**WORCESTER WORKS FINANCE LIMITED**

**v.**

**COODEN ENGINEERING COMPANY LIMITED**

IN THE COURT OF APPEAL, CIVIL DIVISION

ON THE 20TH DAY OF JULY, 1971

OTHER CITATION(S)

2PLR/1971/73 (CA-E)

**BEFORE THEIR LORDSHIPS:**

LORD DENNING MR

PHILLIMORE AND MEGAW LJJ

**BETWEEN**

WORCESTER WORKS FINANCE LIMITED – Appellant

AND

COODEN ENGINEERING COMPANY LIMITED – Respondent

**ORIGINATING COURT**

JUDGE HERBERT IN THE WESTMINSTER COUNTY COURT

**REPRESENTATION**

I E Jacob for the Plaintiffs.

T M F Stow for the Defendants.

Solicitors:

D H P Levy AND Co (for the plaintiffs)

Higgs, Thompson AND Samwell, Sutton (for the defendants)

L J Kovats Esq   Barrister.

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMMERCIAL LAW - Sale of goods – Disposition by seller in possession after sale – Seller continuing in possession – ‘Continues in possession’ – Unlawful possession – Sale of car to finance company – Finance company hiring car to third party on hire-purchase terms – Seller remaining in possession of car without knowledge of finance company – Subsequent disposition of car by seller – Whether relevant that seller’s continued possession wrongful – Whether disposition passing a good title – Sale of Goods Act 1893, s 25(1).

COMMERCIAL LAW - Sale of goods – Disposition by seller in possession after sale – ‘Delivery of the goods under any disposition’ – Disposition – Seller in possession having purchased car from previous sellers – Seller remaining in possession after subsequent sale of car to finance company – Seller’s cheque to previous sellers dishonoured – Retaking of car by previous sellers from seller’s custody with his acquiescence – Previous sellers unaware at time of retaking of subsequent sale to finance company – Whether retaking a delivery of the car under a disposition thereof – Sale of Goods Act 1893, s 25(1).

**PRACTICE AND PROCEDURE ISSUES**

JUDGEMENT AND ORDER:- Judicial decision as authority – Court of Appeal – Previous decisions of Court of Appeal – Disapproval by Privy Council – Court at liberty to depart from previous decisions disapproved by Privy Council.

**MAIN JUDGEMENT**

20 July 1971. The following judgments were delivered.

LORD DENNING MR.

This case raises again the question of which of two innocent people should suffer owing to the fraud of a third. In June 1966 the defendants, Cooden Engineering Co Ltd (‘Cooden’), or their parent company, owned a

Ford Zephyr motor car. A dealer called Griffiths (who turned out to be a fraud) wanted to buy it from Cooden. He said he had a customer to whom he wanted to resell it. Cooden agreed to sell it to Mr Griffiths for the sum of £525. Mr Griffiths gave them his cheque dated 21 June 1966 for £525. He took delivery of the car and the log book with it. On 14 July 1966 he was registered with the registration authority as the owner of the car. In point of fact, he did not pay for the car. His cheque was returned dishonoured. But more of that hereafter.

Whilst Mr Griffiths still had the car, he made arrangements with a man called Millerick (whom one suspects was in the fraud) by means of which Mr Griffiths got money from a finance company called Worcester Works Finance Ltd (‘Worcester Finance’), the plaintiffs. Mr Griffiths and Mr Millerick filled up documents which on the face of them appeared to evidence the following transaction: on 14 July 1966 Mr Griffiths invoiced this car to Worcester Finance at a price of £645, less initial payment of £195, leaving £450. Worcester Finance paid the £450 to Mr Griffiths and thus became the owners of the car. By a hire-purchase agreement dated 14 July 1966 Worcester Finance let the car on hire-purchase terms to Mr Millerick at a total hire-purchase price of £757 7s 6d payable at £20 15s 10d a month for 26 months. Mr Millerick signed a delivery receipt acknowledging that he had taken delivery of the car.

Those documents told a false story. Mr Millerick never took delivery, never paid any deposit, or any instalment of hire charges. The truth was that Mr Griffiths took the car to Mr Millerick’s house. He left it outside. He went in and got Mr Millerick to sign the documents. Mr Griffiths then went off in the car with the documents. He sent the documents up to Worcester Finance and got £450 from them on the faith of the documents. Worcester Finance did not see the car or have anything to do with it. They simply received the documents, assumed they were genuine and paid out the £450. Mr Griffiths retained the car in his own possession. Mr Millerick never had it.

Let me return to the original transaction. Cooden had sold the car to Mr Griffiths and received a cheque from him for £525. They presented the cheque for payment but it was dishonoured. It was re-presented and still dishonoured. It was dishonoured three times. Not being paid, Cooden on 15 August 1966 determined to repossess the car. They sent a man along to Mr Griffiths’s premises. The car was still in Mr Griffiths’s custody. So Cooden took possession of it. So far as Cooden were concerned, they thought that the cheque not having been met, they were entitled to retake possession, and they did so. The man who retook it said: ‘We all thought it belonged to Cooden, because the cheque had been dishonoured.' After Cooden had got the car back, they used it in their own fleet of self-drive cars.

Now I must return to Mr Griffiths again. He had, as I have said, received £450 from Worcester Finance and paid out nothing. But he did not want his fraud to be discovered. So he—no doubt in league with Mr Millerick—kept up the hire instalments for several months. He paid some £240, but then stopped altogether. (That still left Mr Griffiths well in hand.) After that, Mr Griffiths kept Worcester Finance quiet for a time by asking for a settlement figure at which Mr Millerick could buy the car. Worcester Finance quoted £310, being the balance of the hire-purchase price. But nothing was ever paid.

I come back now to Cooden. They used the car in their own fleet for a time, but afterwards let it out on hire-purchase themselves; and they registered their interest with the Hire-Purchase Information Bureau. In consequence Worcester Finance got to know that the car was in the hands of Cooden. Thereupon Worcester Finance claimed that the car was theirs. Now they bring this action for damages for conversion. They have limited their claim to £315 0s 10d, which was the balance of the hire-purchase price. Worcester Finance rely on the documents which were executed, which, on the face of them, give them that title to the car. They claim £315 which is the balance outstanding, recoverable in conversion.

In answer Cooden rely on the provisions of s 25(1) of the Sale of Goods Act 1893, which provides:

‘Where a person having sold goods continues or is in possession of the goods … the delivery or transfer by that person … of the goods … under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.’

Cooden apply that section in this way. They say that Mr Griffiths was a person who, having sold goods to Worcester Finance, continued in possession of them.

The judge has found (and it is no longer disputed) that when Cooden delivered the car and log book to Mr Griffiths and received the cheque for £525, then that was a completed sale to Mr Griffiths. That was in June 1966. So Mr Griffiths was the owner of the car at that time and was in possession of it. Then when Mr Griffiths on 14 July 1966 invoiced the car to Worcester Finance he was ‘a person having sold goods’ to the finance company; and was thus within the opening words of s 25(1). So far there is no difference between the parties.

The question is whether Mr Griffiths comes within the following words. Was he a person who ‘continues or is in possession of the goods’? The material word here is ‘continues’. The words ‘or is’ have been explained in a New Zealand case of Mitchell v Jones, which was approved by the Privy Council in Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd. They refer only to a case where the person who sold the goods had not got the goods when he sold them, but they came into his possession afterwards. Those words ‘or is’ do not apply to this case because Mr Griffiths, at the time when he sold the car to Worcester Finance, was already in possession of it. The only relevant word is therefore ‘continues’. Was Mr Griffiths a person who, having sold goods, ‘continues … in possession of the goods’?

Counsel for Worcester Finance submits that the words ‘continues in possession’ mean continues in lawful possession. He says that, after Mr Griffiths sold the car to Worcester Finance, he ought to have delivered it to the hirer Mr Millerick; and that, by retaining it himself, he retained it unlawfully; and he was, vis-a-vis Worcester Finance, a trespasser. He was in possession of it without their consent at all. In support of this contention counsel relied on two cases: Staffs Motor Guarantee Ltd v British Wagon Co Ltd, applied in this court in Eastern Distributors Ltd v Goldring (Murphy, Third Party). In those cases it was held that the words ‘continues in possession’ mean continues in possession as seller and not as bailee; and accordingly, if the person who had sold goods continued in possession as a bailee, he did not ‘continue in possession’ within the meaning of the section. But those cases are no longer good law. They were disapproved by the Privy Council in Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd, and, although decisions of the Privy Council are not binding on this court, nevertheless when the Privy Council disapprove of a previous decision of this court, or cast doubt on it, then we are at liberty to depart from the previous decision. I am glad to depart from those earlier cases and to follow the Privy Council. The words ‘continues … in possession’ refer to ([1965] 2 All ER at 114, [1965] AC at 888)—

‘the continuity of physical possession regardless of any private transaction between seller and purchaser which might alter the legal title under which the possession was held.’

This is how Lord Pearce put it ([1965] 2 All ER at 114, [1965] AC at 888). It does not matter what private arrangement may be made by the seller with the purchaser—such as whether the seller remains as bailee or trespasser, or whether he is lawfully in possession or not. It is sufficient if he remains continuously in possession of the goods that he has sold to the purchaser. If so, he can pass a good title to a bona fide third person, and the original purchaser will be ousted. But there must be a continuity of physical possession. If there is a substantial break in the continuity, as for instance, if the seller actually delivers over the goods to a purchaser who keeps them for a time, and then the seller afterwards gets them back, then the section might not apply. Applying these principles it is plain that Mr Griffiths was a person who, having sold goods to Worcester Finance, ‘continued … in possession’ of them until the time when they were re-taken by Cooden.

The next question is whether the retaking by Cooden was ‘the delivery or transfer’ by Mr Griffiths of the goods to Cooden under a ‘disposition’ thereof. Mr Griffiths did not actually deliver or transfer the car to Cooden. But he acquiesced in their retaking it. That was, I think, tantamount to a delivery or transfer by him. But was it under a ‘disposition’ thereof? Counsel for Worcester Finance argued that there was no disposition here; there was, he said, only a retaking by Cooden. To my mind the word ‘disposition’ is a very wide word. In Carter v Carter ([1896] 1 Ch 62 at 67) Stirling J said that it extends ‘to all acts by which a new interest (legal or equitable) in the property is effectually created’. That was under an entirely different statute, but I would apply that wide meaning in this section. When Cooden retook this car (because the cheque had not been met) there was clearly a transfer back to them of property in the goods. They would not thereafter be able to sue on the cheque. By retaking the goods they impliedly gave up their remedy on the cheque. That retransfer of the property back to Cooden was a ‘disposition’ within the section.

The last question is whether at the time when Cooden retook the car, they received ‘the same in good faith and without notice of the previous sale’, ie without notice of the sale by Mr Griffiths to Worcester Finance. The word ‘notice’ here means actual notice, that is to say, knowledge of the sale or deliberately turning a blind eye to it. Our commercial law does not like constructive notice. It will have nothing to do with it. I am quite clear that Cooden acted in good faith without notice of the sale to Worcester Finance. They had sold a car and been given a dud cheque for it; and were just retaking it. So all the requisites of s 25(1) are satisfied. The retaking by Cooden has the same effect as if it was expressly authorised by Worcester Finance. It is equivalent to a transfer by Mr Griffiths back to Cooden with the express authority of the finance company. So Cooden acquired a good title to the car.

This result is consonant with the object of s 25. Worcester Finance did not see the car at all. They did not take possession of it. They simply received documents from the dealer, Mr Griffiths, and handed out money to him. They relied on his honesty. He was dishonest. He got £450 out of them by a trick. In contrast, Cooden actually had possession of the car, sold it to Mr Griffiths and, when his cheque was dishonoured, they retook it. Plainly as a matter of commercial good sense the title should remain in Cooden and not in Worcester Finance. Cooden are protected by s 25. The car is theirs.

I think that the judge was right in the conclusion to which he came, and I would dismiss the appeal.

**PHILLIMORE LJ**.

I agree that this appeal must be dismissed and that this case comes squarely within the provisions of s 25 of the Sale of Goods Act 1893.

So far as the first point, the question of possession, is concerned, I entirely agree with Lord Denning MR that this court must follow the decision of the Privy Council in Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd in preference to the earlier cases to which he has referred. I find the argument in that case in the speech of Lord Pearce convincing. There was evidence before the learned judge here that after his dealings with the plaintiffs, the finance company, Mr Griffiths remained in uninterrupted physical possession of the car. The learned judge so found, and I think that he was fully entitled to do so. Accordingly, the goods were in his uninterrupted possession from the time that they were delivered to him by the defendants until the time when they were returned.

On the second point it seems to me that counsel for the plaintiffs was quite right when he said that, of course, to constitute a disposition the dealing with the goods must go beyond the mere transfer or delivery of it; there must be some disposal which involves transfer of property. I think that is clearly the case here and the learned judge was indeed entitled to infer, as he did, that what had really happened here was that there had been a resale by Mr Griffiths, although he had, of course, no right to do so—there had been a resale by him to the defendants. It is perfectly clear that at that time, when the defendants collected the car, it was understood that if they retook the car, they would not attempt to pursue Mr Griffiths in regard to the cheque; and it was on this basis that Mr Griffiths cheerfully handed over the key and probably the log book as well. It is, as I see it, plain on the evidence—and the learned judge so found—that at that time the defendants had no idea of Mr Griffiths’s dealing with the plaintiff finance company. I find that, as I think, quite clear from the evidence of Mr Gillingham, who retook the car. He said: ‘I think he expected me to come and pick it up. Everyone thought it was the defendants’ car.' And what happened afterwards? The defendants used it themselves until the summer of 1968, when they hired it out to a Mr Stevenson. Meanwhile they had re-registered it with the county council as being their property; but, having hired it out, as in duty bound, they informed the information bureau which deals with hire-purchase and such matters in regard to commercial vehicles; and it was only as a result of this that the plaintiffs discovered what had happened. I think it is quite plain that in acting as they did, the defendants were acting in the belief that they had genuinely and properly retaken, and, if you like, repurchased this car, and that it was their property to do with as they thought fit.

As I have already stated, I agree with Lord Denning MR that this appeal should be dismissed.

**MEGAW LJ**.

Despite the very attractive argument of counsel for the plaintiffs I also agree that this appeal should be dismissed. Counsel puts his submissions on three points relating to s 25(1) of the Sale of Goods Act 1893.

The first point is that in order to take the benefit of that section the defendants have to show that a person having sold goods continues in possession of the goods. Counsel for the plaintiffs says that the words ‘in possession of the goods’ must be construed as meaning in lawful possession of the goods. In the present case the possession by the defendants was, he says, possession as trespassers, as persons converting another person’s property; and therefore the defendants cannot be said to be in possession. To my mind there is a short and simple answer to that submission, the first answer which was given by counsel for the defendants. It is well known that the Factors Acts of 1889 and 1890 and the Sale of Goods Act 1893 must for many purposes be treated as one code. In s 2(1) of the Factors Act 1889 the legislature used these words: ‘Where a mercantile agent is, with the consent of the owner, in possession of goods … ’ That falls to be contrasted with the words of s 8 of the same Act. The words there are ‘Where a person having sold goods, continues, or is in possession of the goods … ’ The words of s 2(1) ‘with the consent of the owner’ do not appear. The section with which we are here concerned, s 25(1) of the Sale of Goods Act 1893, is for present purposes identical with s 8 of the Factors Act 1889. Again the words ‘with the consent of the owner’ do not appear. Those words have been deliberately left out by the legislature in s 25(1) of the Sale of Goods Act 1893.

The effect of their omission, when contrasted with their inclusion in s 2(1) of the Factors Act 1889, must be that counsel for the plaintiffs’ argument, attractive though it otherwise would be, is wrong, because it is to be inferred that Parliament intended that ‘continues … in possession of the goods’ means ‘continues in possession of the goods whether or not with the consent of the owner’. If here the possession is possession of a trespasser, it is irrelevant that that is possession which is not with the consent of the owner.

The second point raised by counsel for the plaintiffs is as to the meaning of the words, again in s 25(1), ‘delivery or transfer … of the goods … under any … disposition thereof … ’ It is said by counsel for the plaintiffs, that ‘disposition’ in that context must mean something more than a mere transfer of possession. That is plainly right. ‘Disposition’ must involve some transfer of an interest in property, in the technical sense of the word ‘property’, as contrasted with mere possession. In the present case, however, I have no doubt that what happened is properly described as a delivery of the goods under a disposition thereof in that sense. The cheque which Mr Griffiths had given for this motor car had been presented by the defendants to their bank and had been dishonoured more than once. The cheque finally came back on 26 July 1966, the defendants’ account being again debited by the bank because of the refusal of the cheque. Three weeks later the defendants took repossession of the car, having first telephoned and said that they were proposing so to do. After repossession had been taken, the car having been given up voluntarily by Mr Griffiths following on the call made on him after the telephone conversation, I have no doubt whatever that the effect in law of that taking, the repossession, was that the interest in property in the car reverted to the defendants. It was not, in law, a mere transfer of possession. It was a transfer of the goods under a disposition in the true sense of the word. It does not matter whether or not the parties to the transaction realised its legal effect. If thereafter the defendants had sought to sue Mr Griffiths on the cheque, they would have been met by the completely unanswerable defence by Mr Griffiths: ‘You [the defendants] have waived your right to sue on that cheque in consideration of my surrender to you of my interest in the car.' That is a disposition.

The third and last point taken by counsel for the plaintiffs is that s 25(1) of the Sale of Goods Act 1893 is of no avail to the defendants unless it can be shown that what was done by them was done in good faith and without notice of the previous sale. Let it be assumed for present purposes that counsel for the plaintiffs is right in his submission that the onus of proof of absence of notice of a previous sale rests on the defendants. In my view there was evidence on which the judge was entitled to come to the conclusion to which he did come, that there was at the relevant time no notice on the part of the defendants of the previous sale. Since there was evidence on which the judge was entitled to reach that conclusion, I see no ground for interference by this court.

Accordingly I agree that this appeal fails.

Appeal dismissed.

**Cases referred to in judgments**

Carter v Carter [1896] 1 Ch 62, 65 LJCh 86, 73 LT 437, 38 Digest (Repl) 855, 688.

Eastern Distributors Ltd v Goldring (Murphy, Third Party) [1957] 2 All ER 525, [1957] 2 QB 600, [1957] 3 WLR 237, 26 Digest (Repl) 675, 77.

Mitchell v Jones (1905) 24 NZLR 932, 39 Digest (Repl) 657, \*897.

Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd [1965] 2 All ER 105, [1965] AC 867, [1965] 2 WLR 881, Digest (Cont Vol B) 637, 1582a.

Staffs Motor Guarantee Ltd v British Wagon Co Ltd [1934] 2 KB 305, [1934] All ER Rep 322, 103 LJKB 613, 151 LT 396, 39 Digest (Repl) 655, 1580.

Appeal

This was an appeal by the plaintiffs, Worcester Works Finance Ltd, from the judgement of his Honour Judge Herbert in the Westminster County Court on 10 December 1970 dismissing the plaintiffs’ claim against the defendants, Cooden Engineering Co Ltd. The facts are set out in the judgement of Lord Denning MR.