

IN THE PRIVY COUNCILNo. 30 of 1969

O N A P P E A L

FROM THE COURT OF APPEAL NEW ZEALAND

B E T W E E N :-

BATEMAN TELEVISION LIMITED (In
Liquidation) and BATEMAN T.V.
HIRE LIMITED (In Liquidation)

Appellants

- and -

COLERIDGE FINANCE COMPANY LIMITED

Respondent

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CASE FOR RESPONDENTThe Circumstances out of which the appeal arises

1. This appeal is from a judgment of the Court of The Court of
Appeal of New Zealand which dismissed an appeal from Appeal, New
the judgment of Macarthur J. in the Supreme Court of Zealand.
New Zealand wherein he made winding-up orders against
each of the Appellants. Record.

20 2. The Appellants were at all material times
engaged in the business of selling or hiring television
sets to members of the public in the City of
Christchurch, New Zealand, and surrounding districts -
Each of the Appellants had the same shareholders and
directors and secretary. Their business procedure
was that Bateman Television Ltd. would buy television
sets from manufacturers or wholesalers. If a tele-
vision set was sold to a member of the public, either
outright or on hire-purchase terms, then Bateman
Television Ltd. would sell it. If the sale was on
30 hire-purchase terms then Bateman Television Ltd.
would assign the hire-purchase agreement to the
Respondent (or to another finance company) by way of
charge in consideration of the Respondent or other
finance company advancing the unpaid balance of the
purchase price to Bateman Television Ltd. If a
television set was to be hired to a member of the
public then the set would be sold by Bateman Tele-
vision to Bateman T.V. Hire Ltd. under hire-purchase
agreement and Bateman T.V. Hire Ltd. would hire the

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set to a member of the public, the intent being that Bateman T.V. Hire Ltd. could use the hiring fees to pay its hire-purchase instalments to Bateman Television Ltd. Bateman Television Ltd. would assign by way of charge to the Respondent (or to another finance company) the hire purchase agreement executed by Bateman T.V. Hire Ltd. in consideration of the Respondent or other finance company advancing the unpaid balance of purchase price owing by Bateman T.V. Hire Ltd.

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3. Bateman T.V. Hire Ltd. did not sell television sets to the public, but only bailed the same on terms of a hire agreement signed by the hirer. The effect of the above-described arrangements was that the Respondent not only financed the purchase of television sets by Bateman Television Ltd. but also the sale of such sets to the public, and in terms of the assignments of hire-purchase agreements previously referred to various sums of money became in due course due and owing to the Respondent by each of the Appellants. The said debts arose in the following manner:

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(a) as to the Appellant Bateman Television Ltd., it owed to the Respondent the deficiency which arose when a television set was re-possessed from a member of the public and then sold by Bateman Television Ltd. for a price less than the amount then due for principal and interest to the Respondent. The total of the debt incurred in this manner by Bateman Television Ltd. to the Respondent was at the time material to this Appeal \$8704.46

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(b) as to the Appellant Bateman T.V. Hire Ltd. it owed to the Respondent arrears of hire-purchase instalments for television sets which it had purchased from Bateman Television Ltd., such instalments being payable to the Respondent by virtue of the assignments of hire-purchase agreement previously referred to. The total of the instalments due and owing to the Respondent on the day before the commencement of the hearing of the winding-up petitions against the Appellants was \$247,300.54.

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4. On the 27th day of November 1968 Macarthur J. commenced the hearing of winding-up petitions presented by the Respondent against the Appellants in respect of the unpaid debts referred to in the last preceding paragraph hereof.

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5. Upon the hearing of the said petitions the Respondent submitted proof of insolvency by two methods:

- 10 (a) by proof of service of notices to each Appellant under S.218 of the Companies Act 1955, such notices not having been complied with
- (b) by oral and documentary evidence that each Appellant was insolvent and unable to pay its debts.

20 6. Macarthur J. held that proof of insolvency based on non-compliance with the notices served under S.218 of the Companies Act 1955 failed, because the notices had been signed by an agent for the Respondent and not by the Respondent itself. But Macarthur J. went on to hold that it had been proved aliunde on the facts that, subject to two specific defences raised by the Appellants, each was insolvent and unable to pay its debts.

30 7. Macarthur J. then proceeded to deal with the two specific defences raised by the Appellants. The first defence was that the whole of the debts due by the Appellants to the Respondent were subject to a binding agreement whereunder the Respondent had agreed that they be secured by a debenture granted in favour of the Respondent. Macarthur J. held on the facts that no such binding agreement had ever been completed and that this first defence failed. The Appellants accepted this finding and did not appeal against it to the Court of Appeal of New Zealand.

40 8. Macarthur J. then proceeded to deal with the second defence raised by the Appellants which was that the debts due by the Appellant Bateman T.V. Hire Ltd. arose from loans by an unregistered moneylender and that the amounts due were accordingly irrecoverable. The Appellants contended that although by Section 2(3) of the Chattels Transfer Amendment Act 1931 the provisions of the Moneylenders Act 1908 did not apply to any assignment to a finance corporation of a "customary hire-purchase agreement", the hire-purchase agreements made between Bateman Television Ltd. and Bateman T.V. Hire Ltd. were not "customary hire-purchase agreements" because:

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- (a) they fell within the terms of sub-section 5 of Section 2 of the Chattels Transfer Amendment Act 1931 which reads as follows:

"An agreement in relation to customary chattels, made between the manufacturer of or a wholesale dealer in such chattels or a finance corporation and a retail dealer in such chattels, by which possession of the chattels is given to such dealer, shall not be deemed to be a customary hire-purchase agreement."

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- (b) there were substantial misdescriptions or deficiencies in some of the schedules of chattels forming part of the agreements and consequently the agreements, or those of them affected in this manner, were void in terms of Sections 23 and 24 of the Chattels Transfer Act 1924.

9. Macarthur J. rejected each of these defences. In relation to the first defence he held that Bateman T.V. Hire Ltd. at no time sold television sets but only hired them to members of the public and therefore it was not a "retail dealer" in such articles within the meaning of Section 2(5) of the Chattels Transfer Amendment Act 1931, and that in any event Bateman Television Ltd. was not a "wholesale dealer" within the meaning of the same sub-section.

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As to the second defence, Macarthur J. held that the provisions of Sections 23 and 24 of the Chattels Transfer Act 1924 only operate in respect of persons other than the parties to a customary hire-purchase agreement and their assignees.

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10. Macarthur J. accordingly made winding-up orders against each Appellant on the 12th day of December 1968.

11. The appeal by the Appellants to the Court of Appeal was heard on 18th, 19th, 20th and 21st March 1969. The Appellants made the following submissions in support of their appeal against the winding-up orders:

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- (a) that Macarthur J. was right in holding that the notices under Section 218 of the Companies Act 1955 were invalid.

All members of the Court of Appeal rejected this submission, holding that Macarthur J. was wrong on this aspect of the case. So far as is known, this part of the judgments of the Court of Appeal will not be attacked by the Appellants in this Appeal to Her Majesty in Council.

p.135 line 18
to p.137 line
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p.151 line 45
to p.155 line
15. p.165
line 45 to p.
166 line 14

(b) that there was not sufficient evidence to establish that Bateman Television Ltd. owed the Respondent \$8704.46 at the time of the hearing of the winding-up petitions, and that the Respondents should have been directed to bring an action to prove the debt.

This submission was rejected by the Court of Appeal. North J. refused to disturb the finding of fact of Macarthur J. on this point. Turner J. rejected the submissions for two reasons, firstly that it was now too late to take this point which had not been taken in the Court below, and secondly that in any event Macarthur J. was right in holding that prima facie the debt of \$8704.46 was proved and there was no sufficient rebutting evidence.

p.137 line 49
to p.138 line
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p.161 line 39
to p.163 line
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McCarthy J. expressed the same views as Turner J. holding that the point had not been taken in the Court below and that in any event Macarthur J. had been right in holding that a debt had been proved against Bateman Television Ltd. sufficient to support a winding-up order.

p.166 line 15
to p.168 line
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(c) That the hire-purchase agreements made between Bateman Television Ltd. and Bateman T.V. Hire Ltd. which were assigned by way of mortgage to the Respondents were shams got up by the three parties in a vain attempt to disguise ordinary money-lending transactions as dealings in customary chattels.

North J. rejected this submission on the grounds that it had not been shown on the evidence that the transactions were anything but commercial dealings legitimately entered into between the three companies for

p.138 line 33
to p.141 line
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sound commercial reasons. He cited In re George Inglefield Ltd. (1933) Ch. 1 and Olds Discount Co. Ltd. v. Playfair Ltd. (1938) 3 A.E.R.275 as demonstrating the correct approach to be made in considering such a submission. He also pointed out that this argument had not been advanced before Macarthur J.

p.156 line 22
to p.157 line 7

Turner J. rejected the submission on the short ground that it involved a misconception of the word "shams". He said that he accepted these transactions in the form in which they were recorded as indicating the true nature of the transactions into which the parties in fact and in law entered.

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p.168 line 36
to p.170 line 31

McCarthy J. rejected the submission on the same grounds as appear in the judgment of Turner J.

- (d) that the Respondent was not entitled to claim the statutory protection provided by S.2 of the Chattels Transfer Amendment Act 1931 for the reason that Bateman Television Ltd. was to be regarded as a "wholesale dealer" and Bateman T.V. Hire Ltd. as a "retail dealer" within the meaning of subsection (5) of the said Section 2, with the consequence that the hire-purchase agreements made between the two Appellants were deemed not to be "customary hire-purchase agreements" and were thus caught by the Moneylenders Act 1908.

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p.141 lines
37-44

North J. regarded this submission as containing the "nub of the case". After examining the terms of S.2 of the Chattels Transfer Amendment Act 1931 and its legislative history he concluded that the expression "retail dealer" was limited to persons engaged in selling customary chattels to members of the public. Since Bateman T.V. Hire Ltd. at no time sold television sets to members of the public, it followed that the hire-purchase agreements made between the Appellants were "customary hire-purchase agreements" and that the assignments to the Respondent were

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p.141 line 37
to p.145 line
22

therefore not affected by the provisions
of the Moneylenders Act 1908.

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10 Turner J. rejected this submission for the same reasons as given by North J. and also considered that it was not sufficiently established that Bateman Television Ltd. was a "wholesale dealer" within the meaning of sub-section (5). p.158 line 22 to p.159 line 43

20 McCarthy J. rejected the submission on the same grounds as North J., namely that the term "retail dealer" did not include a person who hired chattels to members of the public and did not sell them. He did not find it necessary to consider whether Bateman Television Ltd. was a "wholesale dealer". p.171 line 16 to p.172 line 32

- (e) That in any event the hire-purchase agreements contravened Regulation 3 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 and accordingly are void.

30 North J. held that although these Regulations require that there be a statement of the cash price of goods of the description being dealt with under a hire-purchase agreement and that in the present case the hire-purchase forms were not in compliance with the regulations, yet the Regulations only applied to sales "at retail" and the sales from Bateman Television Ltd. to Bateman T.V. Hire Ltd. were not made at retail. Consequently the said Regulations had no application to the case. p.145 line 23 to p.146 line 24

Turner J. was of the same opinion as North J.

p.159 line 44
to p.161 line 5

40 McCarthy J. was inclined to the view that the agreements did in fact recite the "cash price" but found it unnecessary to come to a concluded view on the point because he too agreed that the transactions under review in this Appeal were not sales "at retail" within the meaning of Regulation 2(3) of the said Regulations. p.172 line 34 to p.173 line 24

- (f) that even if the Court of Appeal was unwilling to accept, on the evidence given

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before Macarthur J., that the transactions in question were not customary hire purchase agreements because of the various submissions advanced on behalf of the Appellants, yet there was sufficient doubt in the matter to entitle the Appellants to a dismissal of the petitions upon the ground that a winding-up order should not be made upon a disputed debt.

p.146 line 41 to p.150 line 17

North J. after considering such cases as Mann v. Goldstein (1968) 2 A.E.R. 769, Re. Imperial Silver Quarries Co. Ltd. (1868) 16 W.R.1220, In re Great Britain Mutual Life Assurance Society (1880) 16 Ch. 246 and In re King's Cross Industrial Dwellings Company (1870) 11 L.R. Eq. 149 held that even if there be a general rule that in a case of a disputed debt the Court usually either adjourns or dismisses a winding-up petition and requires the creditor to establish his debt by action, yet the general rule is not inflexible and will not be invoked unless the dispute is shown to be based on substantial grounds. Further, North J. considered that there was a substantial reason why the general rule should not apply to the present case, namely that it had never been submitted to Macarthur J. that the petitions ought to be adjourned or dismissed on this ground, with the result that the Appellants were now asking the Court of Appeal to direct the Respondent to embark on new and lengthy proceedings to establish its debt when in the Court below viva voce evidence had been given and discovery and inspection of documents had been completed so as to afford every opportunity for full investigation of all questions as to the validity of the hire-purchase agreements.

p.162 lines 10-37 p.167 line 19 to p.168 line 8

Turner J. and McCarthy J. concurred with these views and this submission was therefore also rejected by the Court of Appeal

CONTENTIONS TO BE URGED BY RESPONDENT

12. The Respondent made out a prima facie case establishing that Bateman Television Ltd. was indebted

to the Respondent in the sum of \$8704.46. The accounts and vouchers which supported this figure were all made available to an accountant employed by the Appellants but the Appellants chose not to call the accountant as a witness. Particulars of the items totalling \$8704.46 were produced before Macarthur J. as Exhibit "D". Even if on further enquiry the true amount owing was shown to be something less than \$8704.46 nevertheless a substantial debt was proved by the Respondent and it accordingly relies upon Re Tweeds Garage Ltd. (1962) 1 A.E.R.121.

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p.207

13. The argument that the agreements in question were shams fails on the facts. The agreements were entered into between the Appellants as separate corporate entities and were acted on according to their tenor. One effect of the agreements was to create a security in favour of Bateman Television Ltd. which could be assigned by way of mortgage to the Respondent in consideration for an advance by the Respondent of the moneys required by Bateman Television Ltd. to pay for its stock purchases. Another effect of the agreements was to keep separate the functions of selling television sets to the public and hiring them to the public.

The Respondent further submits that the Appellants failed to present this argument before Macarthur J. and thus deprived the Respondent of the opportunity to rebut the allegation by evidence, with the result that the submission was not open to them in the Court of Appeal and is also not open in this Appeal to Her Majesty in Council.

14. It was conceded by the Appellants that Bateman T.V. Hire Ltd. only hired television sets to the public and did not at any time sell such television sets. It is therefore submitted that Bateman T.V. Hire Ltd. is not a "retail dealer" within the meaning of S.2(5) of the Chattels Transfer Amendment Act 1931.

The terms of the statute show that "retail dealer" means a person selling customary chattels to members of the public. Section 57 of the Act uses the word "dealer" as exclusively referring to a person selling customary chattels to another.

It is further submitted that the object of subsection (5) of Section 2 is to protect purchasers of

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customary chattels where the retailer of such chattels still remains liable to the wholesaler under a hire-purchase agreement. The effect of S.2(5) is to make the wholesaler register the hire-purchase agreement under which the retailer has bought the goods, thus giving notice that the retailer does not have title to the goods in his possession.

In any event, it is submitted on the facts that Bateman Television Ltd. is not a "wholesale dealer". That Company either sells at retail to the public, or sells to Bateman T.V. Hire Ltd. as a means of providing a security in favour of itself upon which it can borrow in order to finance stock purchases. Neither class of sale is a sale at wholesale. 10

15. The hire-purchase agreements do not contravene Regulation 3 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 because they are transactions "otherwise than at retail" within the terms of Clause (3)(a) of Regulation 2.

Apart from the above submission, the Respondent contends that the two following points of alleged non-compliance with the Regulations are not made out - 20

(a) Inadequate deposit This point was not taken in the Supreme Court and evidence could have been given as to the payment of deposits and the quantum thereof.

(b) Cash price not stated It is submitted that McCarthy J. is right when he considers that the word "Value" used in the Schedule to the agreements can only mean "Cash price" when read in conjunction with the expression "terms price" and with other parts of the agreement. 30

16. There is no ground for the submission made by the Appellants that the winding-up petitions ought to have been adjourned or dismissed and the Respondent required to bring actions to establish its debt against each Appellant. On this issue the Respondents' contentions are:

(a) The general rule that a winding-up order should not be made on a disputed debt is not applicable where the dispute can effectively be resolved in the winding-up proceedings. In the present case oral evidence was given 40

on each side and discovery and inspection was obtained. The only ground of alleged invalidity of the hire-purchase agreements which could not be determined from the documents themselves was the argument that the transactions evidenced by the documents were sham transactions. In this respect, oral evidence was given for each party and the factual course of dealing between Appellants and Respondent was plainly established. There was nothing in this evidence to give the slightest support to any allegation of sham. But the sham argument was not raised before Macarthur J. and although other evidence was available to support the validity of the documents the Respondent was denied the opportunity of using it. Consequently it is submitted that it is now too late for the Appellants to submit that the Respondent should now be forced to bring actions against the Appellants so that an allegation of sham may be made.

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- (b) The Appellants did not make any application to Macarthur J. for adjournment or dismissal of the petitions on the grounds now advanced. On the contrary, they conducted the hearing of the winding-up petitions so as to advance by way of defence every point then considered to be available in the particular circumstances of the case. The allegations of sham and non-compliance with the Credit Sales and Hire Purchase Stabilisation Regulations would each have required the calling of the Appellants' two directors, or one of them, as witnesses in order to prove in the one case the alleged true arrangement made with the Respondent and in the other case the fact of misdescription in the Schedules to the agreements of various numbers of television sets, such agreements having been signed by one or other of the said directors. The limitation of the grounds of defence to those advanced before Macarthur J. made it possible for the petitions to be defended without the two directors of the Appellant having to go into the witness box. This in turn had

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the tactical advantage of avoiding any cross-examination of the two directors as to the present whereabouts of moneys well in excess of \$250,000.00 which the Appellants had received from purchasers and hirers of television sets and which had not been used for the purpose of liquidating the instalments due to the Respondents by the Appellants.

In view of the decision of the Appellants to limit their grounds of opposition to those which would not involve calling their directors as witnesses, it is submitted that they ought not to be allowed at this stage in the litigation to present grounds of opposition to the petitions which were available but not relied on at the proper time. 10

17. The Respondent respectfully submits that this Appeal should be dismissed and that the Order of the Court of Appeal should be affirmed, and that the Appellants should be ordered to pay the Respondents' costs and disbursements for the following among other 20

R E A S O N S

- (a) Because the decision of the Court of Appeal was right for the reasons given in the judgments
- (b) Because the hire-purchase agreements between the Appellants which were the subject of assignment to the Respondent were and are "customary hire-purchase agreements" under the Chattels Transfer Amendment Act 1931 30
- (c) Because such "customary hire-purchase agreements" and the assignments thereof are consequently not subject to any of the provisions of the Moneylenders Act 1908 and are in all other respects valid and effectual in law. 40

(d) Because the debt due by the Appellant Bateman Television Ltd. is not open to attack on any statutory ground of invalidity and the amount of such debt was clearly established as being due and owing to the Respondent.

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P.T. Mahon.

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CASE FOR RESPONDENT

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London, E.C.4.