Privy Council Appeal No. 30 of 1969

Bateman Television Limited (in Liquidation) and Bateman T.V. Hire Limited (in Liquidation) – – – – *Appellants*

v.

Coleridge Finance Company Limited – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY 1971

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD UPJOHN
LORD DONOVAN
SIR GORDON WILLMER

[*Delivered by* LORD UPJOHN]

These appeals are concerned with company winding up proceedings whereby the respondent company in two petitions launched in September 1968 sought to wind up the appellant companies Bateman Television Limited and Bateman T.V. Hire, Ltd., respectively on the ground that they were each unable to pay their debts. Their Lordships will refer to these companies separately when necessary as the "T.V. Company" and the "Hire Company" respectively. Throughout, both petitions have been heard together, first by Macarthur J. in the Supreme Court of New Zealand, who after a hearing lasting five days with much oral and documentary evidence delivered judgment on 12th December 1968 and made winding up Orders in each case, and then in the Court of Appeal of New Zealand (North P., Turner J. and McCarthy J.). After a hearing of four days both appeals were dismissed on 8th May 1969.

The appellant companies were closely related and had identical directors and shareholders. The business of the T.V. Company was to acquire television sets which they sold on hire purchase terms to individual members of the public; but they also sold on hire purchase terms to the Hire Company television sets in batches of 5, 10, 15 or 20 sets at a time which the latter hired out to individual members of the public; the Hire Company did not engage in any transactions of sale, even by way of hire purchase. The respondent company is a finance corporation which has provided finance on the security of these hire purchase agreements by the T.V. Company (some 156 hire purchase agreements are involved in the petitions) for the operations of the appellant companies, and they have not been repaid the money which they have advanced and which they claim to be due and payable to them.

The real question which their Lordships' Board have to determine is whether or not the hire purchase agreements on which the respondent company has lent its money are valid "customary hire purchase agreements" as defined by the relevant New Zealand legislation; but before considering this question their Lordships must briefly deal with two matters canvassed below which their Lordships' Board have not considered. First, in support of the allegation in the petitions that the appellant companies respectively were unable to pay their debts, the respondent company served on the appellant companies demands, purporting to comply with section 218 (*a*) of the Companies Act 1955, for payment of specified sums requiring them to be paid. These demands were signed under the hand of the respondent company's solicitor and admittedly duly authorised agent, but it was contended by the appellant companies that these demands did not comply with sub-paragraph (*a*) of section 218, which required the creditor to serve "a demand under his hand". Macarthur J. held that a demand under the hand of a duly authorised agent was not under *his* hand, so that the claim based on that sub-paragraph failed.

But apart from these statutory demands, the state of accounts between the appellants and the respondent was fully investigated in the trial before the learned judge. There was full inspection and discovery of documents and much oral evidence upon which there was examination and cross-examination and in the result the learned judge found as a fact that apart from the specific defences raised and later to be mentioned in their Lordships' judgment, it was perfectly clear that appellant companies were insolvent and unable to pay their debts; so that the petitions succeeded under section 218 (*c*) of the Companies Act of 1955.

It was recognised in the Court of Appeal that this made the point under section 218 (*a*) academic, but as full argument was presented to the Court they felt it right to express their opinions upon this point. In very careful judgments examining a number of authorities North P. and Turner J. reached the conclusion that the learned judge was wrong and that a demand under the hand of a duly authorised agent was a sufficient compliance with section 218 (*a*), and McCarthy J. expressed his entire agreement with those judgments.

Before their Lordships, Counsel for the respondent company was content to rest on the trial judge's finding of insolvency under section 218 (*c*) and no argument was addressed to them upon section 218 (*a*) by either side. In these circumstances their Lordships do not think it would be proper for them to express any concluded opinion upon this point, which so far as their Lordships' Board is concerned must be treated as open to argument; but in saying this they do not want to be understood as casting any doubt upon the views of the Court of Appeal upon this sub-paragraph of section 218.

The other point which their Lordships did not consider was the allegation that these hire purchase agreements were not intended to operate according to their apparent tenor as customary hire purchase agreements, but were "shams" or "cloaks" to disguise the true transactions, namely money lending transactions.

This point was, it seems, mentioned before Macarthur J., for he cited in his judgment a passage in the judgment of Finlay J. in *Cash Order Purchases, Limited v. Brady* [1952] N.Z.L.R. 898 very relevant to this matter. But it was hardly canvassed, for he did not refer to it again in specific terms, but he said much later in his judgment:

> "Now Mr. Fox [Counsel for the respondent company] submitted, and I accept his argument, that when one examines the documents in this case and the course of dealing and when one considers the oral evidence, then speaking generally the documents here were valid customary hire purchase agreements."

In the Court of Appeal this point was pressed by Counsel for the appellant companies with great vigour and was dealt with in detail by each of the judges in their judgments and was decisively rejected by each of them.

It is quite clear that an allegation of sham or cloak to disguise the true transaction must be proved as a matter of primary fact and as the appellants failed to establish such allegation in either Court below their Lordships refused to allow Counsel for the appellant companies to open this point before them.

One matter argued before their Lordships can be dealt with very shortly. It was argued that as the debts in question were disputed debts no winding up order should have been made, and for this purpose their Lordships are prepared to assume that the debts were genuinely disputed debts.

In such cases the general rule is, no doubt, that no Order will be made on a petition founded on such debts. But each case must depend upon its own circumstances and it is a question for the discretion of the judge; a discretion to be exercised judicially, which is not open to review unless it is shown to be exercised on some wrong principle, or that the judge relied on some fact irrelevant for the purpose, or omitted consideration of a relevant fact or finally that he was wholly wrong. As their Lordships have already pointed out, the disputed questions of indebtedness were fully investigated in a lengthy hearing before the learned judge with oral and documentary evidence and he held that both appellant companies were insolvent. Their Lordships add the very important fact that from start to finish neither side ever suggested to Macarthur J. that the petitions should be dismissed or even stayed on the ground of disputed debts pending the bringing of appropriate proceedings at law to determine these matters.

In these circumstances it seems to their Lordships impossible to suggest that the learned judge wrongly exercised his jurisdiction to wind up the appellants, and they are content to agree with the meticulous judgments in the Court of Appeal upon this point.

Their Lordships turn then to the question whether the agreements upon which the debts were founded were customary hire purchase agreements. If they were, it is not in issue that the debts due thereunder were debts valid and sufficient to support the petitions. If they were not, then Counsel for the respondent Company admits that they were money lending transactions and as against the Hire Company invalid, so that against that Company his petition must fail. While he does not admit that as against the T.V. Company, he concedes that the difference is, as a practical matter, academic, so this point was not pursued before their Lordships.

Therefore the question is narrowed to the point whether the hire purchase agreements between the T.V. Company and the Hire Company were valid customary hire purchase agreements.

Upon this three points were taken.

The first, to use the phrase of North P., is the "nub of the case", and is whether these agreements were deemed not to be customary hire purchase agreements by virtue of section 2(5) of the Chattels Transfer Amendment Act 1931. That subsection is in these terms:

> "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."

So their Lordships have to determine whether the T.V. Company is a " wholesale dealer " in T.V. sets and whether the Hire Company is a " retail dealer ". As to the former question, although the main business of the T.V. Company was to retail sets to the public on hire purchase terms, yet the business of the T.V. Company with the hire company of selling on hire purchase terms in batches as already mentioned, for subsequent hire to the public was most certainly not a series of retail transactions or transactions at retail (a point to which their Lordships will refer later), and their Lordships think that for the purpose of section 2 (5) the T.V. Company is probably properly described as a wholesale dealer, contrary to the view of Macarthur J. in this respect; but as Turner J. pointed out in the Court of Appeal the evidence is not very full on this matter.

The more difficult question is whether the Hire Company is properly described as a " retail dealer ". Turner J. and Macarthur J. considered the ordinary meaning of the phrase a " retail dealer " is one who sells and does not include one whose business, such as that of the Hire Company, is exclusively that of a hirer pure and simple. North P. did not agree with this view, but concluded that for the purposes of section 2 (5) a retail dealer should bear a more limited meaning and should extend no further than to persons engaged in the business of selling customary chattels. McCarthy J. agreeing with North P. dealt with this matter at some length and concluded by saying:

> " . . . I believe that the purpose of sub-section (5) was to protect people *purchasing* from a retailer, and I think the key is to be found in the words of section 57 [of the Chattels Transfer Act 1924]. I do not consider that section 2 (5) was intended to apply to situations such as the present. I prefer to think that a retail dealer for the purposes of sub-section (5) must be one who does something more than hire out without transferring ownership."

Their Lordships agree with this construction of the phrase " retail dealer " for the purposes of section 2 (5), and accordingly are of opinion that the provisions of that sub-section do not exclude these hire purchase agreements from the category of customary hire purchase agreements. They do not find it necessary therefore to express any opinion on the wider point as to the ordinary or commercial meaning of this phrase.

The second point taken by the appellants was that these agreements failed to comply with section 23 of the Chattels Transfer Act 1924 which is in these terms:

> " Every instrument shall contain, or shall have endorsed thereon or annexed thereto, a schedule of the chattels comprised therein, and, save as is otherwise expressly provided by this Act, shall give a good title only to the chattels described in the said schedule, and shall be void to the extent and as against the persons mentioned in sections 18 and 19 hereof in respect of any chattels not so described."

Macarthur J. found as a fact that there was evidence that some of the agreements did not in their schedules state the serial numbers of the sets and that in other cases fictitious numbers were inserted.

But he pointed out that the total amount covered by those particular types of agreement was not a very large proportion of the grand total, from which their Lordships infer that his Honour was not prepared to find that these deficient agreements were sufficient to alter his finding that the appellant companies were insolvent.

But he further pointed out, and Turner J. expressly agreed with him, that a failure to comply with section 23 merely results in the avoidance of the agreements against the persons mentioned in sections 18 and 19

of the Act (which did not include a description of the parties to this litigation) and that the section does not affect the validity of the agreements as customary hire purchase agreements. Their Lordships agree with this view and this point also fails.

The third and last point taken in the attack upon the agreements was that they did not comply with the Hire Purchase and Credit Sales Stabilisation Regulations 1957. This point was first raised in the Court of Appeal. Clause 3 of the Regulations provides that a person should not dispose of any goods in pursuance of a hire purchase agreement unless the requirements of the First Schedule were satisfied in relation thereto. The First Schedule provided by paragraph 2 that the agreement must contain a statement of the " cash price ", and it was argued that the statement in the agreements under the heading of " value " was an insufficient compliance with this requirement. In the Court below the appellants relied also on paragraph 3 of the First Schedule, which contained provisions with regard to the payment of deposit, but this was not pursued before their Lordships as it was recognised that, had the point been taken in the Court of first instance, the respondent company might have led evidence thereon. Upon the question whether the word " value " was a sufficient indication of " cash price " the learned judges in the Court of Appeal were inclined to differ but all were agreed that if the agreements did fail to state the cash price the agreements were not thereby invalidated, for Clause 2 (3) of the Regulations by sub-paragraph (*a*) provided that nothing in the Regulations should apply in respect of or in connection with the purchase or sale or disposal of any goods " otherwise than at retail ", and these agreements between the T.V. Company and Hire Company could not be described as " at retail ".

Their Lordships have already given their reasons for taking the same view and accordingly this point fails also.

It follows that the allegations of insolvency of the appellants are based upon valid customary hire purchase agreements operating according to their tenor, and the learned trial judge rightly held that under section 218 (*c*) of the Companies Act 1955 the appellants respectively were unable to pay their debts. The winding up orders were therefore properly made and the appeals against those orders were rightly dismissed.

Their Lordships will therefore humbly advise Her Majesty that the appeals should be dismissed. The appellants must pay the costs of the appeals to their Lordships' Board.

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In the Privy Council

BATEMAN TELEVISION LIMITED (IN LIQUIDATION) AND BATEMAN T.V. HIRE LIMITED (IN LIQUIDATION)

v.

COLERIDGE FINANCE COMPANY LIMITED

DELIVERED BY
LORD UPJOHN

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1971