20/79

SUPREME COURT OF VICTORIA — FULL COURT

DODD v TAYLOR

Young CJ, Starke and Marks JJ

15 November 1978 — [1979] VicRp 22; [1979] VR 228

MOTOR CAR TRADER – MOTOR VEHICLE SOLD TO PURCHASER BY MOTOR CAR TRADER – NO WRITTEN AGREEMENT MADE – APPLICATION TO RESCIND AGREEMENT MADE – APPLICATION DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR TRADERS ACT* 1973, S30.

1. The *Motor Car Traders Act* ('Act') is mostly concerned with the regulation of motor car traders and not with the contractual relationships between the traders and those who trade with them. Section 30 of the Act is however an exception. It is concerned amongst other things to give certain rights to those who purchase motor cars from motor car traders and one of those rights is to apply to a Magistrates' Court for an order for the rescission of the sale of the motor car if the events described in sub-s(4) of the Act are made out.

2. The true meaning of sub-s(6) of the Act is that it confers authority upon the Court to make the orders referred to in the sub-section but does not require an order that the sale in question be rescinded as a matter of course merely because the facts giving rise to the jurisdiction to make an order are established. Reasons for this conclusion are derived from the context rather than from the use of the word "may". The context puts the matter beyond doubt. Thus if the Court were obliged to order that the sale be rescinded in any given case, there would be no point in hearing the purchaser or affording any other person likely to be affected by the order an opportunity of being heard. But an order may only be made after those steps have been taken. Further, the power conferred by the sub-section is a novel power, superimposed, so to speak, upon the law of contract to deal with one class of contract only, viz, contracts for the purchase of motor cars. Those are contracts which commonly involve financial arrangements in which a third party provides the finance. Indeed s30 recognises as much. It is not to be supposed that Parliament would, regardless of any other considerations, require a Court to order that a sale be rescinded simply because the jurisdictional facts giving rise to the authority so to order are established. It is not difficult to imagine injustices that might be done if that meaning were given to the sub-section.

3. Sub-section (6) of the Act authorises the Magistrates' Court to make the orders set out in the sub-section upon an application made under sub-s(4). The Court may only do so after hearing the purchaser and after affording any other person likely to be affected by any order made an opportunity of being heard. In the present case the Magistrate appears to have thought that an order that the sale be rescinded could only be made if the applicant had been prejudiced or disadvantaged.
***Genevezos v Petrovic* [1978] VicRp 3; (1978) VR 17, overruled.**

4. When an applicant makes an application pursuant to sub-s(4) he must prove the jurisdictional facts, e.g. as in this case, that the agreement was not in writing. If no more appears, the applicant will be entitled to an order rescinding the sale. He will be entitled to an order rescinding the sale because he has shown, for example, that a motor car has been sold otherwise than by an agreement that complied with sub-s(1). There is no need to import into the section a requirement that an applicant show that he has been prejudiced or disadvantaged. It may be of course, that more will appear than that the jurisdictional facts are established and in any event sub-s(6) only authorises the magistrate to make an order after he has afforded the purchaser and the other persons therein specified an opportunity of being heard. Accordingly the magistrate is obliged to consider whether, on appropriate evidence being given, an applicant's *prima facie* entitlement to an order might be displaced and his application refused.

5. In the present case the applicant sought to lead evidence as to the terms of the contract in order to support paragraph 3 of his application. The applicant should have been allowed to prove the full terms of what he alleged was the agreement because the proper interpretation of s30(1) is that the whole of the agreement between the parties must be in writing. The evidence the applicant desired to lead was clearly admissible in support of his proof that there had been an agreement which did not comply in form with s30(1). The Magistrate declined to receive such evidence. In our opinion, he was in error in doing so.

6. Upon the applicant establishing that s30(1) had not been complied with, he became *prima facie* entitled to an order rescinding the sale. It may then be that the respondent is unable to advance any reason why that *prima facie* entitlement should not be acted upon. If, however, a reason were advanced the full terms of the agreement between the parties might be relevant to the exercise of the Court's discretion in making or refusing to make an order. It appears from s30(8) that in summary the principles to be applied in making orders under sub-s(6) include a consideration of the question whether it is possible to restore all parties to the position they were in before the agreement of sale was made. In a consideration of this question the full terms of any agreement entered into by the parties are clearly relevant.

THE COURT: *[After referring to the application and Section 30 of the Act, continued]* ... the application came on for hearing in the Magistrates' Court on 12 May 1978. The applicant and the respondent were represented by counsel. Counsel for the applicant opened the case and indicated that the applicant had purchased a truck from the respondent pursuant to an agreement which had not been embodied in writing and that thereby he had suffered prejudice. Then he called upon Counsel for the respondent to state the defences upon which he proposed to rely. Counsel for the respondent indicated that he would contend that the applicant had not suffered any prejudice due to non-compliance with the provisions of s30 and that the misrepresentations alleged in the application had not been made and if they had been made (which was not admitted) they were not false. This statement was curious, for no misrepresentations were *eo nomine* alleged in the application. It seems however that reference was probably intended to what were alleged by paragraph 3 to be "express terms" and which in the case of an oral agreement might well have been regarded as representations.

The applicant gave evidence on oath. He said that in March 1978, he had purchased a furniture van from the respondent for $10,500. When he went to the respondent's premises to inspect the van with a view to purchase, the respondent (who was admittedly a motor car trader within the definition in s2 of the Act) told him, that he had removed and fixed the gear box and done up the engine. The respondent also told the applicant that he (the respondent) could obtain finance for the applicant to buy the van, provided that the applicant's parents guaranteed the loan. The applicant was also told that the van was a 1971 model. He agreed to buy the van. The next day the applicant saw a representative of a company named Addpluss Finance Pty Ltd when he and his parents signed various documents including a memorandum of contract pursuant to the *Money Lenders Act*. Some time later Addpluss Finance Pty Ltd informed the respondent that it had approved a loan to the applicant and the respondent undertook to inform the applicant of this fact. Addpluss Finance Pty Ltd asked the respondent to deliver the van's registration papers to it. This was done, the Certificate of Registration showing Addpluss Finance Pty Ltd as the "proprietor". Addpluss Finance Pty Ltd paid the Money lent to the applicant direct to the respondent. The van was delivered to the applicant but no document embodying the agreement was delivered. It was common ground that the agreement had not been reduced to writing. Subsequently, the applicant received from Addpluss Finance Pty Ltd notice that it had assigned and transferred the "loan" to Eastrock Finance Corporation Pty Ltd.

After the applicant had been cross-examined the Magistrate drew attention to the fact that the order sought could affect the rights of Addpluss Finance Pty Ltd and adjourned the further hearing so that consideration might be given by counsel for the applicant to the question what steps should be taken. The Magistrate was clearly right and we should have thought that since the applicant sought an order in terms of Part B of his application, he should certainly have addressed his notice not only to the motor car trader, but also to the finance company.

Upon the resumption of the hearing counsel for the applicant said that instead of seeking the order set out in the application he would ask for an order that the loan agreement between the applicant and Addpluss Finance Pty Ltd be set aside. No formal amendment of the application was sought but it may be observed that such an application would *a fortiori* require the presence of Addpluss Finance Pty Ltd. It was however suggested to the Magistrate that he might determine that the financial agreement between Addpluss Finance Pty Ltd and the applicant was not a "collateral credit agreement" within s30 of the Act and that if that were so there would be no need to give Addpluss Finance Pty Ltd an opportunity of being heard. The suggestion was evidently adopted but it should not have been. If the Magistrate had decided that the financial agreement was *prima facie* a collateral credit agreement, the evidence would have had to be given all over again after Addpluss Finance Pty Ltd had been made a party, but even if the Magistrate had

decided that the financial agreement was not a collateral credit agreement, *non constat* that the rights of Addpluss Finance Pty Ltd would not have been affected by other orders sought by the applicant, e.g. rescission of the sale of the van. Whether these rights would have been affected would depend upon the terms of the agreement between the applicant and Addpluss Finance Pty Ltd.

After hearing argument the Magistrate then indicated that he did not think that the financial agreement between Addpluss Finance Pty Ltd and the applicant was a collateral credit agreement within the Act, but that if he were to rescind the sale of the van, Addpluss Finance Pty Ltd would be affected because of the Bill of Sale over the van. Counsel for the applicant then agreed and the Magistrate adjourned the further hearing of the application in order that all parties who might be affected by any order made could be served with notice of the application. He ordered the notice of application to be served on the applicant's parents, on Addpluss Finance Pty Ltd and on Eastrock Finance Corporation Pty Ltd.

Upon the adjourned hearing after proof of service no further representation was sought. The Magistrate then said that he had decided that there was no collateral credit agreement within the meaning of s30. Counsel for the applicant then sought to call evidence on the question whether an order for rescission should be made. He sought to call evidence in particular as to the terms of the contract and as to how the applicant had suffered "prejudice and disadvantage" (words taken from the judgment of Harris J in *Genevezos v Petrovic* [1978] VicRp 3; (1978) VR 17). It is not clear from the material why the evidence was not led from the applicant when he was first called. After some debate the Magistrate allowed the applicant to be recalled. It is unnecessary to detail all of his evidence. It is sufficient to say that after argument the Magistrate refused to allow counsel for the applicant to lead evidence as to the terms of the agreement entered into with the respondent for the sale of the van. Counsel sought also to rely upon this evidence for the purpose of showing that the applicant had suffered a prejudice and disadvantage. The Magistrate then dismissed the application.

The order nisi to review the Magistrate's decision states the following grounds:

"1. The Magistrate erred in that he held:
(a) that the requirement of Section 30(1)(a) of the *Motor Car Traders Act* (1973) that the agreement be in writing required only the matters referred to in clauses (b) to (g) (both inclusive) of Section 30(1) to be in writing;
(b) that evidence as to what were the express terms of the agreement was irrelevant to the Application except insofar as those terms related to the matters referred to in clauses (b) to (g) (both inclusive) of Section 30(1) of the said Act;
(c) that before rescinding an agreement for the sale of a motor car pursuant to the powers conferred upon him by s30(4) of the said Act he had to be satisfied that the Applicant had suffered prejudice by reason of the non-compliance with such Act;
(d) that the agreement entered into between the Applicant and AddPluss Finance Pty Ltd, on the 23rd March 1978, was not a 'Collateral Credit Agreement' within the meaning of Section 30(10) of the said Act;
(e) without having first ordered a rescission of the said agreement under section 30(4) of the said Act, that the agreement entered into between the Applicant and Addpluss Finance Pty Ltd on the 23rd March 1978, was not a 'Collateral Credit Agreement' within the meaning of section 30(10) of the Act;
(f) that in order to find that a 'Collateral Credit Agreement' was 'arranged' or 'procured' within the meaning of section 30(10) of the said Act he needed to be satisfied that the Respondent was 'to get something' for arranging or procuring the loan on behalf of Addpluss Finance Pty Ltd.

2. The Magistrate erred in that he refused to admit evidence that the said agreement made between the Applicant and the Respondent included the warranties given by the Respondent to the Applicant regarding the said motor vehicle.

3. The Magistrate erred in that he refused to admit evidence as to what were the express terms of the said agreement.

4. The Magistrate erred in that he failed to find:
(a) that the applicant was prejudiced and/or disadvantaged by the said Agreement not being in writing;
(b) that the Applicant was prejudiced and/or disadvantaged by entering into an Agreement which did not comply with the terms of Section 30(1) of the said Act;

(c) that the Applicant was prejudiced and/or disadvantaged because he did not have a written agreement containing all of the express terms of the said agreement;
(d) what were the express terms of the said Agreement to purchase the motor vehicle.

5. That the Magistrate ought to have found that it was not necessary for the applicant to adduce evidence that he had suffered prejudice and/or disadvantage as a consequence of the Respondent's failure to comply with the provisions of Section 30 of the said Act before he could exercise his discretion and rescind the said Agreement."

Mr Gillard, who appeared for the applicant in this Court, although he had not appeared for him in the Court below, made an elaborate analysis of s30 in support of his principal submissions which was that once it was shown that the basis for the exercise of the jurisdiction conferred by s30(6) existed, the Court was obliged to make an order rescinding the sale and had no discretion to refuse to make such an order.

The *Motor Car Traders Act* is mostly concerned with the regulation of motor car traders and not with the contractual relationships between the traders and those who trade with them. Section 30 is however an exception. It is concerned amongst other things to give certain rights to those who purchase motor cars from motor car traders and one of those rights is to apply to a Magistrates' Court for an order for the rescission of the sale of the motor car if the events described in sub-s(4) are made out. Having conferred that right upon a purchaser it was necessary for the section to confer jurisdiction or authority upon the Magistrates' Courts to make the appropriate order. This is done by sub-s(6) although the power to order the rescission of a sale would no doubt, in the absence of sub-s(6), have been implied from sub-s(4). Sub-section (6) however, has other tasks to perform as well and it was therefore natural and desirable that the authority of the Court should be spelled out in sub-s(6) rather than left to implication.

In spelling out the authority of the Magistrates' Courts to make orders upon applications made pursuant to sub-s(4), it seems a very natural use of language to say that the Court "may order". If the draftsman has intended that the Court should have no discretion to refuse to make an order, presumably the expression "shall order" would have been used. "'May'", unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used just as 'shall' which is a mandatory word, may be deprived of its obligatory force and become permissive in the context in which it appears": per Williams J in *Johnsons Tyne Foundry Pty Ltd v Shire of Maffra* [1948] HCA 46; (1948) 77 CLR 544 at p568. Mr Gillard referred us to a number of authorities which, he submitted, contained examples of the word "may" being construed as "must".

He referred at length to the well-known case of *Julius v Bishop of Oxford* (1880) 5 AC 214; [1874-80] All ER 43; 49 LJQB 577; 42 LT 546. But the conclusion in any given case does not depend upon the abstract meaning of the word "may". In those cases where "may" has become "must" it is because the context in which the word is found requires that meaning to be given to it. The context may indicate that the word "may" not only confers authority, but requires the authority to be exercised in certain circumstances: see *Finance Facilities Pty Ltd v FCT* [1971] HCA 12; (1971) 127 CLR 106 at pp134-5; 45 ALJR 241; 2 ATR 194 per Windeyer J.

In the present case we are satisfied that the true meaning of sub-s(6) is that it confers authority upon the Court to make the orders referred to in the sub-section but does not require an order that the sale in question be rescinded as a matter of course merely because the facts giving rise to the jurisdiction to make an order are established. Our reasons for this conclusion are derived from the context rather than from the use of the word "may". The context puts the matter beyond doubt. Thus if the Court were obliged to order that the sale be rescinded in any given case, there would be no point in hearing the purchaser or affording any other person likely to be affected by the order an opportunity of being heard. But an order may only be made after those steps have been taken.

Further, the power conferred by the sub-section is a novel power, superimposed, so to speak, upon the law of contract to deal with one class of contract only, viz, contracts for the purchase of motor cars. Those are contracts which commonly involve financial arrangements in which a third party provides the finance. Indeed s30 recognises as much. It is not to be supposed that Parliament would, regardless of any other considerations, require a Court to order that a

sale be rescinded simply because the jurisdictional facts giving rise to the authority so to order are established. It is not difficult to imagine injustices that might be done if that meaning were given to the sub-section.

A further reason for concluding that sub-s(6) confers authority but does not require it to be exercised is to be found in sub-s(9). The last three lines of that sub-section imply that there may be other facts which constitute a bar to the making of an order than the impossibility of fully restoring the parties to the positions that existed prior to the sale. If, for instance, they could not be restored at all to the position that existed prior to the sale, that fact might, by implication, be a bar to the making of an order, consistently with the concluding words.

We do not think that any useful purpose would be served by referring to the authorities in detail. Modern authority may be said to begin with *Julius v Bishop of Oxford*, *supra*, but reference to *Stroud's Judicial Dictionary* s.v."May" will show that there are as many instances where "may" (or some equivalent expression) has been construed as imposing an obligatory duty as there are of its conferring a discretionary or enabling power.

Sub-section (6) therefore authorises Magistrates' Courts to make the orders set out in the sub-section upon an application made under sub-s(4). The Court may only do so after hearing the purchaser and after affording any other person likely to be affected by any order made an opportunity of being heard. In the present case the Magistrate appears to have thought that an order that the sale be rescinded could only be made if the applicant had been prejudiced or disadvantaged. Doubtless the Magistrate took the words "prejudiced or disadvantaged" from the decision of Harris J in *Genevezos v Petrovic*, *supra*.

In that case His Honour appears to have held that before an applicant was entitled to an Order under s30(6) he must show that he was in some way prejudiced or disadvantaged by reason of the non-compliance with the requirements of s30(1). See (1978) VR at pp24, 28 and 29. In so far as His Honour so held we cannot with respect agree.

When an applicant makes an application pursuant to sub-s(4) he must, of course, prove the jurisdictional facts, e.g. as in this case, that the agreement was not in writing. If no more appears, the applicant will be entitled to an order rescinding the sale. He will be entitled to an order rescinding the sale because he has shown, for example, that a motor car has been sold otherwise than by an agreement that complied with sub-s(1). There is no need to import into the section a requirement that an applicant show that he has been prejudiced or disadvantaged. It may be of course, that more will appear than that the jurisdictional facts are established and in any event sub-s(6) only authorises the magistrate to make an order after he has afforded the purchaser and the other persons therein specified an opportunity of being heard. Accordingly the magistrate is obliged to consider whether, on appropriate evidence being given, an applicant's *prima facie* entitlement to an order might be displaced and his application refused.

It is not possible to prescribe in advance all the matters which might in any given case be relevant to the exercise of the discretion to make or refuse an order. Each case must be considered in the light of its own facts and the magistrate has a wide discretion. Some guidance may be obtained from sub-s(8), for that sub section directs that so far as is possible the Court is to have regard to the principles in paragraphs (a) to (d) in making any orders under sub-s(6). It may also be gleaned from the section that some considerations are not necessarily a bar to the making of an order, for example, the mere loss of the transaction or the circumstance that the parties cannot be fully restored to the positions that existed prior to the sale. Of course, if the magistrate receives evidence which might militate against the making of an order he would be obliged to consider any countervailing circumstances which the applicant desired to put forward. In *Genevezos v Petrovic supra,* Harris J made a number of observations inconsistent with this approach. We shall not analyse the whole of His Honour's judgment in detail. It is sufficient to say that in so far as His Honour's judgment is inconsistent with this judgment it should not be followed.

In the present case the applicant sought to lead evidence as to the terms of the contract in order to support paragraph 3 of his application. The applicant should have been allowed to prove the full terms of what he alleged was the agreement because the proper interpretation of s30(1) is that the whole of the agreement between the parties must be in writing. The evidence

the applicant desired to lead was clearly admissible in support of his proof that there had been an agreement which did not comply in form with s30(1). The Magistrate declined to receive such evidence. In our opinion, he was in error in doing so. Indeed Mr Burnside, who appeared for the respondent, conceded as much in this Court.

It must, however, be observed that the applicant sought to lead evidence of the full terms of the contract for a dual purpose. He sought to prove not only that there had been a failure to comply with the requirements of s30(1) but also that the respondent was in breach of certain of the terms of the agreement. We must, however, not be taken as asserting that having regard to the interpretation we have placed on sub-s(6) it was necessary for the applicant to prove that the respondent was in breach of the agreement before an order rescinding the sale could be made. Upon the applicant establishing that s30(1) had not been complied with, he became *prima facie* entitled to an order rescinding the sale.

It may then be that the respondent is unable to advance any reason why that *prima facie* entitlement should not be acted upon. If, however, a reason were advanced the full terms of the agreement between the parties might be relevant to the exercise of the Court's discretion in making or refusing to make an order. It appears from s30(8) that in summary the principles to be applied in making orders under sub-s(6) include a consideration of the question whether it is possible to restore all parties to the position they were in before the agreement of sale was made. In a consideration of this question the full terms of any agreement entered into by the parties are clearly relevant.

Mr Burnside frankly conceded that for the reason just referred to, if for no other reason, the order nisi would have to be made absolute and the matter remitted for rehearing. But it would be necessary to order a rehearing in any event because, for the reasons already stated, the Magistrate relying upon *Genevezos v Petrovic*, *supra*, misconceived the effect of the applicant's establishment of the fact that the agreement with the respondent had not been in writing thereby entitling him *prima facie* to an order that the sale be rescinded.

Turning to the grounds of the order nisi we are of the opinion that grounds 1(a), (b) and (c), 2 and 3 at least are made out. It will accordingly be necessary for the matter to be reheard *de novo* and in all the circumstances we think that it should be heard before another magistrate. It thus becomes unnecessary for us to consider the other grounds of the order nisi or to consider whether the Magistrate was justified in his conclusion that the agreement between the applicant and Addpluss Finance Pty Ltd was not a "collateral credit agreement" within the meaning of s30(1). As the matter is to be reheard it is undesirable that we should discuss that question, but we are not to be understood as having formed a view that the Magistrate was correct in his conclusion. The matter was not argued before us and we express no views upon it.
