

BETWEENR.D. FROST

1077

PlaintiffANDJ.F. JOHNSON & ANORDefendantsHearing: 18 July & 6 August 1986Counsel: Mr Black for plaintiff  
Mr Dugdale for defendantsJudgment: 6 August 1986

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(ORAL) JUDGMENT OF HILLYER J

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This case came before me on 18 July and for reasons that I gave in a judgment I delivered that day, I adjourned the matter giving Mr Black leave to put forward evidence as to the basis on which Broadbank obtained the vehicle from Wilson Motor Supplies, and further evidence as to the value of the car.

Mr Dugdale was given leave to file an amended notice of opposition, dealing with the question whether Mr J.F. Johnson was the owner of the car at the time he gave it to Wilson Motor Supplies.

I then had the pious hope expressed in my judgment that the matter would not take more than about 15 minutes when it came back in front of me. That has proved to be far

from the case, and I have heard substantial further argument and been given further affidavits. What the evidence now reveals is when Mr Johnson gave the vehicle to Wilson Motor Supplies (Hastings) Ltd in April 1984, he was not the owner of the vehicle. He had acquired it under a hire purchase agreement from Levin Caravan Sales Ltd, which had assigned its interest to Spiers Finance Ltd. The owner therefore, at the time it was left with Wilsons, was either Levin or Spiers.

Mr Dugdale has now taken the point that in order for the Mercantile Law Act, 2.3 to operate, the mercantile agent must be in possession of the goods with the consent of the owner. It is quite clear that Levin Caravan Sales or Spiers Finance Ltd did not know that Wilsons had possession of the car.

Mr Dugdale cited from Lloyds Bank v Bank of America 1938 2 KB.147 at 161:

"The section, therefore, on its face is contemplating that the person it describes as the 'owner' will be the person who would be in a position to give express authority with regard to the dealing in question. It seems to me that a person who would not be in a position to give that express authority cannot by himself constitute what is described as the owner. It may, of course, very well be, and it happens very frequently, that the incidents and rights of ownership are divided among two or more hands. One person may have the right to possession, which is one of the rights incident to ownership, and another person may have all the other rights incident to ownership. Nevertheless it is only the two of them who can confer on a third party

the ownership of the property in question. It is only by their combining in an assignment that they can confer a good title."

Mr Black, however, submitted that when Spiers was paid out, title was then fed down the chain to Mr Frost. The doctrine of feeding is referred to in Lawson Law of Sale and Hire Purchase in New Zealand, p.22. That presumably would have given a good title to Mr Frost if Mr Johnson had been paid out, but what we are concerned with here is whether Wilsons as mercantile agent had possession at the time it sold, with the consent of the owner, and in my view it clearly did not.

Mr Dugdale further submitted that the assignment of the hire purchase agreement was not a sale or disposition in the ordinary course of business of a mercantile agent, and he referred to the case of Dempsey v Traders Finance [1933] NZLR 1258 and a decision of Patterson SM Automobile Investment v Walker [1930]-35 MCR.87.

I have some doubt whether those authorities would still be valid, and I think it is probably a question of fact which would have to be determined if necessary, whether a transaction of this nature was in the ordinary course of business of a mercantile agent. Transactions with hire purchase agreements are so common these days it may well have become an ordinary transaction.

It is not necessary for me to decide that point because having decided that Wilsons did not have possession with the consent of the owner the sale by them from which Mr Frost derived his title would not be valid to pass good title to the car.

The motion for summary judgment will therefore be dismissed. The effect of that, as I understand it, is that the action is left to be determined in the ordinary course of events. I reserve the question of costs.

  
P.G. Hillyer J

Solicitors

Rudd Watts & Stone for plaintiff

Kensington Swann for defendants