of goods) and be personally liable for all freight and delivery costs in respect of Goods and will repay to Marac any such freight and delivery costs which it may have paid or incurred.

(e) EVERY trade-in taken over by the Dealer and hired hereunder shall if covered by the limits of this authority from Marac existing at the time (but not otherwise) be deemed to have been purchased by it as agent of Marac (whether it discloses to the other party the fact of agency or not) and it shall be deemed to have paid to the other party as agent for Marac an amount equal to the trade-in allowance on the trade-in, and Marac shall reimburse the Dealer accordingly."

By virtue of clause 3, all moneys expended by Marac in the purchase of goods, together with rental expenses and interest, are to be debited to a bailment account in the name of the dealer and all moneys paid by Marac to the dealer pursuant to the facility (presumably if they are not paid direct, as in this case) are to be credited to that account. The contract further provides (inter alia) that Magnum is to pay to Marac rental for the goods from time to time the subject of the contract, such rental to be an amount arrived at by taking the balance of the bailment account for each day in the month and charging on that balance interest on a daily basis at the interest rate provided under the agreement. There is an acknowledgement that the contract is a revolving credit contract. According to Clause 9, the facility may be terminated by notice in writing by either party and, upon

termination, the dealer is obliged to purchase from Marac all goods then held on bailment. While it is not expressed in the contract, it was stated in evidence by Marac's credit manager in Christchurch that, under their arrangement with Magnum, Marac allowed the dealer to display each particular item purchased for a period of six months; if he had not disposed of the item by that time, Marac would insist that he re-purchase by paying a cheque for the required amount. I understand that would be the original price paid or credited to him by Marac.

Clause 12 commences as follows:-

> "THIS Facility shall be collateral with every Security and all other mortgages deeds and securities given by any person whatsoever to secure the Credit or any part thereof and with all documents which evidence the terms of any financial service and shall also be collateral with all documents herein or therein expressed to be collaterial herewith"

If default should be made by the dealer of any of his obligations under the facility, Marac is empowered by Clause 16:-

> "immediately without notice to the Dealer and without prejudice to any other rights or remedies it might possess to re-take possession not only of the Goods in respect of which such default has been made but also of all other goods held by the Dealer pursuant to the provisions hereof ..."

Clause 17 provides that nothing contained in the contract shall confer in the dealer any right of property or interest in or to the goods and that the dealer should be bailee only. Then by Clause 20, an option is granted to the dealer as follows:-

> "IN respect of any Goods held by the Dealer as bailee pursuant to the provisions hereof the Dealer may at any time during the hiring thereof provided it has not committed any breach of any stipulation binding on it in respect of the Goods have the option to purchase the Goods for its own use by

> paying to Marac as the price of the Goods a sum equivalent to that paid by Marac for them together with all Marac's hiring charges included in the rent of the Goods for the initial term of hiring and any extension or extensions thereof together with any registration fees taxes charges or expenses incurred by Marac but less all sums paid by the Dealer by way of rent of the Goods. Until such payment the property in the Goods shall remain exclusively in Marac and the Dealer shall remain bailee only."

One cannot but note that the true situation is normally concealed from anyone selling an item to the dealer. According to the credit manager's evidence:-

> "Under normal circumstances, the dealer will in fact issue a cheque to the seller of the item to enable him in the strictest of confidence to show that he in fact is buying the vehicle and basically the public merely led to believe that the title is then transferred to the dealer. However, the consequences as it does, favour the dealer, produce the cheque, supplies it to the seller. The dealer is then reimbursed by the financier for the amount which the dealer supposedly paid out."

On 23rd June 1982, when the plylite boat and outboard motor were still in its possession, Magnum executed a Bailment Acknowledgement, the wording of which is as follows:-

> "ACKNOWLEDGEMENT BY DEALER UNDER WHOLESALE DISPLAY FACILITY
>
> TO MARAC FINANCE LTD.
>
> We, the undersigned, hereby acknowledge to have received the goods described below together with all accessories, fittings and toolkit (if any) under the terms and conditions set forth in a written agreement between MARAC FINANCE LTD., and ourselves entitled Wholesale Display Facility related to goods delivered to us under the terms of such agreement. We acknowledge that the particulars set forth herein are correctly stated, and that the said goods have been delivered to us under the said Wholesale Display Facility and we hold such goods as Bailee thereunder."

The acknowledgement then gave particulars of the Plylite boat and 40 horse power outboard motor and stated the wholesale price to be $4000; in addition, a date was stated, six months ahead, which would be the date upon which Magnum would be required to purchase the boat and motor from Marac should a sale not have been made. A cheque, which included the sum mentioned, was paid to the dealer by Marac on 25th June 1982.

When Mr Rigg discovered that Magnum had gone out of business and that Marac had seized the boat and motor, he made demand of Marac to hand over possession of the boat and motor to him; the response was to the effect that, by virtue of the contract of 1st June 1982 and the bailment acknowledgement metioned, Marac had become the owner of the chattels and thus entitled to possession to the exclusion of Mr Rigg.

Having noted that Marac relied on Section 23(1) of the Sale of Goods Act and 3(1) of the Mercantile Law Act, the learned District Court Judge said:-

> "For Section 3(1) Magnum must have been in possession of the Plaintiffs' chattels in its capacity as a mercantile agent and the Defendant company at the time of the sale must have acted in good faith and not have been aware of any lack of authority on the part of Magnum to dispose of the chattels. The evidence of both Plaintiffs clearly shows that the chattels were in the possession of Magnum in its capacity as a mercantile agent and Magnum obtained possession in that capacity. There is no evidence to suggest that the Defendant acted otherwise than in good faith or that it was aware of the true position about the ownership of the boats, motors and trailer when they were sold to the Defendant. Section 23(2)(a) of the Sale of Goods Act reads:
>
> > 'Provided that nothing in this Act shall affect the provisions of the Mercantile Law Act 1908, or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true

owner thereof.'

> .....
> The Defendant company acquired its interest respectively on the 23rd and the 24th of June 1982 when it bought the traded in chattels for $4,000 and $1,900 respectively. On the evidence I cannot find that Magnum was acting as agent for the Defendant company on either of the transactions arising from the sale of the Plaintiffs' boats etc."

Having referred to the decision in Raffoul v. Esanda Limited [1970] 72 CLR 633, he concluded:-

> "The Defendant company bought the boats, engines and trailer from Magnum in the ordinary course of business and at a time when Magnum was in possession as a mercantile agent and with no notice of the true position about ownership. I therefore find that the seizure of the two Plaintiffs' boats, engines and trailer by the Defendant company was within the terms of the Defendant company's agreements with Magnum and that the ownership and property in these items had passed to the Defendant company which by virtue of such ownership was entitled to take possession."

It appears from the judgment that it proceeded on the basis that there was in fact a purchase of the chattels by Marac; whether it was argued in the District Court that there was no sale at all, I do not know. At the hearing of the appeal, it was not disputed by the appellants that:-

(a) Magnum was a mercantile agent;

(b) It was in possession of the various chattels with the consent of the owners; and

(c) Subject to a submission made, Marac acted in good faith and did not have notice that Magnum did not have authority to execute the bailment acknowledgement form.

but counsel contended that the submission to Marac by the

dealer of the bailment acknowledgement was not in the nature of a "sale, pledge or other disposition"; that it constituted no more than an assertion by Magnum that it had acquired goods as agent for Marac at a specified price and would hold those goods pursuant to the wholesale display facility. Further that, if Marac relied on the transaction being a sale of goods made by Magnum when acting in the ordinary course of business as a mercantile agent, then Magnum was acting as agent of the vendor and also of the purchaser and counsel referred to the finding in Raffoul v. Esanda Limited (supra) that such a conflict of interest on the part of the mercantile agent was such as to take the transaction outside the ordinary course of his business as such.

On the other hand, it was submitted for Marac that Magnum was authorised to sell at such a price as would produce a certain sum for Mr Rigg, that Marac was a bona fide purchaser for value and that the situation was such that, as provided in Section 23(1) of the Sale of Goods Act, even if the goods were sold by a person who was not the owner and who did not sell them under the authority or with the consent of the owner, the owner was by his conduct, precluded from denying the seller's authority. Alternatively, that Marac was entitled to rely on the provisions of Section 3(1) of the Mercantile Law Act as being a sale in the ordinary course of business of a dealer.

I consider that the essential question is whether there had been a "sale, pledge or other disposition" of the chattells at all; I use the expression contained in Section 3 of the Mercantile Act 1908 but from a practical point of view we are concerned with anything which could constitute a sale or purported sale by Magnum as agent for the true owner on the one hand, with or without authority, and Marac as the purchaser on the other. While one is tempted to view the situation as between the dealer and Marac as the giving of a pledge over the chattels by the former in return for the advance of $4000,

that would certainly not have been within any actual or implied authority of the dealer. Nor could it be said that the dealer would have been acting in the ordinary course of business as such.

As I understand the submissions for the respondent, it is contended that a sale occurred following receipt of the Bailment Acknowledgement form upon which payment was made by Marac; that there was an offer and acceptance situation, the offer being the transfer of title of the chattels and the acceptance was the payment by Marac. The respondent did not accept that the Bailment Acknowledgement impliedly purported that a sale had taken place, but submitted that it did no more than state that Marac had "received the goods described" and that the word "received" in that context had a wider meaning than that they had been acquired by means of a sale.

As against this, it was submitted for the appellants that although Marac had acted as agent for both the owner of the goods and Marac, it could not be that a sale occurred at the time when Mr Liddy, employed by and on behalf of Marac, made a personal and private decision as to the sale; that there would have to be an offer and acceptance involving objective manifestations going beyond such a mental decision. It was submitted, further, that the Bailment Acknowledgement was fraudulent in that it contained an implied assertion that a sale had already occurred; it was neither an offer to sell nor was it an acceptance of an offer previously made by Magnum.

If there was a sale, there must have been a point in time when it could be said that a bargain has been struck; when agreement between the parties was such that a contract had come into existence and bound each of them. The manner in which this may happen is not restricted. Section 5 of the Sale of Goods Act provides:-

> "Contract of sale, how made - Subject to the provisions of this Act and of any statute in that

> behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:
>
> ....."

In the present situation, setting aside the Bailment Acknowledgement form and the payment made by Marac, there is nothing in writing, no word spoken either to the dealer's principal or to Marac, no actual delivery to Marac of the chattels which remained in the dealer's yard, nothing which would indicate to anyone that a sale had taken place or that at any particular point of time property in the goods had passed. I turn, therefore, to the Bailment Acknowledgement form. In brief, it states that Magnum has received the particular chattels under the terms and conditions of the Wholesale Display Facility and that they are held by Magnum as bailee thereunder. Turning to the Facility contract, Clause 2(b) provides that "at the time of or before taking delivery of any goods ... "the dealer shall sign a Bailment Acknowledgement and this shall be deemed to mean that the dealer shall hold the goods as bailee.. The form of acknowledgement in the schedule does not contemplate the possibility of an acknowledgement being signed <u>before</u> delivery is taken, but for present purposes I set aside that fact. When considered in the context of the Facility and the manner in which the financial arrangements are intended to operate, the practical effect of an acknowledgement appears to be to convey information to Marac from the dealer in the latter's capacity as such and as a party to the Facility agreement, not as an agent of Marac or of the owner of the chattels; information that, on Marac's behalf, it has purchased, or that it is about to purchase, certain goods which are, or will shortly be, in its possession as bailee, and to call upon Marac to reimburse it for the money expended, or to put it in funds to enable it to make the purchase.

I am unable to see that it can be regarded as an offer to Marac, an offer which is accepted upon Marac making the payment. Rather it carries an implied assertion that

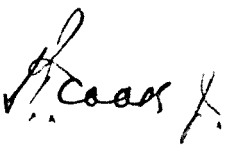
something has happened, as in the present case, having regard to the wording of the Bailment Acknowledgement, or in some cases it may be that something is about to happen. The word "delivery" I can only read as meaning delivery pursuant to a contract entered into by the dealer as agent for Marac to acquire goods for that company, or in anticipation of such a contract. While, as I have indicated, Magnum was not acting as agent for Marac when the ackowledgement was signed, neither was it acting as agent for the owner of the goods.

It follows that I am unable to accept the respondent's submission that a sale occurred following receipt by Marac of the Bailment Acknowledgement. Nor, in the absence of anything to indicate that a sale had taken place, am I able to see other grounds for holding that there was a sale made by the dealer, on the one hand, as agent for the owner and, on the other, as agent for Marac. It seems to me that what in fact happened, the signing of the bailment acknowledgement by the dealer, was no more than an untrue assertion by the dealer made fraudulently with the object of extracting from Marac the sum of $4000 and having no effect so far as the ownership of the chattels is concerned. What happened was not sufficient to pass the property in the goods from the true owner to Marac.

In such circumstances, the respondent cannot rely on Section 23 of the Sale of Goods Act because there was no sale, nor can it avail itself of the protection afforded by Section 3(1) of the Mercantile Law Act to a purchaser acting in good faith and without notice of any lack of authority.

So far as the appeal by K.R. Corkran is concerned, I do not understand there to be any material difference in the essential facts which would justify a different conclusion. Accordingly, in each case, the appeal must be allowed. Each appellant is entitled to judgment and costs, but I do not appear to have information whether the chattels are still held by Marac or have been sold. If a formal order is required, I should be pleased to see counsel or to receive an agreed

memorandum.



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