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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.413/83

BETWEEN DAVID JOHN CRICHTON

Appellant

A N D RADIO TIMES COMMUNICATIONS LIMITED (IN LIQUIDATION)

Respondent

Hearing: 23 February 1984

Counsel: A.A. Couch for Appellant
G.H. Nation for Respondent

Judgment: 5 MAR 1984

JUDGMENT OF COOK J.

The determination of this appeal requires a careful analysis of the evidence. The respondent, Radio Times Communications Limited ("RTC"), went into voluntary liquidation on 1st November 1982 with a substantial deficiency of assets against liabilities. The appellant, D.J. Crichton, had been a director of the company since its formation on 5th March 1982. He and his wife held 7,000 $1.00 shares out of a capital of $10,000 and another couple, Mr and Mrs Brazukas, held 3,000. The liquidators formed the view that the company was the owner of a Honda Accord car which was in the possession of the appellant and accordingly made demand of Mr Crichton for its return, but this was not complied with.

A security over the vehicle was held by General Finance. This document was produced and, on its face, it purports to be an agreement dated 8th March 1982 between General Finance Acceptance Limited and RTC. In addition to the names of the parties, the first page of the document contains items of information about the vehicle, from whom it was being purchased and financial details, and the operative portion of

the deed, containing the covenants on the part of the grantor, i.e. RTC, commences with the recital:-

> "WHEREAS the grantor is the owner of the goods or being about to acquire the goods for the price and by the method herein set out and from the advance to be advanced and expended in whole or in part for such purpose and thereby having good right and full power to assign the goods and the goods being free and clear from encumbrances now therefore in consideration of the advance by the grantee the grantor or the purchaser hereby covenants with the grantee as follows:"

On the face of the document, RTC was purchasing the vehicle from a company called Print Media Design Limited ("PMD") for a cash price of $14,000, plus legal fees $25, thus making a total gross cost of $14,025. There is a reference to a deposit of $8,457 leaving the sum of $5,568 to be financed. When charges are added this increased to a total indebtedness to General Finance of $7,303, payable by 23 monthly instalments of $304 and a final payment of $311. The deed contains an assignment of the vehicle to General Finance by way of mortgage to secure payment and the due performance of all covenants.

There was also a chattel security in favour of the appellant to secure the sum of $9,000. An accountant, employed by the firm of chartered accountants to which the liquidators belong and familiar with the liquidation, understood that it had been agreed that this security would be released upon the execution of the assignment to General Finance. The security was produced and also a memorandum of satisfaction. The former had been given by PMD to secure the sum of $9,000 expressed to be advanced by the appellant and the Honda Accord in question was assigned to him. When given, it was subject to a customary hire purchase agreement in favour of General Finance to secure $5,684. The covenant by the grantor, PMD, was not to repay the advance by the appellant but to perform its obligations under the hire purchase agreement and, upon the discharge of the balance owing thereunder, to transfer the vehicle to the appellant in exchange for a discharge of the security.

Mr Fuller, a lending representative employed in

Christchurch by General Finance, stated that his company held the first mentioned security over the Honda Accord. He described it as "a hire purchase agreement over a Honda Accord motor vehicle Regd. No. KL 9416 financing a purchase by Radio Times Communications Limited from Print Media Design Limited, we held a hire purchase chattel instrument." Possibly it may be regarded as a form of hire purchase agreement, but it is not one whereby the vendor and the purchaser enter into such an agreement and the vendor then assigns his rights to a finance company. As to the existence of the chattel security in favour of the appellant, Mr Fuller said that his company was not in the habit of financing a car over which a charge is already registered so far as they were concerned, after the agreement was entered into the owner of the motor vehicle was RTC. It seems, however, that a change of registration into the name of that company from PMD was never registered; this was an oversight on someone's part and no point was made of it. It is clear that the legal ownership of the vehicle passed to RTC at that time.

The security in favour of the appellant remained registered against the vehicle although a memorandum of satisfaction had been executed by the appellant. The latter is undated and is in the form of a consent to a memorandum of satisfaction being entered on the registered copy of the instrument and concludes with the words - "The moneys for which the said instrument was given as security having been satisfied". It appears to be accepted that this constituted a release by the appellant, but there is no evidence one way or the other as to the use that was to have been made of this memorandum; whether it was signed in anticipation of and subject to the car being transferred into his name pursuant to the terms of the security, as one might expect, or whether it was intended to operate as a discharge in any event. What is clear is that PMD had not fulfilled its obligation to him under the document.

At about the same time, but prior to the execution of the security to General Finance, there were certain letters written and received by the solicitors acting for the appellant. First a letter of the 9th February 1982 addressed to PMD containing an undertaking that, in consideration of a change of ownership of the vehicle (presumably in favour of the

appellant) being signed on behalf of the company it would not be registered until the solicitors had confirmed with New Zealand Motor Corporation (presumably as agents for General Finance and expressed to be holders of the hire purchase agreement over the vehicle) that such a change of ownership met with their approval. From this and the other letters, it seems that it had been proposed that the appellant, having left the employment of PMD, should take over the Honda Accord and assume the obligations in respect of the car under the security to General Finance, but subject to him giving a discharge of the security which existed in his own favour. The Corporation, presumably on behalf of General Finance, refused to agree, however, on the somewhat illogical grounds that the vehicle was subject to the security in favour of the appellant, notwithstanding that it had been made clear that it would be discharged. Despite having the proposed procedure explained in detail, it seems that General Finance would not agree to the course proposed.

As mentioned, Mr Brazukas was also a shareholder in RTC and, initially at least, a director. According to his evidence, he was aware of a transaction which the company entered into over the Honda Accord. He said the nature of that transaction was that the car became the property of RTC and that that was achieved by way of signing over the hire purchase agreement to RTC and that company then carrying on paying the monthly instalments; further, that eventually the car would have been sold and a new car or cars would have been bought. Under cross-examination he accepted that RTC did not keep on paying the monthly instalments on the car; that,when it got into financial difficulties, it was decided that the appellant should pay the instalments personally "because there was no other way we could do it apart from selling the car." He realised that there had been some arrangement between PMD and the appellant concerning the car but did not know the details:-

"Q. You have been in Court and you heard reference to the correspondence between those solicitors and General Finance regarding the car, were you aware of that.

A. I was aware of something that was going on as regards the Print Media affair with the car but I am not 100% sure of what all that

about.

Q. Yes it was not something that you were really personally involved in or deeply involved.

A. No the car was probably David's at that stage, there was something hanging over it legally I don't know exactly what it was and when we signed it over to the finance company or to the company it was then a company car.

Q. All right, that was your understanding.

A. That was my understanding of the situation."

When giving evidence, the appellant explained that in 1981 he and his wife had been the owners of an earlier model Honda Accord. He was then working for PMD and used his own vehicle for travel on the company's business. It was decided to buy a new vehicle and his explanation was this:-

> "The arrangement - the managing director of Print Media Design Limited had paid out a bonus to all his staff and he indicated my bonus would be in excess of $4,000. I was expecting that in a cash payment, he couldn't make the payment to me and suggested that, at that time my wife and I had talked about purchasing a new car and he take over the hire purchase payments for that car in lieu of my receiving that money."

He said that the managing director of PMD saw tax advantages if the car was in the company's name. The new car was purchased, the old Honda being traded in on the basis of a value of $9,000, the remaining moneys required being obtained through General Finance. To protect the appellant, the chattel security already referred to was entered into. As to payment, the purchase was made in December 1981, PMD made one payment, the January one and the February and March payments were made by the appellant. He confirmed that, after he had left the company in January 1982, his solicitors endeavoured to arrive at an arrangement whereby the car would be transferred to him, the transfer of ownership was signed and also the memorandum of satisfaction. The car was in his possession throughout. He said that when he left PMD he wanted to make sure the vehicle was no longer owned or under hire purchase agreement with that company. When RTC was incorporated in March 1982, he felt that what he should do then was to ask General Finance to act in the

same manner as with PMD, whereby RTC would pay the hire purchase payments and get certain tax advantages. The car was used extensively by the appellant for that company's business and, for a period, the company paid the instalments due, also petrol, oil and lubrication. The appellant, however, states that he personally paid the registration fee and the insurance. When the vehicle was re-registered in June 1982, he said this was done in his name. The company made five payments only under the chattel security and then defaulted twice, the appellant and his wife then making the payments with their personal cheques. When the company got into difficulties, he and his wife kept up all payments under the security. In all, he paid $3,649.20 to General Finance.

He was cross-examined to a considerable extent as to where the ownership of the vehicle lay. He stated that PMD had owned the car and owed him $9,000,but it is unlikely that the appellant understood the difference between legal and beneficial ownership and certainly no distinction was made between the two either during the evidence or in the judgment. The question of ownership is a question for the Court to decide in the light of the relevant evidence and I do not consider that he should be regarded as bound by any answer he may have given on a point which involves a question of law.

The District Court Judge was unable to accept that the appellant was at all times the true owner of the vehicle and that the transfer to the employer was merely a device for tax purposes, but to suggest that that was all that was involved is an over-simplification of what the evidence reveals, particularly in relation to the acquisition of the car and its initial registration in the name of PMD.

The question must be with whom the beneficial ownership lay from the time when the car was acquired until RTC went into liquidation. The appellant's own car was used as a trade-in, so that he provided $9,000 of the purchase price. While one can never be impressed with the explanation that a certain course is adopted because of tax advantages, when it seems doubtful if such advantages would have accrued had the true facts been known to the Inland Revenue Department, there

was the other explanation given by the appellant that PMD were to pay off the amount remaining owing under the security i.e. the balance of the purchase price in lieu of paying him a bonus. Possibly the same result could have been achieved without ownership being taken in the name of PMD, but that some such arrangement was made is borne out by the fact that the obligation under the security to the appellant is to transfer the vehicle to him following payment of the amount owing to General Finance. Had PMD duly fulfilled its obligation under that security, on the face of the document the appellant would have been entitled to call for that to be done. When he ceased to be employed by PMD, it seems clear that, subject to the charge in favour of General Finance, the beneficial ownership of the vehicle lay with the appellant. In this connection one notes the steps taken at that time to try and arrange that the obligation to the finance company should be taken over by him coupled with a transfer of ownership into his name.

If the vehicle became the property of RTC, in the sense that that company was beneficially entitled to it, in some way the appellant must have divested himself of the beneficial ownership; there is nothing in the evidence to suggest that any consideration passed from the company to him in return, so it is difficult to see that this could have been otherwise than by way of gift. It is highly unlikely that he would have intended to make a gift to the company, however. It is accepted that the legal ownership passed and that the failure to register a change of ownership was an oversight, but I am unable to find anything in the evidence from which it may be inferred that the beneficial ownership passed also. In this connection one notes that the chattel security in favour of General Finance refers to a cash deposit of $8,457, but there is no suggestion in the evidence that such a sum was paid to PMD, named in the document as the vendor; rather it appears to have been the equity in the vehicle at that time.

At the hearing in the District Court, a number of questions were asked as to the ownership of the car and, in his judgment, the District Court Judge stressed that, when the car was refinanced through General Finance, RTC was shown on the document as owner and that the appellant had allowed the ownership to pass to that company from PMD. While that is certainly true as to the legal ownership, no distinction is drawn between

that and the beneficial ownership, nor does the possibility of the two being divided seem to have been considered. In the absence of any evidence to indicate the contrary, that ownership must have remained with the appellant,subject at all times to the debt owing to the finance company and secured against the vehicle.

One suspects that the appellant's intention, or hope, was that he would have the same convenient arrangement with RTC as he had with PMD whereby, on the final discharge of the security, the vehicle would be transferred into his name. There is no evidence,however, to indicate any agreement to such a course on the part of RTC.

It seems that, of the instalments which fell due prior to the liquidation, a total of 5 were paid by the company, $1,520 in all, so that of the total expenditure (including interest on the borrowed money) which went to acquire the vehicle RTC contributed that amount. With the misunderstanding which existed as to the ownership of the vehicle, it is hardly possible to determine what the intention of the company may have been, but it is entitled to such interest in the vehicle as may be attributed to that expenditure and it would appear proper to apply the principles set out in Underhill's Law of Trusts and Trustees 13th Ed. p. 267:-

> "Where the purchase-money is contributed, partly by the person in whose name the property is taken, and partly by another, then, if they contribute it in equal shares, they will (in the absence of evidence or circumstances showing a contrary intention) take as joint tenants, because the advance being equal the interest is equal; but if in unequal shares, then a trust results to each of them of an undivided share in proportion to his advance where this can be calculated with reasonable certainty."

I am informed that the vehicle in question has now been sold yielding a net figure of $14,214.65, after payment of the balance of advance from General Finance; that the contributions by the company constitute 10.67% of the whole. It appears proper that it should receive that portion of the moneys now in hand, the balance going to the appellant. The

appeal must be allowed, but circumstances have changed since the hearing in the District Court. Possibly the matter can be resolved between the parties on the basis of the finding made; if not, I am prepared to see counsel as to the appropriate order to be made and as to costs.

Solicitors:

Weston, Ward & Lascelles, Christchurch, for Appellant
Wynn Williams & Co., Christchurch, for Respondent.