NOTES OF CASES

ESTOPPEL BY NEGLIGENCE*

Industrial Resources Bhd. v. *United National Finance Ltd.*[1]

Facts

IN THIS case the Brunei courts had to deal with "the ever-recurring question; which of the two innocent persons is to suffer by the fraud of a third?"[2] In August 1983 one Martin Loh filled in a hire-purchase proposal form asking the defendants, Industrial Resources Bhd., to finance the purchase by him of a new BMW car. The car was to be bought from a reputable firm of car dealers. The defendants accepted the proposal and so became the legal owners of the car on their purchase of it from the dealers. The defendants' normal practice was to leave the dealers to attend to the registration of the car with the Registrar of the Land Transport Department. The defendants would send an employee to the Department from time to time to collect the registration books relating to any new vehicles they had financed. The Department was very busy and there was sometimes a delay of many months before the registration book was ready.

There was no evidence as to why the usual procedure went wrong, but it did, and the car was not registered in the name of Loh, nor was any claim of ownership in favour of the defendants recorded in the register, as would normally have happened. The defendants, apart from sending an employee to see if the registration book was ready for collection, took no further steps to protect their interest in the car.

In May 1984 Loh asked the plaintiffs, United National Finance Ltd., a finance company, to lend him $30,000 on the security of the car. This was to be achieved by their purchasing the car and hiring it to Loh under the usual kind of hire-purchase agreement. Loh produced to the plaintiffs the registration book relating to the car, but it showed not Loh but one Pg. Ismail as the registered owner of the car. The registration book, however, bore no claim of absolute ownership by the defendants, nor indeed of anyone else. Loh explained that he had bought the car from Pg. Ismail and was taking steps to have it

* My thanks are due to my colleagues, Professor K.L. Koh and Mr. A. Hicks, for their helpful comments on an earlier draft of this case note. Needless to say I am solely responsible for such errors as remain.

1 [1987] 1 M.L.J. 513. This judgment of the Brunei Court of Appeal reversed the decision of Roberts C.J., which is reported *sub nom. United National Finance Ltd. v. Industrial Resources Ltd.* in [1986] 2 M.L.J. 481.

2 *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.* [1957] 1 Q.B. 371, 379, *per* Denning L.J.

registered in his own name. In fact Loh's name was subsequently entered on the registration book and the ownership claim of the plaintiffs was endorsed on it by the Land Transport Department. It was only after this was done that the plaintiffs signed the hire-purchase agreement. After paying only two instalments, Loh disposed of the car, assigning his interest to one Ong with the consent of the plaintiffs. A few months later the true facts came to light, and the defendants seized the car from Ong, whom all agreed was a wholly innocent *bona fide* purchaser for value. Ong was not involved in the present litigation, which turned on the question whether the first finance company, the defendants, could assert their ownership of the car as against the second finance company, the plaintiffs, in spite of their failure to register a claim of absolute ownership.

The facts of the case are similar to those of many English cases.[3] As in England it is the hirer's name which appears on the registration book as the owner of the vehicle and the book contains a printed warning that the person who is in possession of the vehicle may be registered as the owner, but he may or may not be the legal owner.[4] What makes this case different is the procedure which exists in Brunei enabling the hire-purchase company to give notice of its interest. Regulation 47(1) of the Brunei Road Traffic Regulations provides as follows:

> "[W]here the person entitled to the possession of a motor vehicle or trailer is not the absolute owner thereof, but is registered as the owner thereof, any person claiming to be the absolute owner thereof... may apply to the licensing officer... to enter his name in the register as the absolute owner in addition to the name of the registered owner."[5]

This provision therefore enables a finance company to register its ownership of a vehicle on hire-purchase in addition to the registration of the hirer as the person in possession. In these circumstances Roberts C.J., the judge at first instance, awarded the plaintiffs damages for conversion of the car. The defendants' failure to register a claim of ownership estopped them from asserting their title to the car. This decision was reversed on appeal by the Brunei Court of Appeal on the ground that there was no legal duty on the defendants to register their claim to ownership and they were therefore not precluded from denying the seller's right to sell or estopped from asserting their own title.

Estoppel

Under section 21(1) of the U.K. Sale of Goods Act 1979, which applies in Brunei, "where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from

[3] See, *e.g., Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd., supra,* note 2 and *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1977] A.C. 890.

[4] In Singapore too the hirer's name appears on the registration book as the owner, but the book does not contain any warning for the unwary that he may not be the legal owner.

[5] 1956 Subsidiary Regulation, p. 402.

denying the seller's authority to sell". The law on the subject of estoppel in relation to sale of goods is summarised by Benjamin as follows: "Where the true owner of goods, by words or conduct, represents or permits it to be represented that another person is the owner of the goods, any sale of the goods by that person is as valid against the true owner as if the seller were actually the owner thereof, with respect to anyone buying the goods in reliance on the representation."[6] The true owner may also be estopped from asserting his title where he has acted negligently on the basis that, "A man may act so negligently that he must be deemed to have made a representation, which in fact he did not make, but because he has acted negligently he is deemed to have made it."[7]

The difficulty, of course, it to determine what sort of behaviour will be sufficient for this estoppel by negligence to operate. Certainly mere carelessness with one's own goods is not of itself enough. Nor is entrusting another with possession of goods.[8] Were it otherwise, every bailee would be able to pass good title to a *bonafide* purchaser for value of the goods entrusted to him. There would be no need for the limited protection provided by the U.K. Factors Act 1889 for certain types of unauthorised sales by persons in possession of goods. It follows that entrusting another with possession of documents of title to goods will not of itself raise the estoppel. Delivery of possession of documents of title can have no greater effect than the delivery of possession of the goods themselves.[9]

"Breach of duty" approach: duty to register

The use of the term "estoppel by negligence" suggests that the various elements of negligence as required in the law of torts must be present before the estoppel can arise.[10] If this is correct, then the plaintiff, who is seeking to assert his title to the goods, must owe a duty of care to the defendant, he must have breached that duty and his breach must be the proximate cause of the defendant's purchasing the goods. The existence of these requirements has been assumed without argument in the Privy Council[11] and the House of Lords[12] just as it was in the present case.

6 *Benjamin's Sale of Goods,* 3rd ed., London,1987, s. 457.

7 *Bell* v. *Marsh* [1903] 1 Ch. 528, 541.

8 See *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.* [1957] 1 Q.B. 371, 396, 398.

9 *Mercantile Bank of India Ltd.* v. *Central Bank of India* [1938] A.C. 287, 303. For an interesting local illustration of this principle with reference to possession of title deeds to land see *Ong Lock Cho* v. *Quek Shin & Sons Ltd.* [1941] M.L.J. 88.

10 The use of the term "estoppel by negligence" has been criticised. See Spencer Bower, *The Law Relating to Estoppel by Representation* (3rd ed., 1977), para. 74. Nevertheless, Spencer Bower insists that silence or inaction can only constitute a representation for the purpose of an estoppel where a legal duty is owed by the representor to the representee to make the disclosure, or take the steps, the omission of which is relied upon as creating the estoppel. See para. 55.

11 *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] A.C. 287.

12 *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1977] A.C. 890. See also *Mercantile Credit Co. Ltd.* v. *Hamblin* [1965] 2 Q.B. 242 (C.A.). See also the recent Singapore case of *E.G. Tan & Co. (Pte)* v. *Lim & Tan (Pte)* [1987] 2 M.L.J. 149, where the existence of these requirements was again assumed without argument.

At first instance Roberts C.J. felt able to distinguish the decision of the House of Lords in *Moorgate Mercantile Co. Ltd.* v. *Twitchings*[13], which is at first sight very similar to the present case. Ninety-eight per cent of the motorcar finance companies in England belonged to Hire-Purchase Information Ltd. ("H.P.I.") and the practice was for members to inform H.P.I, of any hire-purchase agreements entered into by them. When any car dealer was offered a vehicle, he would ask H.P.I, if it was the subject of any hire-purchase agreement and would be given the information. In this case the plaintiffs, a finance company, had failed to notify H.P.I, of a hire-purchase agreement entered into by them and the question arose whether this failure estopped them from asserting their title to the car which was later sold to the defendant dealer. Before buying the car the defendant had made the usual enquiry of H.P.I, and had been told that no hire-purchase agreement was registered in respect of the car. By a majority of three to two, the House of Lords concluded that the plaintiffs were under no legal duty to the defendant to register, or take care to register, the hire-purchase agreement and that they were not therefore estopped from asserting their title to the car as against the defendant.

A clear difference between the present case and the *Moorgate* case lies in the nature of the registration system. In England it is a private system established by the finance companies themselves and in Brunei it is a statutory scheme.[14] This distinction enabled Roberts C.J. to hold that "in Brunei, by reason of the different legislation and practice in force for 30 years, there is a duty which differs from that which exists in England, namely to take reasonable steps to register a claim to ownership of a motor vehicle."[15]

The Court of Appeal did not accept this reasoning. In the words of Sir Alan Huggins V.P., who delivered the leading judgment,

> "I am satisfied that negligence cannot constitute an estoppel or 'conduct precluding', unless there is a legal duty and that no legal duty arises under the terms of regulation 47(1), although I accept that there can be a representation by omission sufficient to found an estoppel where there is a duty to act. It must, however, be a legal duty to act and not merely a social or moral duty.... Can long usage resulting from a misunderstanding of the intended effect of regulation 47(1) alter the rights and obligations of those to whom it relates? I think it cannot. An absolute owner has been given a privilege of having his name entered in the register for the purpose of acquiring the protection which such entry will give him, but he is under no such obligation to exercise that privilege."[16]

The difficulty here lies with the term "legal duty". In the present context, this expression has at least two possible meanings. Firstly, it may mean an obligation imposed by the statutory instrument itself to register a claim of ownership. Secondly, it may mean in the context of

13 *Supra,* note 12.

14 The Brunei scheme is , however, a voluntary one as shown by the use of the word "may" in the regulation, which Roberts C.J. said could not be read as "shall" in the context in which it appears: see [1986] 2 M.L.J. 481, 486. The contrary was not argued on appeal: see [1987] 1 M.L.J. 513, 515.

15 [1986] 2 M.L.J. 481,486.

16 At p. 519.

the law of negligence, a duty of care — an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.[17] This is a wider meaning. It would seem that the Court of Appeal was using the expression "legal duty" in the first sense. But it was never doubted at any stage of the proceedings that regulation 47(1) does not purport to impose any obligation in the strict sense.[18] If the absence of a duty in the first sense were sufficient to determine the question of estoppel by negligence, then the *Moorgate* case could have been disposed of easily. It is hard to understand why it was necessary for the case to go to the House of Lords and even there to be decided by a majority of only one that no duty exists. It was quite clear in that case that the rules of H.P.I, at the relevant time did not impose any obligation to register agreements. However, that fact would not, of itself, prevent a court finding that a legal duty in the second sense — a duty of care —existed. That is a decision taken by the court itself and is based to a large extent on policy grounds.

In the *Moorgate* case the majority held that no duty of care existed. A reading of the majority speeches suggests strongly that their Lordships were reluctant to impose an obligation on companies solely because they had for their own protection chosen to join a private scheme, especially as, once such a liability were established, there would be no logical reason for failing to extend it to cover anyone who made an enquiry of H.P.I., whether a member or not.[19] In the words of Lord Edmund-Davies, "[I]t is odd that a finance company which, without obligation, takes the precaution of joining H.P.I. Ltd. [should] thereby [be] placed under a higher duty than those companies who refrain from joining."[20]

In Brunei the system is a statutory one and has been in force for over thirty years. The position is, therefore, quite different from that in the *Moorgate* case, which Roberts C.J. therefore distinguished. The legislature has conferred a power on finance companies to give notice of a claim of absolute ownership and they have made regular use of this power. Those dealing with motor vehicles have come to expect that, if no claim has been registered, none exists. The existence of such an expectation might well be sufficient to ground an obligation in the second sense of duty of care. It is unfortunate that instead of considering this possibility and, in particular, whether there were any policy reasons for or against finding a duty of care in these circumstances, the Court of Appeal decided the case simply by saying that there was no legal duty to register under the terms of regulation 47(1).

Turning to the policy considerations, it may be assumed that in enacting regulation 47(1) the legislature intended to reduce the incidence of fraud. Now as a result of this decision, a finance company which decides not to bother to register its claim of ownership can still look to an innocent purchaser of the car to act as its unpaid insurer. Such a legal regime is not designed to encourage use of the fraud prevention system.

17 Fleming, *The Law of Torts* (6th ed., 1983), p. 129.
18 See above, note 14.
19 See [1977] A.C. 890, 919-920, 926-927, 930.
20 At p. 919.

The result of the case may perhaps be justified on a different basis from that given by the Court of Appeal. Even if the existence of a duty of care is accepted, there are difficulties in the finding that the defendants were in breach of that duty. The defendants through their agents, the dealers, did submit the necessary forms to register their claim to the Land Transport Department. It was the Department which was at fault in not making the correct registration. Roberts C.J. was constrained to hold, though "[n]ot without hesitation", that the defendants were in breach of their duty of care because they failed to take positive steps to ensure that registration occurred, rather than by any positive act of carelessness.[21] They did nothing at all for about nine months before the date of registration of the plaintiffs claim, not even making a specific enquiry at the Department. However, there was evidence before the court, which does not appear to have been disputed, that the Department was very busy. It did sometimes take many months for a registration book to be issued and the officers of the Department objected to the making of enquiries, which were time-consuming and had the effect of increasing the backlog.

Even if it is accepted that the defendants were in breach of their duty of care, there are difficulties in seeing that this was the proximate cause of the plaintiffs' buying the car. One would have thought that it was the failure of the Department to make the correct registration, the reasons for which were never explained, which was the direct cause of what happened.

"Estoppel by representation" approach

All the above difficulties result largely from the incorporation of elements of the tort of negligence into the law of estoppel. Professor Sir Rupert Cross has argued that "It is possible that when the cases and underlying principles come to be authoritatively reviewed it will be found that the requirements of duty of care and proof of carelessness can be dispensed with. All that is necessary, it may be urged, is proof of intentional words, acts or conduct, which can reasonably be construed as a representation by the representor to the representee who need not be in direct relationship."[22] As has already been noted, in the *Moorgate* case the existence of a legal duty was assumed by all their Lordships to be a *sine qua non* of negligence for the purpose of establishing an estoppel by conduct. Lord Edmund-Davies said, however, that the reason for this was because the point, never having been taken at the initial hearing, could not have been entertained by an appellate court even had it been subsequently raised.[23] It would have been better for the development of the common law in this area had the Brunei courts taken the opportunity to undertake the authoritative review advocated by Professor Cross instead of deciding the case on the basis of whether or not there was a duty to register.

[21] In the Court of Appeal Sir Alan Huggins V.P., with whom Sir Geoffrey Briggs P. concurred, stated (at p. 519) that on the assumption that he was wrong as to the existence of an obligation to register, he was prepared to accept the view of Roberts C.J. on this point. Hooper J. said (at pp. 519-520) that he had reservations on the matter.

[22] *Cross on Evidence* (6th ed., 1985), p. 94.

[23] *Moorgate Mercantile Co., Ltd.* v. *Twitchings* [1977] A.C. 890, 921.

If Professor Cross's approach were adopted, the question would then simply be whether the defendants' failure to ensure that their claim of ownership was registered could reasonably be construed as amounting to a representation to a prospective buyer that the defendants did not have any interest in the car. It is doubtful whether one could see the defendants' failure to make enquiries at the Department as to the progress of their application as amounting to any sort of representation.

However, Professor Cross's approach would presumably produce a different result from that of the Court of Appeal in a case where a finance company failed even to apply to have a claim registered. This raises the question of what sort of representation is made by a finance company when it fails to make such an application. In *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd.,*[24] it was held that allowing a person possession of a car together with its registration book did not amount to a representation that that person was the owner. Essentially this was because of the warning as to ownership contained in the registration book. Pointing out that the Brunei registration book contains a similar warning, Sir Alan Huggins V.P. said that it would be strange if regulation 47(1) had the effect of making that warning inaccurate in a case where the legal owner had not applied to have his claim of ownership registered and endorsed on the registration book. It is submitted, however, that the different legal regime pertaining in Brunei means that a different meaning must be ascribed to the warning. A reasonable man might well understand it in the same way as an officer of the plaintiffs, who gave evidence that he thought the warning meant merely that the registered owner may only be a hirer, and as the registration book carried no ownership claim, he was not suspicious.[25]

Conclusion

The case is of interest as an illustration of the different approaches adopted by the Brunei judiciary to English authorities. In the judgment of Roberts C.J. one has an example of a court refusing to follow unquestioningly a House of Lords decision and instead examining whether local circumstances necessitate a different result. The Court of Appeal favoured rather a relatively straightforward application of the English authorities, even though arguably this limits the effectiveness of the local legislation. As has been suggested above, the decision of the Court of Appeal is open to the criticism that it does nothing to encourage use of the fraud prevention scheme embodied in regulation 47(1).

The owner of a car can take steps to prevent its loss and also can easily protect himself financially against such an event by insurance. It is less easy for a purchaser to discover that the person he is buying from is not the true owner, especially when that person comes armed with documentation to prove his ownership, and the innocent purchaser is unlikely to have insurance to cover his loss should it turn out he has not acquired title. It seems fairer therefore to place the risk

[24] [1957] 1 Q.B. 371.
[25] See [1986] 2 M.L.J. 481,483.

of fraud on the original owner, as did Roberts C.J., rather than on the innocent purchaser as did the Court of Appeal.

Unlike civil law systems[26] the common law[27] has — with only a few exceptions — remained loyal to the principle of *nemo dat quod non habet.* Denning L.J. said, "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."[28]

The problems of buying a used car are well-known, although it must be admitted that the greatest risk is not usually that the car does not belong to the seller. Nevertheless, as the cases show, that risk is a real one. In England the Hire Purchase (No. 2) Bill 1963 originally contained provisions that the registration book of a vehicle let on hire-purchase should be retained by the owner, and that the hirer should be given a licensing card which would enable him to pay the annual road tax. But the cost of such a scheme appeared to be prohibitive to finance companies in comparison with the loss which they in fact sustained as a result of wrongful dispositions. It was therefore abandoned and in its place Part III of the Hire Purchase Act 1964 was enacted, which provides in broad outline that a disposition of a motor vehicle made by a hirer under a hire-purchase agreement is to be effective to transfer title to a private purchaser taking in good faith and without notice.

It may be pertinent to consider the position in Singapore. Here the purchaser of a used car has no equivalent protection. The car registration book shows the name of the hirer as the registered owner and there is no provision for noting the interest of the hire-purchase company. The position is essentially the same as that which existed in England before 1964. However, the risk of fraud is avoided to a large extent in Singapore because the finance company generally retains the registration book. The hirer does not usually need it because the major finance companies are empowered to collect the annual road tax on behalf of the Registry of Vehicles. Nevertheless, as the facts of both the present case and the *Moorgate* case show, any fraud prevention system can break down occasionally, and the innocent purchaser of the car will usually be the one who has to bear this risk in Singapore. It seems strange that Singapore has remained more loyal to the old common law concept of *nemo dat quod non habet* than England itself. This is particularly curious when it is borne in mind that the exceptions to this rule have been developed to further the needs of commerce. One could

[26] See, *e.g.,* Article 2279 of the French Civil Code: "En fait de meubles la possession vaut titre." A similar result has been achieved by legislation in an essentially common law jurisdiction. See the Israel Sale Law 5728–1968, s. 34.

[27] Equity, of course, adopts a different position and equitable interests are defeated by a *bona fide* purchaser for value of the legal estate without notice. For a detailed discussion see *Snell's Principles of Equity* (28th ed., 1982), pp. 48 *et seq.*

[28] *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.* [1949] 1 K.B. 322, 336–7.

argue that in the sophisticated commercial environment of Singapore, obstructions on the free movement of goods in the market should be removed as far as possible. The present case may perhaps serve to focus attention on the need to review the current law relating to the protection of good faith purchasers of goods.

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