

## THE HIGH COURT

[2002 No.1282 P]

BETWEEN

MALLETT AND SON (ANTIQUES) LIMITED

PLAINTIFF

AND  
RORY ROGERS

DEFENDANT

**Judgment of Quirke J. delivered on the 12th day of May, 2005.**

1. The plaintiff is a limited liability company registered in the United Kingdom which specialises in the purchase and sale of antique furniture and paintings.
2. The defendant carried on a business which includes the restoration and sale of antique furniture from premises at Shelbourne Road in the city of Dublin 4.
3. The plaintiff claims that on 30th January, 2000, it purchased a Queen Anne red lacquered bureau bookcase from the defendant for the sum of STG£80,000 on foot of an agreement which had been entered into on 28th January, 2000, between the defendant and Mr.Lanto Synge on behalf of the plaintiff.
4. The plaintiff claims further that it carried out extensive restoration work on the bookcase at a total cost of STG£31,533 at a time when the defendant knew that the plaintiff intended to restore the bookcase and to put it up for sale for profit.
5. It is claimed on behalf of the plaintiff that the bookcase had been stolen from its lawful owner in or around 1990 and that consequently the defendant never had the right to sell the bookcase and never had any interest in or title to the bookcase.
6. On or about the 8th August, 2001, the bookcase was released into the possession of its lawful owner and it is claimed that the plaintiff is now entitled to repayment of the sum of STG£80,000 being money paid to the defendant upon a consideration which has wholly failed. The sum of STG£31,533 is claimed as damages arising from a breach the agreement between the plaintiff and the defendant.

**FACTUAL BACKGROUND**

7. I am satisfied on the evidence and on the balance of probabilities as follows:

In 1990 a robbery occurred at the estate of Lord Roden in Newcastle in County Down. During the course of the robbery some paintings and valuable items of furniture were stolen including a Queen Anne red lacquered bureau bookcase (circa 1720) which is the subject of these proceedings.

During the last week of January, 2000, the defendant contacted Mr Lanto Synge, of the plaintiff company and told him that he had come across a piece of furniture of considerable interest. The defendant was known to Mr.Synge and had transacted business on previous occasions with him. Mr.Synge had satisfied himself that the defendant was a reputable and trustworthy business man. The defendant told Mr.Synge that it would be worth his while travelling to Dublin to see the piece of furniture concerned.

Mr.Synge flew to Dublin on or about the 28th January, 2000. He was met at the airport by the defendant and his brother Brian and brought to premises in Francis Street.

That premises were occupied by Mr.Sean Eacrett and Mr.Fintan Daly who were furniture restorers and dealers who used the premises as a workshop.

When Mr.Synge entered the premises with the defendant and his brother he was shown the bureau bookcase. The only other person present was Mr.Eacrett. There was no conversation between Mr.Eacrett and Mr.Synge. I am satisfied on the balance of probabilities that nothing was said by Mr.Eacrett to Mr.Rogers in the presence of Mr.Synge which would have identified the provenance of the bookcase.

Mr.Synge remained in the workshop for no more than 5 minutes before leaving the premises with the defendant and his brother.

Immediately after they left the premises the defendant and Mr.Synge engaged in a negotiation which concluded with the defendant entering into an agreement to sell the bureau bookcase to the plaintiff for the sum of STG£80,000. During the course of that negotiation Mr.Synge made it known to the defendant that the plaintiff intended to purchase the bureau bookcase for re-sale and would carry out a comprehensive and expensive restoration of the bureau bookcase for that purpose. The defendant acknowledged that this would be necessary and would take a considerable period of time.

The negotiations took place in the defendant's motor vehicle which was parked outside the Francis Street premises at all material times.

Earlier that week on 26th January, 2000, the defendant and his brother Brian had entered into negotiations with Mr.Eacrett and Mr.Daly seeking to purchase the bureau bookcase.

The defendant's offer of £40,000 had been declined. IR£60,000 was the asking price. The defendant had told Mr.Eacrett that he had a potential buyer from England and after some discussion Mr.Eacrett had agreed to allow the defendant to show the bookcase to his potential buyer in Francis Street.

Accordingly when the defendant brought Mr.Synge into the Francis Street premises on the 28th January, for the purpose of viewing the bookcase Mr.Eacrett, who was present, was aware that it was the defendant's intention to enter into immediate negotiations with Mr.Synge directed towards entering into an agreement which would enable the defendant to purchase the bookcase from Mr.Eacrett for IR£60,000.

Mr.Synge was aware or ought to have been aware at all material times that the purchase of the bookcase from the defendant for a sum of STG£80,000 was contingent upon the defendant first purchasing the bookcase from Mr.Eacrett.

After the price of STG£80,000 was agreed the defendant's brother Brian left the car and entered into negotiations on behalf of the defendant to purchase the bookcase. These negotiations were successful and within a very short time Mr.Eacrett had agreed to sell the bookcase to the defendant for the sum of IR£55,000.

On 29th January, the defendant paid the sum of €55,000 in purported completion of the purchase of the bookcase from Mr.Eacrett and Mr.Daly. On the 30th January, 2000, the defendant delivered the bookcase to the plaintiff and on 3rd February, 2000, the plaintiff paid the sum of STG£80,000 to the defendant in purported completion of his contract for sale.

During the succeeding 12 months the plaintiff carried out extensive restoration work on the bookcase at a cost of STG£31,533.

When the bookcase was exhibited at the Grosvenor House Hotel in London it was discovered that it was the bookcase which had been stolen from Lord Roden in 1990.

### **THE PLAINTIFF'S CLAIM**

8. The plaintiff claims to be entitled to recover the sum of STG£80,000 from the defendant being money paid upon a consideration which has wholly failed.

9. It also claims that it is entitled to recover the sum of STG£31,553 by way of damages to compensate the plaintiff for monies expended by the plaintiff arising out of a breach on the part of the defendant of a condition of the contract between the plaintiff and the defendant for the sale of the bookcase by the defendant to the plaintiff.

10. The plaintiff claims that it agreed to purchase the bookcase from the defendant for the sum of STG£80,000 and that it was a condition of that agreement (a), that the defendant had a right to sell the bookcase to the plaintiff and (b), that he would have the right to sell the bookcase at the time when the property in the bookcase was to pass from the defendant to the plaintiff.

11. The plaintiff claims that the agreement provided that the property in the bookcase was to pass from the defendant to the plaintiff after the bookcase had been delivered from the defendant to the plaintiff and when the sum of STG£80,000 was paid by the plaintiff to the defendant.

12. It is claimed that the bookcase was duly delivered to the plaintiff but when the sum of STG£80,000 was paid by the plaintiff to the defendant the defendant did not have the right to sell the bookcase because he did not own it or have any title to it since it had been stolen from its true owner.

13. In consequence the plaintiff claims to be entitled to the return of the sum of STG£80,000 which had been paid by the plaintiff to the defendant in consideration of the purchase.

14. It is claimed that the consideration had wholly failed.

15. The plaintiff further claims that it is entitled to the sum of STG£31,553 by way of damages since it was a loss consequential upon the defendant's breach of contract.

16. It has been acknowledged on behalf of the defendant that he knew at the time when he agreed to sell the bookcase to the plaintiff that the express purpose for which the plaintiff required the bookcase was to carry out expensive restoration work upon the bookcase in order to put it on view and to sell it.

17. The plaintiff claims that the loss which has been sustained by the plaintiff flowed directly from the defendant's breach of contract and was a loss which was within the reasonable contemplation of the defendant (and of the plaintiff) at the time when the contract was entered into.

18. It is claimed therefore that the plaintiff is entitled to recover his loss by way of damages from the defendant.

### **THE DEFENCE OF THE DEFENDANT**

19. Mr.Ralston on behalf of the defendant submits that both parties to these proceedings are innocent victims of a robbery.

20. He says that Mr.Synge on the behalf of the plaintiff knew, or ought to have known, at the time when he agreed on behalf of the plaintiff to purchase the bookcase that the defendant was not yet its owner.

21. He contends that the effect of s.12(1) of the Sale of Goods Act, 1893 is to raise an implication as to the title of the seller. He says that there was no express term agreed between the parties which provided that the defendant owned the bookcase and was entitled to sell it.

22. He says that since Mr.Synge knew as much about the bookcase as the defendant the implication raised by s.12 of the 1893 Act was vitiated and the defendant was only bound to deliver such title as he was obtaining from Messrs.Daly and Eacrett.

23. Mr.Ralston also relied upon the decision of the High Court (Henchy J.) in *Anderson v. Ryan* [1967] I.R.34 as authority for the proposition that the defendant had acquired a voidable title to the bookcase in good faith and without notice of a defect in the title of Messrs.Daly and Eacrett.

24. I found it difficult to follow this submission because it seems to me to be based upon an argument which, if adopted, would lead to the inevitable conclusion that the plaintiff acquired a good title to the bookcase. I do not think that that can be the case.

25. The defendant claims that the plaintiff was guilty of negligence and breach of the duty of care which it owed *inter alia* to the defendant, by failing to take any or any reasonable steps to carry out appropriate checks on the authenticity of the bookcase (notwithstanding considerable experience and expertise in the buying, selling and restoration of antique furniture).

26. The defendant claims that if the plaintiff had exercised reasonable care it would have discovered that the bookcase had in fact been stolen and was the property of Lord Roden and would have to be returned to him.

27. It is claimed that this discovery would have been made before the restoration work was started or alternatively before it had been completed and that accordingly the plaintiff would not have incurred the cost of restoration or would not have incurred all of the costs which it incurred.

28. Consequently it is claimed that the plaintiff is not entitled to the sum claimed for the cost of restoration or alternatively is entitled to less than the full cost of restoration.

29. It is acknowledged, however, that when he agreed to sell the bookcase to the plaintiff the defendant was aware of the plaintiff's intention to spend substantial sums of money on the restoration of the bookcase.

## DECISION

30. The basic rule as to the transfer of title to personal property is that no one can give a better title than his own; he can give possession but not a title which is not vested in him. That is the doctrine "nemo dat quod non habet".

31. Section 12 of the Sale of Goods Act, 1893 (as amended by s.10 of the Sale of Goods and Supply of Services Act, 1980) provides inter alia as follows:

*(1) In every contract of sale, other than one to which subs.(2) applies, there is*

*(a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and, in the case of an agreement to sell, he will have a right to sell the goods at a time when the property is to pass,*

*(b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, of any charge or encumbrance not disclosed by the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except insofar as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed."*

32. The Act draws a distinction between an agreement to sell and a sale. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property and the goods is to take place at a future time or subject to some condition to be fulfilled later, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses and the conditions (subject to which the property in the goods is to be transferred) are fulfilled.

33. Where there is an agreement to sell the property remains with the seller until some act or event completes the sale and causes the property to pass.

34. In the instant case the defendant entered into an agreement with Mr. Synge whereby he agreed to sell a bookcase to the plaintiff. The sale was to be completed when the defendant delivered the bookcase to the plaintiff and the latter paid the sum of STG£80,000 to the defendant.

35. On 30th January, 2000, the defendant delivered the bookcase to the plaintiff and on 3rd February, 2000, the plaintiff paid to the defendant the sum of STG £80,000 in purported completion of the contract for sale.

36. However, on 3rd February, 2000, the defendant did not have a right to sell the bookcase to the plaintiff because he did not own the bookcase. It was the property of Lord Roden. It had been stolen from Lord Roden. The defendant had no title to the bookcase. Therefore no title to or property in the bookcase passed from the defendant to the plaintiff. There was an agreement for sale but the sale was not completed.

37. The consideration for the sale was the title to the bookcase (in return for the sum of STG£80,000). The title to the bookcase never passed from the defendant to the plaintiff. The consideration for the sale failed wholly and the plaintiff is entitled to the return of the sum of STG£80,000.

38. The contract for the sale by the defendant to the plaintiff of the bookcase was a contract for sale to which s.12(1) of the 1893 Act (as amended) applied.

39. It was therefore subject to an implied condition on the part of the defendant that the defendant had the right to sell the bookcase at the time when the property in the bookcase was intended to pass from the defendant to the plaintiff.

40. Mr. Ralston argues that Mr. Synge knew or ought to have known from the circumstances of the transaction that the defendant had not yet acquired the bookcase at the time when the plaintiff agreed to purchase the bookcase from the defendant.

41. He appears to be relying upon the provisions of subs.(2) of s.12 of the Sale of Goods Act, 1893 (as amended) which provides as follows:

*"In a contract of sale, in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller shall transfer only such title as he or a third party may have, that is,*

*(a) an implied warranty that all charges or encumbrances known to the seller shall have been disclosed to the buyer before a contract is made,..."*

42. This sub-section is concerned with the intention of the parties at the time of the contract for sale.

43. On the evidence adduced in these proceedings it has been unequivocally established that, at the time of the contract for sale it was the intention of the defendant to pass good title to the bookcase to the plaintiff for STG£80,000 and the intention of the latter to purchase it from the defendant on that basis. The evidence also disclosed that it was the intention of the defendant to purchase the bookcase from Messrs. Eacrett and Daly on the same basis.

44. No evidence has been adduced which would suggest that at the time of the contract for sale it was the intention of the

defendant to "transfer only such title as he or a third party may have" in the bookcase to the plaintiff. Nor can it be inferred from the circumstances of the contract that such was the intention of either of the parties.

45. I believe Mr. Ralston's reliance upon the decision of the High Court (Henchy J.) in *Anderson v. Ryan* [1967] I.R.34 is misplaced.

46. In that case a Mr. Davis agreed to purchase a Sprite Motorcar. He paid for it by exchanging his own motorcar (a Mini) for the Sprite.

47. At the time of that transaction the person who purported to sell the Sprite fraudulently misrepresented that he had title to the vehicle. In fact it had been stolen.

48. The court was required to deal with a subsequent dispute as to the ownership of the Mini. Henchy J. observed (at p.38) that:

*"Therefore, the central question which decides the points raised under both s.12 and s.30 and s.21 is; 'did the defendant have a good title to the car when he sold and delivered it to the plaintiff?' To decide this question one must go back to the circumstances under which the original owner, Mr. Davis, parted with the possession of the car. As I have said, he exchanged it for the Sprite. The inducement for him to do so was not alone the desirability to him of the exchange but also the representation by the other party that the Sprite was his property. That was a false and fraudulent representation as to an existing fact. The contract of exchange was, therefore, a voidable contract. Since Mr. Davis intended to pass the ownership of the Mini, the person who got the car in exchange acquired a title to it, but it was a voidable title, that is, voidable at the option of Mr. Davis. It would have been different if Mr. Davis had parted with the Mini as a result of larceny by a trick, for then no title would have passed... there is no evidence that there was any immediate sale of the Mini between the fraudulent exchange and the sale to the defendant. In fact, all the likelihood is that the car was sold to the defendant by or on behalf of the person who effected the fraudulent exchange. One looks then to see what title, if any, such person conveyed to the defendant. The answer is to be found in s.23 of the Act, which is as follows:*

*'When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.' It is clear from the evidence that Mr. Davis had not avoided the title of the person who sold the car to the defendant at the time of that sale, and it has not been suggested that the defendant bought otherwise than in good faith and without notice of the seller's defect of title."*

49. The position in the instant case is wholly different. In this case Messrs. Eacrett and Daly did not have a voidable title to the bookcase. They had no title to it. The defendant, accordingly, never had any title to the bookcase. At all times material to this case the title to the bookcase was vested in the estate of Lord Roden.

50. It follows that the plaintiff is entitled to repayment of the sum of STG£80,000. being monies paid to the defendant upon a consideration which has wholly failed.

51. It has been fairly and candidly acknowledged on behalf of the defendant that at the time when he agreed to sell the bookcase to the plaintiff the defendant knew that the express purpose for which the plaintiff required the bookcase was to carry out expensive restoration work upon the bookcase in order to put it on view and to sell it.

52. It has also been acknowledged that the plaintiff spent the sum of STG£31,533.00 on the restoration of the bookcase and that this expenditure was reasonable in the circumstances.

53. The bookcase has now been returned to its owner and the plaintiff is at a loss of STG£31,533.00.

54. It had not been disputed on behalf of the defendants that this loss has been a direct consequence of the defendant's (albeit unwitting) breach of contract.

55. *Prima facie* the plaintiff is entitled to recover damages from the defendant in respect of any loss or damage which it has sustained as a result of the defendant's breach of contract. This is so provided that such losses would reasonably have been within the contemplation of both parties at the time when they made the agreement.

56. At that time both parties knew, or ought to have known that if the contract failed then any sums expended by the plaintiffs towards restoring the bookcase would be lost. The plaintiff's financial loss of STG£31,533.00 has flowed directly from the failure of the contract and, *prima facie*, it is entitled to recover its loss by way of damages from the defendant (See *Hadley v. Baxendale* [1854] 9 E.X.341 and *Mason v. Burnighan* [1949] 2 K.B.545).

57. It has been argued on behalf of the defendant that the loss sustained by the plaintiff in restoring the bookcase was caused or contributed to by the plaintiff's negligence in failing to check the authenticity of the bookcase before its purchase or before it had been fully restored.

58. Having considered the evidence of Mr. Synge and in particular the evidence of Mr. Julian Radcliffe who is the proprietor of the Art Loss Register I am satisfied that in January 2000 it was not the practice of reputable dealers in antique furniture and paintings to consult the Art Loss Register before purchasing furniture.

59. Mr. Fintan Daly had taken the bookcase to Messrs Sotheby's for the purpose of valuation on the 9th December, 1999. The bookcase was valued by Sotheby's which is an internationally renowned firm which specialises in the sale and purchase of fine art and furniture.

60. Messrs Sotheby's offered to take the bookcase to London and put it up for sale there. Their letter containing this offer did not suggest that an authenticity check should be carried out in respect of the bookcase.

61. This is by no means conclusive as to practice in 1999 (since Sotheby's were merely conducting a valuation on the bookcase). However it tends to support the testimony of Mr. Synge and Mr. Radcliffe as to the practice at that time and at the beginning of 2000 and it is that testimony which I accept on that issue.

62. In the circumstances then I am not satisfied that the defendant has discharged the onus which rests upon him to show that the

plaintiff has been guilty of negligence of the kind which would have caused or contributed to its losses.

63. It follows therefore that the plaintiff is entitled to recover the sum of STG£31,533.00 by way of damages from the defendant.

64. The plaintiff has also claimed interest arising out of the failure of the defendant to make good the plaintiff's losses between the date when the plaintiff first claimed damages and the date of trial.

65. The award of interest in these circumstances is discretionary and I do not in the circumstances of this case consider that it should be an appropriate exercise of the court's discretion to direct payment of interest.

66. There must therefore be judgment for the plaintiff in the sum of STG£111,533.00.