

74/82

SUPREME COURT OF VICTORIA

BRAKEY v THE MOTOR CAR TRADERS COMMITTEE

O'Bryan J

18 October 1982

SALE OF MOTOR VEHICLE – OWNER AGREED TO ACCEPT A CERTAIN SUM – VEHICLE SOLD TO THIRD PARTY – OWNER NOT REIMBURSED – CLAIM MADE BY OWNER ON GUARANTEE FUND – CLAIM REFUSED – APPEAL TO MAGISTRATE – APPEAL DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR TRADERS ACT 1973, S49.

B. appealed to a Magistrates' Court pursuant to S49(4) of the *Motor Car Traders Act 1973* against the Committee's refusal of a claim made by him against the Guarantee Fund. The Magistrate dismissed appeal. Upon appeal—

HELD: Order nisi discharged.

The transaction did not fall within Part V of the Act.

FACTS: B approached Road Mobiles Pty Ltd re sale of his Ferrari motor car. Roadmobiles took possession on 19th March 1980. B believed he had sold the car for. 29,500.00 and received \$500.00 deposit on 19th March 1980. Balance due in April was never received. Roadmobiles received \$33,750.00 from AGC on the same day, under an agreement known as AGC Bailment Plan. It was argued that the car was purchased by AGC from B, through its agent, Roadmobiles Pty Ltd. Under Part V of the Act, a trader must keep a Trust Account and account to a person on whose behalf he has sold a car, for the proceeds of the transaction (s32). The trader must have an authority in writing (a disposal authority) to sell the car. Such authority was not obtained in this case. The Magistrate found that the contract was finalized on 19th March 1980, although the documents were signed on 22nd March. This finding was supported by the evidence and was not challenged.

O'BRYAN J: ... Mr Goldberg argued that the learned Magistrate ought to have found that on the 19th March Roadmobiles was acting as an agent to effect a sale of the car from Brakey, as vendor, to AGC as purchaser. When the applicant dealt with Roadmobiles, Mr Goldberg contended, he dealt with Roadmobiles as agent for an undisclosed principal AGC. The consequence of upholding Mr Goldberg's analysis of the transaction on the 19th March would mean that one sale of the car took place, from Brakey to AGC. On that analysis however, one might ask, what was the consideration for the sale of the car? The vendor Brakey said that he was prepared to sell his car for \$29,500 and that is the sum he agreed to accept. The purchaser, AGC through Heap said it paid \$33,750 to purchase the car. One does not have a binding contract for the sale of goods unless the three essential elements, the parties, the subject matter and the price are fixed with certainty and the subject of concluded agreement. *Hall v Busst* [1960] HCA 84; (1960) 104 CLR 206, particularly at 222; [1961] ALR 508; 34 ALJR 332. The fact that Brakey accepted \$29,500 for the car from Roadmobiles and AGC agreed to pay to Roadmobiles \$33,750 rather suggests that two sales of the car were made on the 19th March, the first from Brakey to Roadmobiles, the second from Roadmobiles to AGC and the difference between the two amounts represent Roadmobiles' profit. Under the AGC Bailment Plan, Roadmobiles might receive approval from AGC to purchase used goods (including motor vehicles) from the owner, as agent for AGC but without necessarily disclosing the fact of agency. The terms of Clause 6 of the Bailment Plan are important. It reads:

"All used goods ordered in accordance with an approval granted by AGC shall be purchased by bailee (that is Roadmobiles) from the owner thereof as agent for AGC – and shall be paid for in the first instance by bailee as agent for AGC but AGC shall reimburse bailee as hereinafter provided etc."

The evidence showed, quite clearly, that on the 19th March Roadmobiles had requested AGC to reimburse it in accordance with the provisions of the AGC Bailment Plan agreement to the extent of \$36,000 in respect of the purchase of the applicant's Ferrari car, AGC purchased the Ferrari on the 19th March after approving the purchase of the car by Roadmobiles for \$33,750. A cheque for that sum was paid to Roadmobiles on the same day.

Mr Goldberg submitted that there was one contract made on the 19th March between the

applicant and AGC through the agency of Roadmobiles. I am not disposed to accept Mr Goldberg's submission, with respect, essentially for three reasons. In the first place, the evidence seems to show that two different contracts were made on the 19th March. There was in the first instance a terms contract entered into between the applicant and Roadmobiles for the sale of the car for \$29,500. Such an agreement, in itself, contradicts a Bailment Plan purchase of the car by Roadmobiles as agent for AGC. Then, there was an immediate cash sale of the car by Roadmobiles to AGC. A second reason is the fact that Roadmobiles failed to pay the applicant for the car in the first instance. This points strongly in favour of finding that Roadmobiles had made an independent contract with AGC outside the Bailment Plan. Thirdly, the difference between the price offered to Brakey by Roadmobiles and the price offered by AGC for the car is another circumstance more consistent with two contracts than one.

Unless one could be satisfied that one contract was made on the 19th March the applicant cannot succeed against the guarantee fund. The applicant must show that Roadmobiles sold the Ferrari for or on his behalf to bring into operation ss32 and 33 of the Act. But, even assuming that the applicant could prove that he sold his car to AGC on the 19th March through Roadmobiles as agent for AGC under the Bailment Plan, senior counsel contends that the applicant still cannot succeed against the respondent because the respondent was not selling the car for or on behalf of the applicant.

There was no evidence which showed that Roadmobiles obtained a disposal authority from the applicant as owner of the car. In my view, Roadmobiles never became an agent for the applicant to sell the applicant's car. The applicant's own account of the matter negatives such an arrangement and the absence of a disposal authority is further evidence to the contrary. If the applicant sold his motor car to AGC through Roadmobiles as agent, I would not conclude that Roadmobiles sold or otherwise disposed of the car to AGC for or on behalf of the applicant. Roadmobiles' role would have been that of agent to AGC and not that of agent to the applicant. I am not persuaded that the nature of the transaction, whatever form it took, fell within Part V of the *Motor Car Traders Act*. It follows, of course, that I would not disturb the finding that there was not a breach of Part V of the Act by Roadmobiles. I have reached the conclusion that the applicant cannot succeed on any of the grounds in the order nisi, the order nisi must be discharged with costs. Certify for counsel.
