

23/91

## SUPREME COURT OF VICTORIA

**UNITED TOOL & DIE MAKERS PTY LTD (in liq) v JV MARINE MOTORS Pty Ltd**

Beach J

5 February 1991 — [1992] VicRp 16; [1992] 1 VR 266; (1991) 9 ACLC 314

**COMPANIES – COMPANY WOUND UP – LIQUIDATOR APPOINTED – COMPANY GOODS SOLD BY DIRECTOR AFTER LIQUIDATION – WHETHER LIQUIDATOR OWNER OF GOODS – WHETHER LIQUIDATOR COULD CONSENT TO SALE – WHETHER LIQUIDATOR ESTOPPED FROM DENYING SELLER'S AUTHORITY TO SELL DUE TO INACTION – WHETHER GOODS ACT 1958 SUBJECT TO COMPANIES (VICTORIA) CODE: COMPANIES (VICTORIA) CODE, S368(1); GOODS ACT 1958, S27.**

Section 368(1) of the *Companies (Victoria) Code* ('Code') provides:

Any disposition of property of the company, other than an exempt disposition ... made after the commencement of the winding up by the court is, unless the court otherwise orders, void."

Section 27 of the *Goods Act* 1958 provides:

"Subject to the provisions of this part and of any express enactment, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is, by his conduct, precluded from denying the seller's authority to sell."

UT P/L was wound up under the provisions of the *Code* and a liquidator appointed. In the course of the liquidation, the liquidator sought to recover a cabin cruiser which was in the possession of a Director of UT P/L. However, instead of delivering the boat to the liquidator, the Director sold it to JVM P/L. Subsequently, the liquidator sought to recover the boat or its value from JVM P/L; however, a magistrate dismissed the claim on the ground that s368(1) of the *Code* did not prevent JVM P/L obtaining a good title to the boat.

**HELD: Order absolute. Judgment entered in favour of the liquidator for return of the boat or its value.**

**1. As s368(1) of the Code is an express enactment dealing with the disposition of property of a company, it overrides the provisions of s27 of the Goods Act 1958.**

**2. Upon liquidation of a company, the liquidator does not become the owner of the company's goods but is no more than an officer of the court charged with the duty of dealing with the company's assets in accordance with the appropriate provisions of the Code.**

**3. Accordingly, the liquidator could not have consented to the sale of the boat as owner nor could his failure to take possession of the boat before sale preclude him from denying the seller's authority to sell.**

*Ayerst v C & K (Construction) Ltd* (1976) AC 167; [1975] 2 All ER 537, applied.

**BEACH J:** [1] This is the return of an order nisi to review the decision of the Melbourne Magistrates' Court delivered on 12 April 1990, whereby the magistrate dismissed the plaintiff's claim and ordered that the plaintiff pay the defendant's costs, fixed at \$2,587.00. United Tool and Die Makers Pty Ltd (the company) was at all material times the owner of a V18 Delux Aztecrafter cabin cruiser (the boat). By order of this court made on 4 July 1985, the company was wound up under the provisions of the *Company (Victoria) Code* (the Code), and Dennis John Cogle was appointed liquidator for the purposes of the winding up.

At the time the company was wound up, the boat was registered in the name of a director of the company, one LB Szancho, and was in Szancho's possession. For reasons which do not appear in the material before this court or the Magistrates' Court, the liquidator did not become aware of the fact that the company owned the boat until the month of September 1987. On 30 October 1987 the liquidator wrote to Szancho, informing him that the boat was an asset of the company and requiring him to deliver the boat to the liquidator's agent. On 5 November 1987 the

liquidator wrote a further letter to Szantho, repeating his demand and threatening to take legal proceedings against Szantho.

On 19 December 1987 Szantho sold the boat to the defendant, JV Marine Motors Pty Ltd. At the time Szantho sold the boat to the defendant he informed the defendant that he was the owner of the boat, and produced the [2] certificate of registration in respect of the boat which, on its face, confirmed the fact that he was the boat's owner. Before the sale was completed, an employee of the defendant telephoned the Road Traffic Authority and confirmed the fact that Szantho was registered by the Authority and confirmed the fact that Szantho was registered by the Authority as the owner of the boat. There can be no doubt but that the defendant was a *bona fide* purchaser of the boat.

On 18 July 1989 the liquidator instituted proceedings against the defendant out of the Magistrates' Court at Melbourne, seeking to recover the boat or its value. At the hearing before the Magistrates' Court counsel for the liquidator founded his case on the provisions of s368(1) of the *Code*, which states:-

"Any disposition of property of the company, other than an exempt disposition, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court is, unless the court otherwise orders, void."

There was no suggestion that the sale of the boat was an exempt disposition. Counsel for the defendant, on the other hand, contended that s358 of the *Code* had no application to the case but that the relevant legislative provision in relation to the matter was s27 of the *Goods Act* 1958 which states:-

"Subject to the provisions of this part and of any express enactment, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is, by his conduct, precluded from denying the seller's authority to sell."

Counsel for the defendant contended that the behaviour of the liquidator in failing to ascertain that the company was the owner of the boat prior to the month of September [3] 1987, and in allowing Szantho to hold himself out as the owner of the boat, including being registered as the owner of the boat, until such time as he sold the boat to the defendant, was such as to preclude the liquidator from denying Szantho's authority to sell the boat.

The magistrate's decision appears in para.2 of the affidavit sworn on behalf of the liquidator in support of the application for the order nisi, and I quote:-

"In this case I accept the submissions by counsel for the defendant in relation to s358 of the *Companies (Victoria) Code*. There is no constitutional issue involved. Section 368 of the *Companies (Victoria) Code* does not prevent s27 of the *Goods Act* operating to confer title to the defendant. There will be an order that the claim be dismissed and the complainant pay the defendant's costs fixed at \$2,587.00."

On 14 May 1990 the liquidator obtained an order nisi to review the decision of the magistrate on the grounds that:-

"(a) the magistrate was in error in not holding that s368(1) of the *Companies (Victoria) Code* applied to the exclusion of s27 of the *Goods Act* 1958;

(b) the magistrate was in error in not holding that, by virtue of s368(1) of the *Companies (Victoria) Code*, the disposition of property the subject of the proceeding was void;

(c) if the matter was properly to be determined by reference to s27 of the *Goods Act* 1958 and not s368(1) of the *Companies (Victoria) Code*, the magistrate was in error in failing to determine the question whether, for the purpose of s27, the applicant was precluded by the conduct of the liquidator from denying the authority of the director Szantho to sell;

[4] (d) the magistrate was in error in failing to give adequate reasons for her decision".

The defendant's assertion that s27 of the *Goods Act* is applicable to the sale of the boat is based on the proposition that, upon the liquidation of a company, the liquidator immediately

becomes the owner of the goods of the company. But is that proposition correct? Does the liquidator become the owner of the company's goods, or does ownership in the goods remain with the company, with the liquidator having the sole power to deal with the goods?

This matter was considered by Mellish LJ in *In re Oriental Inland Steam Co* (1874) LR 9 LRCh App 557. At p560 his Lordship said:-

"No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding-up order, all the powers of the directors of the company to carry on the trade or deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor."

In *Bank of Scotland v Macleod* [1914] UKHL 3; [1914] AC 311; [1914] SC (HL) 1; (1914) 1 SLT 111 Lord Kinnear said, at AC p321:-

"The effect of the *Bankruptcy Act* is to divest the bankrupt, and to invest the trustee in the entire estate; and it is not surprising that questions should have arisen as to the extent to which this transference of the legal title might or might not involve corresponding transference of all equitable qualifications which might have affected the estate in [5] the hands of the bankrupt. But the liquidators of a limited company are not vested in the estate to the exclusion of the company. The estate remains vested in the company itself, and the liquidators are mere administrators of it for the purpose prescribed by the state, and that is for equal distribution among creditors."

The matter was considered more recently by the House of Lords in *Ayerst v C & K (Construction) Ltd* (1976) AC 167; [1975] 2 All ER 537. At AC p176 Lord Diplock said:- [*His Honour quoted a passage from this judgment and continued*] .... [7] The provisions of Part XII of the Code bear sufficient similarity to the provisions of Part V of the *Companies Act* 1948 (UK) to make the observations of Lord Diplock [8] pertinent to the present case. Based upon the authorities to which I have referred, and the provisions of Part XII of the *Code* itself, the conclusion I have arrived at in the matter is that the liquidator of a company does not become the owner of the goods of the company. He is no more than an officer of the court charged with the duty of dealing with the company's assets in accordance with the appropriate provisions of the *Code*. In that situation s27 of the *Goods Act* can have no application to him. But even if that finding is erroneous, it is nevertheless my opinion that s27 of the *Goods Act* has no application to the present case. In the first place s368(1) of the *Code* is an express enactment dealing with the disposition of property of a company. In that situation it must override the provisions of s27 of the *Goods Act*.

In the second place, in my opinion mere inaction on the part of a liquidator cannot, in the circumstances of this case, amount to conduct on his part sufficient to preclude him from denying the seller's authority to sell. In that connection see *Halsbury's Laws of England*, 4th Edition, Volume 41, para.745 and the cases there referred to.

It follows from what I have said thus far that grounds 1, 2 and 3 of the order nisi have been made out. In that situation it is unnecessary for me to deal further with ground 4, save to say that in all cases it is essential that a court, whether constituted by a magistrate or a judge, give clear and adequate reasons for its decision, and in those reasons deals with the issues it is required to determine to arrive at a conclusion in the matter. [9] If the magistrate in the present case said no more than what appears in para.2 of Marchasi's affidavit, it could well be said that she had failed to properly fulfil her function in that regard. In my opinion the appropriate orders to make are the following:

(1) I order that the order nisi be made absolute.

(2) I order that the order made by the Melbourne Magistrates' Court on 12 April 1990, whereby the plaintiff's claim was dismissed and the plaintiff was ordered to pay the defendant's costs of \$2,587.00, be set aside.

(3) I order that the proceeding be remitted to the Melbourne Magistrates' Court, and that the magistrate enter the appropriate judgment in favour of the plaintiff, in accordance with these reasons for judgment – that is that the magistrate enter judgment in favour of the plaintiff either for the return of the boat or the value of the boat.

(4) I order that the applicant's costs of the order to review, including any reserved costs, be taxed and paid by the respondent. I grant to the respondent a certificate under the *Appeal Costs Fund Act*.

Solicitors for the plaintiff: Macmillan Segal and Lenton.

Solicitors for the defendant: Cole and Co.

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