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CASE COMMENTS

CASE OF THE TWICE SOLD CATERPILLAR

Syarikat Batu Sinar Sdn. Bhd. v. *UMBC Finance Bhd.*[1]

THE rogue in the story of this West Malaysian case was the dealer, who sold a "Caterpillar" tractor used for moving earth to two different people. First, he sold it to UMBC Finance Bhd., who bought it for the purpose of letting it out on a hire purchase agreement. Then he sold it again to Supreme Leasing Sdn. Bhd., so that the latter could lease it out. However, some time later the Caterpillar was seized by UMBC Finance Bhd. because their hirer had fallen into arrears under his agreement. So far, the case seems to prove the truth of Lord Wilberforce's comment that hire purchase agreements have produced much litigation in which hardship to individuals is frequently revealed.

> This is due to the perennial failure of English law to develop a proper method of charging movable property. The hire purchase agreement is an ingenious invention which has proved itself as a very convenient and economically stimulating method of financing sales of chattels. But by divorcing ownership (vested in a finance company) from possession (held by a dealer or private hirer), by permitting the latter to retain documents of title without any endorsement of the interest of others, and by not requiring registration, in an accessible register, of the agreement, it lends itself, almost ideally, to fraudulent dispositions.[2]

There is, however, an important difference between the vehicle registration system in West Malaysia and that which obtains in England. In West Malaysia, as in England, the registered "owner" of a vehicle is the hirer, who is not in fact the true owner. In West Malaysia, however, it is possible for the true owner to register a claim of ownership, which will be noted in the registration book.[3] The problem was that UMBC Finance Bhd. did not register a claim of ownership in this case.

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1 [1990] 3 M.L.I. 468.

2 *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1977] A.C. 890, 901.

3 The relevant statutory provisions at the time of the events which gave rise to the case were the Road Traffic Ordinance 1958, s. 10(2) and (3). See now the Road Transport Act 1987, s. 11(3) and (4).

In Brunei too the true owner can register a claim of ownership when a vehicle is let on hire purchase and on similar facts in *United National Finance Ltd.* v. *Industrial Resources Ltd.*,[4] Roberts CJ. held that failure to register a claim of ownership meant that the original owner was estopped from denying the seller's authority to sell. Title therefore passed to the *bonafide* purchaser. The judgment of Roberts C.J. was, however, reversed on appeal.[5] The Brunei Court of Appeal held that there was no duty to register a claim of ownership and therefore no estoppel arose - *nemo dot quod non habet.* The original owner could still get the goods back despite his carelessness.

The (Brunei) Court of Appeal followed the English case of *Moor gate Mercantile Co. Ltd. v. Twitchings*,[6] where the House of Lords held that the failure of a hire purchase company to register a hire purchase agreement with Hire Purchase Information ("H.P.I.") Ltd. did not prevent it asserting its title as against a motor dealer, who bought the car in good faith after having enquired of H.P.I. Ltd. whether there was any hire purchase agreement recorded against the car. There is, however, an obvious difference between failing to make use of a voluntary private scheme and failing to make use of a statutory system. In holding for the original owner, the majority of the House of Lords was undoubtedly influenced by the nature of the scheme. As Lord Edmund-Davies said, "It 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."[7]

In the present case, Peh Swee Chin J. refused to follow the decisions of the House of Lords and the (Brunei) Court of Appeal, preferring instead the judgment of Roberts J. at first instance. His view was that in West Malaysia buyers of second-hand cars have always depended on the absence of any registered endorsement of claim of ownership in the registration card as a green light to deal with the sellers whose names are registered.[8] According to the learned judge, this was a difference in local circumstances which under section 3(1) of the Civil Law Act 1956 necessitated a refusal to follow English law. He said, "We have to develop our own common law just like what Australia has been

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4 [1986] 2 M.L.J. 481.

5 *Sub nom. Industrial Resources Bhd.* v. *United National Finance Ltd.* [1987] 1 M.L.J. 513.

6 [1977] A.C. 890.

7 *Ibid.*, at p. 919.

8 The Malaysian statutory registration system was undoubtedly introduced for the purpose of preventing fraud. One could therefore go further and argue on policy grounds that anyone who fails to use the system and who thereby facilitates fraud, should bear the risk of any loss which this causes. The alternative is to allow a finance company not to bother to register its claim of ownership but still to look to an innocent purchaser of the vehicle to act as its unpaid insurer. For a more detailed discussion, see the present writer's note on the Brunei case: "Estoppel by Negligence" (1987) 29 Mai. L.R. 299.

doing by directing our minds to the 'local circumstances' or 'local inhabitants'."[9]

It may be questioned, however, whether there was any need to have recourse to the Civil Law Act in the circumstances. Section 3(1) provides as follows:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
> ....
> Provided always that the said common law [and] rules of equity ... shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The case was not decided under the common law principles received in West Malaysia under section 3(1)(a). It was decided under section 27 of the Sale of Goods (Malay States) Ordinance 1957,[10] which is another "provision ... made ... by any written law in force in Malaysia". It is true that the relevant part of section 27 is *in pari materia* with section 21(1) of the (U.K.) Sale of Goods Act 1893[11] under which the *Moorgate* case was decided. However, a House of Lords case on a statutory provision which is *in pari materia* with one enacted in Malaysia is of persuasive authority only.[12] Moreover, the English case can be distinguished readily given the differences between the statutory registration scheme in force in West Malaysia and the private system used in England.

Estoppel by Negligence

Under section 27 of the Sale of Goods (Malay States) Ordinance 1957, "where goods are sold by a person who is not the owner thereof, 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 denying the seller's authority to sell". A clear illustration of the operation of this subsection is in cases of estoppel. Where *A* delivers his

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9 *Supra,* note 1 at p. 474.

10 See now Sale of Goods Act 1957, Act 382. This revised edition only came into force on 21 September 1989, *i.e.* after the occurrence of the events of the *Syarikat Batu Sinar* case.

11 See now (U.K.) Sales of Goods Act 1979, s 21(1), which contains identical provisions.

12 For the position in a jurisdiction from which appeals still lie to the Privy Council see *de Lasala* v. *de Lasala* [1980] A.C. 546, on appeal from Hong Kong.

car to *B* and hands him a signed document stating that he has sold the car to him, *A* will not be able to maintain an action of conversion against *C,* who buys the car from B.[13] He is estopped by his conduct from denying *B's* title to sell.

Where there is some overt conduct on the part of A or a statement made by him which leads *C* to believe that *B* is the true owner of the goods, it is easy to see how *A* might be estopped from denying *B's* title to sell. In assessing A's conduct or words, presumably the test is whether a reasonable man in C's position would understand them as implying that *B* had title to sell. It is much harder to see how an estoppel might arise when *A* has done nothing at all. However, there are circumstances when action is normally expected, so that failure to take that action amounts to a statement of some kind. Logically, the test should be how a reasonable man in C's position would interprete A's inaction. Applying this to the facts of the *Syarikat Batu Sinar* case, the question should be how a reasonable man would interpret the failure of UMBC Finance Bhd. to register a claim of ownership. Peh Swee Chin J. stated that buyers of second-hand cars in West Malaysia have always depended on the absence of any registered endorsement of claim of ownership in the registration card as a green light to deal with the sellers whose names are registered. UMBC Finance Bhd.'s failure to register a claim of ownership should therefore be construed as amounting to a representation to any potential buyer that it had no interest in the Caterpillar.

Unfortunately, the courts have not dealt in this direct way with cases where an estoppel is alleged to arise from a failure to act.[14] This type of estoppel is usually called estoppel by negligence. There would be no objection to the terminology if all it meant was that A had acted carelessly in relation to his own goods in a way which led others to believe that he had no interest in them. Unfortunately, however, the word "negligence" has been taken as a reference to the tort of negligence. The result is that no such estoppel can arise unless A owes a duty of care to *C, A* has breached that duty, and the breach is the proximate cause of C's purchasing the goods. The existence of these requirements derived from the tort of negligence has been assumed without argument in the Privy Council[15] and in the House of Lords,[16] just as it was in the present case. The necessity for these requirements has been questioned by Professor Sir Rupert Cross.[17] Moreover, in the *Moorgate* case

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[13] See *Shaw* v. *Commissioner of Police* [1987] 3 All E.R. 405.
[14] For a more detailed discussion, see the present writer's casenote, *supra* note 8.
[15] *Mercantile Bank of India Ltd* v. *Central Bank of India Ltd.* [1938] A.C. 287.
[16] *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.).
[17] See *Cross on Evidence* (7th ed., 1990), p. 97.

itself the reason why the existence of these requirements was assumed by the House of Lords was simply because no contrary argument was raised by counsel.[18]

Duty of Care

The present case shows clearly the disadvantages of incorporating elements of the tort of negligence - and particularly the requirement of a duty of care - into estoppel by negligence. It was on this point that Peh Swee Chin J. differed from the (Brunei) Court of Appeal. He said,

> [The Brunei Court of Appeal] seemed to hold that the Road Traffic Regulations in question did not create a legal duty of care as opposed to a 'social and moral duty'. The House of Lords in *Donoghue* v. *Stevenson*[19] has made it abundantly clear in my opinion, that if any person can reasonably foresee that his act or omission is likely to cause damage or injury to any other person, he should take steps or precaution to avoid such act or omission, (the snail in the ginger ale's bottle in that case being just an example;), no question of statutorily created duty of care need pre-exist.[20]

This simple invocation of *Donoghue* \. *Stevenson* is open to criticism, although it is precisely the same as Lord Salmon's approach in his dissenting speech in the *Moor gate* case.[21] That, however, was in 1976. The policy of the courts towards the duty of care in negligence has changed since then. The remarks of Peh Swee Chin J. look somewhat dated, particularly after the decision of the House of Lords in *Murphy v. Brentwood District Council,*'[12] which overruled *Anns v. Merton London Borough.*™

The problem is that if estoppel by negligence is tied to the tort of negligence, the present reluctance of the courts to expand the instances where a duty of care can be found in tort cases is likely to extend also to estoppel cases. The policy considerations, however, are quite different. In tort cases, a decision that a duty of care exists means an expansion of liability with a consequent need to increase insurance cover and premiums.[24] Most importantly, an expansion of liability means an

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[18] In *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1977] A.C. 890, 921, Lord Edmund-Davies explained that the point, never having been taken at the initial hearing, could not have been entertained by an appellate court, even if it had been subsequently raised.

[19] [1932] A.C. 562.

[20] *Supra,* note 1 at p. 473.

[21] [1977] A.C. 890, 908. Their Lordships' opinions were given on 16 June, 1976.

[22] [1990] 2 All E.R. 908.

[23] [1977] 2 All E.R. 492.

[24] See in particular the closing remarks of Lord Bridge in his speech *uiMurphy* v. *Brentwood District Council* [1990] 2 All E.R. 908, 931.

increase in litigation. In estoppel cases the consequences are less severe. One of two innocent parties must bear the loss caused by the fraud of a third, and the question is which one. The incidence of litigation simply depends on the accident of which party happens to have physical control of the goods once the facts come to light. Litigation is neither encouraged nor discouraged by the approach one adopts to estoppel by negligence under the sale of goods legislation.

Reliance on Representation

Another difficulty caused by incorporating elements of the tort of negligence into estoppel is that this tends to obscure the real issues of the case. Lord Salmon in his dissenting judgment in the *Moorgate* case set out the principles which apply to a case of estoppel by negligence.[25] First, the original owner must owe the purchaser a duty of care. Secondly, the original owner must be negligent in breach of that duty. Thirdly, the negligence must be the real cause of the purchaser's innocently buying the vehicle and thereby converting it. The result is that the original owner is precluded from claiming damages for the conversion which in reality was caused by his own negligence. The problem with this formulation is that it obscures an essential element of estoppel, namely, that a party is only estopped where his representation has induced the other party to alter his position in reliance on it.[26] To say that the negligence must be the real cause of the purchase is very similar, but not exactly the same as saying that the negligence must have induced the purchaser to buy.

Leaving aside the point about duty of care, no objection can be taken to this formulation on the facts of either the *Moorgate* case or of *United National Finance Ltd.* v. *Industrial Resources Ltd.* In both cases the innocent purchaser was misled into buying the car by the fact that there was no notification of the hire purchase agreement. In the present case, however, the relevant officer of the purchaser, Supreme Leasing Sdn Bhd., did not bother to look at the registration book at the time of purchase. In fact, he only saw it for the first time when the action was filed. Peh Swee Chin J. dealt with this point by saying,

> It would not be wrong to say that if there was an ownership claim registered or endorsed on the registration card, the tractor dealer

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[25] *Moorgate Mercantile Co. Ltd.* v. *Twitching** [1977] A.C. 890, 912. This formulation was adopted by Roberts C.J. in *United National Finance Ltd.* v. *Industrial Resources Ltd.* [1986] 2 M.L.J. 481, 485. Lord Salmon dissented on the issue of the existence of a duty of care, but the principles applying to estoppel by negligence, as set out in his speech, were accepted by the majority of the House of Lords.

[26] See *The Skarp* [1935] P. 134; *Cremer* v. *General Carriers SA* [1974] 1 All E.R. 1. See also Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (1977), Chapter V.

> would not have the gall or the legalistic cover to carry into effect a well-concealed fraud, for to do so in the face of the endorsement would result in an arrest and prosecution of its officers concerned, with the police not requiring at all any lengthy investigation.[27]

One can hardly dispute this view of the facts. However, from the point of view of the law of estoppel, this approach does stretch the normal understanding of what is meant by such concepts as "inducement" or "reliance".

Conclusion

The *Syarikat Batu Sinar* case is of particular interest because of the contrast it reveals between the attitude of the (Brunei) Court of Appeal towards English authority and that of the Malaysian judiciary. In the one case there is an unquestioning acceptance of an English decision. In the other there is a willingness to examine whether local conditions necessitate a different result. This is a most refreshing approach to the law, but there are limits to what can be achieved by judicial activity.

It is clear that the law relating to estoppel by negligence operates within very narrow confines. As a solution towards dealing with the problems caused by the innocent purchase of goods which do not belong to the seller, estoppel has a very small part to play. Indeed, the present case, like those which preceded it, reveals not only, as Lord Wilberforce has said, the perennial failure of English law to develop a proper method of charging movable property,[28] but also the perennial failure of English law to resolve satisfactorily the problem of the innocent purchase of goods, which do not belong to the seller. Perhaps the willingness of Malaysian lawyers to break free from the constraints of English law, as demonstrated by the present case, will lead ultimately to reform of the sale of goods legislation to find a satisfactory solution to this problem.

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[27] *Supra*, note 1 at p. 474.
[28] See text at *supra*, note 2.

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