restrict the general principle to completed conveyances of real property.
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COMPANY LAW

SHEARER TRANSPORT CO. PTY. LTD. v. *McGRATH*

The increase in the birth rate of companies in New South Wales coupled with the tightening of funds available for investment is making problems connected with finance of shares of very good general relevance. By s. 148(1) of the New South Wales Companies Act, 1936[1] it is provided, subject to certain exceptions, that

> it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

The section imposes a penalty for breach of the provision.

The provision is designed to prevent unauthorised reductions of capital and to protect creditors against a weakening of the company's resources by indirect means. Although it is clear that prevention is intended, the actual effect of the prohibition was for some time doubtful. In view of the fact that the Act imposed a penalty without expressly stating that any transaction falling within its ambit was invalid the question arose whether such a transaction was permitted on payment of the penalty or whether it was forbidden altogether and consequently void. The question first came before our Courts in 1951 in *Dressy Frocks Pty. Ltd.* v. *Bock*[2] and the decision of the Full Court of the Supreme Court of New South Wales in that case was followed in a recent Victorian case, *Shearer Transport Co. Pty. Ltd.* v. *McGrath.*[3] These cases have established that a transaction which falls within the section does not only invoke the penalty but that the effect of the words "it shall not be lawful" is to render void any such transaction.

Shearer's Case involved two propositions:

(1) that a payment by a company on the basis that it is a loan by the company to another person to enable that person to buy shares in the company held by a third party is void, being both illegal and *ultra vires* (even where the payment is made to the third party direct and not to the person getting the loan) and

(2) that such a payment is recoverable by the company from the third party.

The facts of the case were as follows: The Shearer Transport Co. Pty. Ltd. brought an action against McGrath to recover moneys paid to him by the company following a decision made by McGrath and one Connors, both then being directors of the Company, that the payment should be made as a loan to Connors to assist him in the purchase of McGrath's shares in the company.

It was not disputed that the transaction fell within s. 45 of the Companies Act 1938 (Vic.)[4] (which is identical with s. 148 of the New South Wales Act). What was contended on behalf of the plaintiff was that the transaction, though unlawful, was not avoided nor was it *ultra vires* the company as the company had power to lend. Before dealing with *Dressy Frocks Pty. Ltd.* v. *Bock,*[5] which was directly in point, O'Bryan, J. disposed of the cases relied on by the plaintiff. The first of these was

[1] Act No. 33, 1936 — Act. No. 2, 1955.
[2] (1951) 51 S.R. (N.S.W.) 390.
[3] (1956) A.L.R. 840.
[4] No. 4602 (1938).
[5] (1951) 51 S.R. 390 (N.S.W.).

Spink (Bournemouth) Ltd. v. *Spink*[6] where it was held that if a company contravened s. 45 of the English Companies Act, (1929)[7] by advancing money to a director to enable him to complete his purchase of shares from another director the company would be liable to a fine but the agreement for the sale of the shares was not thereby rendered invalid. The agreement was between Spink and his brother and it seems clear that the validity of that agreement would not be tainted by an unlawful act of the company which was not a party to it. The case is therefore no authority for the proposition that an agreement between a company and a director may stand in the face of an unlawful act by the company, a party to the agreement.

The second case with which O'Bryan dealt was *Victor Battery Co. Ltd.* v. *Curry's Ltd.*[8] This case was criticised by the learned Judge and also by the Full Court of New South Wales in *Dressy Frocks Pty. Ltd.* v. *Bock.*[9] The company which was the defendant in the action had lent three sums totalling £10,000 to the plaintiff company which in turn had used £9,000 of this sum to enable a third party to buy shares in the plaintiff company. The plaintiff company issued a debenture to the defendant company to secure repayment of the £10,000 and an action was brought by it for a declaration that the debenture was void and of no effect as having been issued in contravention of s. 45.[10] The action was dismissed by Roxburgh, J. who held that the section punishes the borrowing company on the footing that the security was and remained valid and that even assuming that the debenture was an illegal contract the plaintiff could have no relief because the maxim *in pari delicto potior est conditio defendentis* applied.

The case is distinguishable on its facts from the Victorian case. The plaintiff was the borrower of money which was used for the purpose of buying its shares. The defendant lender did not contravene the section because none of its shares were involved. The only point where the transaction fell within the ambit of the section was with regard to the security given by the plaintiff company for the moneys borrowed by it. What the plaintiff wanted to do was to say in effect: "The issue of a debenture to me is a contravention of s. 45 and therefore I am released from my obligation" to which the Court replied in effect: "You can't take advantage of your own illegal act so as to benefit from it". In the Victorian case the position was somewhat different. True it is that the plaintiff company wished to recover moneys paid by it unlawfully, but it was not attempting to have its cake and eat it too as was the plaintiff in *Victor Battery Co. Ltd.* v. *Curry's Ltd.*[11]

The case which on its facts is most similar to *Shearer Transport Co. Pty. Ltd.* v. *McGrath*[12] is *Dressy Frocks Pty. Ltd.* v. *Bock.*[13] In that case the company brought an action against Bock who had borrowed money from the company, in order that he might purchase shares in it. The company was aware of the purpose of the loan, and, as in *Shearer's Case,* it was not denied that the transaction fell within s. 148 (1) of the Companies Act, 1936. The contention was put forward by the plaintiff on demurrer that that section

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[6] (1936) Ch. 544.

[7] S. 45 of the English Companies Act (1929) was identical with s. 148 of the N.S.W. Companies Act 1936. Following the decision in *In re V.G.M. Holdings Ltd.* (1942) 1 All E.R. 224 where it was held that the word "purchase" in the section did not include the acquisition of shares by subscription or allotment; the loophole which had thus been revealed was closed, when the Act was redrafted in 1948 the section (54 of the new Act) provides as follows:

" . . . it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company".

The extension of the prohibition to subscriptions for shares and to holding companies has not been adopted in New South Wales.

[8] (1946) Ch. 242.

[9] (1951) 51 S.R. (N.S.W.) 390.

[10] Companies Act, 1929 (Eng.).

[11] (1946) Ch. 242.

[12] (1956) A.L.R. 840.

[13] (1951) 51 S.R. (N.S.W.) 390.

did not prevent a company, which acted in contravention of the provision from recovering the debt contracted. The decision of the Full Court was unanimous that an act done in contravention of the section does not only invoke the penalty imposed but that the section renders a contract falling within it illegal and therefore void. The company was therefore unable to recover the moneys paid by it to the defendant.

Herron, J. said[14] quoting Collins, M.R. in *Harse* v. *Pearl Life Assurance Co.*[15]

> "It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered . . ." In my opinion, this general proposition of law applies to this case, and money lent in contravention of s. 148 cannot be recovered back, as the plaintiff in this case is seeking to do. This proposition involves the further proposition that a contract which is made and carried into effect in contravention of s. 148 is illegal, and, as a consequence, is void.

The above dicta, though referring to a specific instance, are of general application to breaches of statutory provisions.[16] If the doing of an act is forbidden by statute then in the absence of some indication of intention to the contrary the act if done is illegal and void.

On the question, how far is a contract made in contravention of a statute which provides a penalty to be regarded as illegal and void, Herron, J. quoted[17] Jordan, C.J. in *Marks* v. *Jolly*.[18]

> "If the act is prohibited it is illegal whether it be prohibited under a penalty or left as an indictable misdemeanour at common law . . . and if a contract is prohibited by statute it is not only illegal, but void because illegal . . . unless a contrary intention appears".
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> . . . The general policy of the law with regard to enforcing contracts made illegal by statute was confirmed in *Newtown* v. *Brownet*[19] where Jordan, C.J. said: "If, however, the contract is illegal by statute, then, as a general rule, neither party can recover from the other in respect of anything done in its performance."

The same principle was applied by the Privy Council in *Montreal Trust Co.* v. *Canadian National Railway Co.*[20] In another Canadian case, *Macdonald* v. *Riordan*[21] the Supreme Court of Canada held that the effect of a prohibition was to render a contract illegal and void, although the statute itself does not state that this is so and only imposes a penalty on the offender.

The critical difference between *Shearer Transport Co. Pty. Ltd.* v. *McGrath*[22] and *Dressy Frocks Pty. Ltd.* v. *Bock*[23] is that in the second case the action was brought by the lender against the borrower, that is, by one party to the forbidden contract against the other, whilst in the first case the action was between the lender and a person who was not a party to the unlawful loan transaction although he was fully aware of every detail of it and benefited under it. Had the Company brought its action against Connors it would clearly have been precluded from recovering, on the principle *in pari delicto potior est conditio defendentis*. But McGrath was not a party to the lending-borrowing transaction. He was, indeed, in the words of O'Brian, J., "one of the principal parties who devised the plan". It was he whose shares were the subject of the need by Connors for financial assistance. It was he who agreed that that assistance should be provided by the Company. It was he who, as director, signed the very cheque he received as vendor. Nevertheless he was not a party to the contract, and there is

[14] *Supra*, at 397.
[15] (1904) 1 K.B. 558 at 563.
[16] 8 *Halsbury's Law of England* (3 ed., 1954) 140.
[17] (1951) 51 S.R. (N.S.W.) at 398.
[18] (1938) 38 S.R. (N.S.W.) 351 at 357.
[19] (1940) 41 S.R. (N.S.W.) 1, at 6.
[20] (1939) A.C. 613.
[21] (1899) L.R. 8 Q.B. 555.
[22] (1956) A.L.R. 840.
[23] (1951) 51 S.R. (N.S.W.) 390.

authority for the view that a payment made in pursuance of a void transaction to a third party is recoverable.

> Where an illegal contract has been made by the plaintiff with a third party under which money has been paid by the third person to the defendant for the use of the plaintiff, the defendant is bound to pay over the money so received to the plaintiff and is not entitled as against him to set up the illegality of the contract under which it was received unless the contract between the plaintiff and the defendant is unlawful in itself.[24]

In *Sykes* v. *Beadon*[25] it was held that an illegal contract, though not giving rise to a claim by one party to it against the other, did in some cases allow a party to such a contract to recover from a third person money paid over to that person in pursuance of the contract. Jessel, M.R. said[26]

> A distinction has been drawn between the case of one of two parties to an illegal contract suing the other party and the case of his suing a third person for money received under the contract. This distinction is illustrated by *Tenant* v. *Elliott*[27] and *Farmer* v. *Russell*[28] . . . In *Tenant* v. *Elliott*[29] there was an illegal contract between the plaintiff and a third person. The defendant received the money from the third person to the use of the plaintiff . . . it was held that, although the plaintiff could not have forced the third person to pay under the illegal contract, yet he was entitled to sue the defendant, and that he, the defendant, could not set up the illegality of the contract, having received the money for the use of the plaintiff.

Farmer v. *Russell*[30] was a similar case in which it was held that if the money is paid to the defendant by the plaintiff on behalf of the third party the same principal is applicable.

In the report of *Shearer Transport* v. *McGrath*[31] this aspect of recovery of moneys paid under an illegal contract is not mentioned. The case as reported is decided on the question of whether there was consideration for the payment received by McGrath from the company. The learned Judge said[32]

> The only consideration which Mr. Mann (Counsel for the company) could suggest was that the company received for this payment a promise, expressed or implied, by Connors to repay a like sum to the plaintiff company. The decision in *Dressy Frocks Pty. Ltd.* v. *Bock*[33] shows quite clearly that the company received no such binding promise, and as a result of the transaction there accrued to the company no right to recover this money from Connors.

Thus there was no consideration for the payment to McGrath and as the company had no power to make a payment without consideration or a loan in contravention of s. 45, the payment was also ultra vires the company. From these findings the learned Judge concluded[34]

> I feel quite satisfied that in the circumstances the law will impute to McGrath a promise to repay the money and that the money is recoverable as money had and received to the use of the plaintiff. He was not only fully aware of every detail of the transaction, but it was he himself who was one of the principal parties who devised the plan . . . He signed as director the very cheque which he received.

Accordingly he found for the plaintiff.

It follows from Shearer's case that a company paying money in contravention of s. 148 is prevented from recovering it only in the hands of

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[24] 8 *Halsbury's Laws of England* (3 ed., 1954) 251.
[25] (1879) 11 Ch. D. 170.
[26] *Supra*, at 194.
[27] (1797) 1 Bos. & P. 3.
[28] (1798) 1 Bos. & P. 296.
[29] (1797) 1 Bos. & P. 3.
[30] (1798) 1 Bos. & P. 296.
[31] (1956) A.L.R. 840.
[32] *Supra*, at 843.
[33] (1951) 51 S.R. (N.S.W.) 390.
[34] (1956) A.L.R. at 843.

the borrower. It is not the unlawfulness of the payment which determines its recoverability but the relation of the parties to the transaction. The unlawful payment cannot be recovered only where the parties are in *pari delicto*. It seems at first sight that *Shearer Transport Co. Pty. Ltd.* v. *McGrath*[35] is one of those cases where the maxim applies, since McGrath was very much involved in the transaction and a party to a scheme involving an unlawful act. However, closer analysis of the transaction reveals that it contravened the section and consequently was not within the ambit of the maxim.

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VICARIOUS LIABILITY

LONG v. *DARLING ISLAND STEVEDORING AND LIGHTERAGE COMPANY LIMITED*

Much has been said in academic writing and judicial pronouncement concerning the functional justification of the doctrine of vicarious liability, one of the matters before the court in the present case;[1] but little has been said concerning the analytical basis of the doctrine.[2] One purpose of this Note is to examine the extent to which the judgments of the High Court in *Long* v. *Darling Island Stevedoring and Lighterage Company Limited*[3] have contributed an analytical basis for the doctrine, and the implication of any such contribution for the functioning of the doctrine.

The facts of the case were as follows. An accident in which the plaintiff was injured occurred on board a ship during some unloading operations. Part of a hatch on the ship had been removed and a hatch beam had been left in position. During the unloading something caught on the hatch beam and dislodged it, with the result that the plaintiff (who apparently was standing on the hatch beam) and part of the hatch, fell into the hold of the ship. Regulation 31(3) of the Navigation (Loading and Unloading) Regulations provides, "Where any hatch beam is left in place, it shall, before loading and unloading work begins, be securely fastened at each end by means of stout bolts, with nuts, attached, or other suitable fastenings provided for the purpose of preventing and in such manner as to prevent its accidental displacement. Penalty on the person-in-charge, One hundred pounds".

Prior to the action which gave rise to the appeal with which this Note is concerned, the plaintiff brought an action against the defendant claiming damages for injuries allegedly caused by the negligence of the defendant. There was no count for breach of statutory duty in the declaration in that action. The jury found a verdict for the defendant. The Full Court of the Supreme Court of New South Wales dismissed the appeal, holding that the jury had been properly directed on the issues of negligence and contributory negligence.[4] Whether the jury found for the defendant on the ground of absence of negligence on his part, or on the ground of the plaintiff's contributory negligence is of course not known. But the possibility that they may have found for the defendant on the ground of contributory negligence left open, as the plaintiff thought, the way to a second action, founded on the breach of a statutory duty. It may be mentioned that in New South Wales by virtue of the Statutory Duties (Contributory Negligence) Act, 1945 contributory negligence is no defence to an action for breach of a statutory duty.[5]

The defendant demurred to the declaration in the second action. The

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[35] *Supra.*

[1] (1957) 64 A.L.R. 505.

[2] That is, until the recent discussion by Professor Glanville Williams, "Vicarious Liability — Tort of Master or Tort of Servant ?" (1956) 72 *L.Q.R.* 522.

[3] (1957) 64 A.L.R. 505.

[4] (1956) S.R. (N.S.W.) 137.

[5] Although Williams, J. (1957) 64 A.L.R. 505 describes the second proceedings as "an attempt to re-litigate very much the same facts to prove a separate cause of action", only Fullagar, J. (at 516) adverted to the issue of *res judicata*.