THE *NEMO DAT* RULE AND ESTOPPEL BY REPRESENTATION AND ESTOPPEL BY NEGLIGENCE

MOORGATE MERCANTILE CO. LTD. v. *TWITCHINGS*

Fundamental to the law of personal property is the rule that no-one can give a better title than he himself possesses: *nemo dat quod non habet*. Although the essence of the rule is the protection of personal property, its scope has been read down so as to accommodate a competing and equally important principle — the protection of commercial transactions. Accordingly certain exceptions have arisen designed to protect the innocent purchaser who takes for value and without notice of any defect in the seller's title.[1]

The rule and an exception find statutory expression in s. 26(1) of Sale of Goods Act, 1923 (N.S.W.) which states:

> . . . where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or 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.

As to what constitutes conduct sufficient to preclude the owner from denying the seller's authority to sell, reference must be made to the case law.

Two defences which have emerged are estoppel by representation and estoppel by conduct of which estoppel by negligence is a sub-branch. The former entails a representation to the effect that the seller is the owner or has authority to sell whilst the latter involves conduct which allows the seller to appear as the owner or to appear as having authority to sell.[2] This twofold classification has been adopted for the purpose of expository convenience. Hence, it ought to be borne in mind that the categories are in no way distinct or mutually exclusive and that the various fact situations can readily be subsumed under either head. Both defences were raised in *Moorgate Mercantile Co. Ltd.* v. *Twitchings*[3]

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[1] Sutton, K. T. *The Law of Sale of Goods in Australia and New Zealand* (2nd Ed. 1974) Law Book Co. pp. 229-230.

[2] *Id.*, pp. 230-231.

[3] [1977] A.C. 890.

which is illustrative of the readiness of courts to countenance the conceptual validity of estoppel in this context but their reluctance to allow it an expansive operation in practice.

Moorgate itself was a decision of the House of Lords on appeal from the Court of Appeal.[4] The facts of the case were as follows. The respondent car dealer was a member of H.P. Information Ltd. (H.P.I.) which was the central register recording about 98% of all hire purchase agreements relating to motor vehicles. The respondent was approached by M, who offered the car for sale and stated that the car was free of all hire purchase liability. The dealer checked with H.P.I. and was told that according to their records the car was not the subject of a hire purchase agreement. The car was subsequently purchased from M. In fact the car was subject to a hire purchase agreement made with the appellants, a finance company, also a member of H.P.I. The appellants had failed to register the agreement, and although the precise cause of this omission was never ascertained, evidence suggested that responsibility lay with the appellants. When M defaulted on the instalments under the agreement, the finance company discovered what had happened and brought an action against the dealer for damages for conversion. The dealer relied upon a three pronged defence: estoppel by representation, estoppel by negligence and a cross claim in negligence for damages equal to the damages claimed by the appellants. The House took the view that the second and third grounds were substantially the same thing. In effect, therefore, there were two defences. Each is considered in turn.

I. Estoppel by Representation

The House of Lords[5] by a majority of four to one did not allow this defence, thereby reversing the Court of Appeal's[6] decision and supporting Geoffrey Lane, L.J.'s dissenting judgment.

It was common ground that in order for the respondent to succeed he had to establish that there was (a) a representation to the effect that the car was not subject to a hire purchase agreement and (b) that H.P.I., in answering the respondent's enquiries, had done so as agent for the appellant.

(a) As to the first limb, the rule was that the representation must be clear and unambiguous. In a celebrated *dictum*, Bowen, L.J. in *Low* v. *Bouverie*[7] had qualified this saying that it did not mean that the representation must be capable of only one interpretation but that, where more than one construction was possible, the one relied upon by the representee must be reasonable in the circumstances and context of the case. The

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[4] [1976] Q.B. 225.

[5] Majority: Lords Wilberforce, Edmund-Davies, Fraser and Russel. Lord Salmon dissenting.

[6] Majority: Lord Denning, M.R. and Browne, L.J.

[7] (1891) 3 Ch. 82 at 106. Adopted by Lord Wright in *Canada & Dominion Sugar Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* [1947] A.C. 46 at 55.

qualification held sway with Browne, L.J.[8] in the Court of Appeal. He held that H.P.I.'s response ought to be seen in a broad business context. Thus the statement that "the car had not been registered as being subject to a hire purchase agreement" would be understood in the trade as meaning that no finance company which was a member of H.P.I. had a hire purchase agreement on it.

In the House of Lords, Lord Wilberforce rejected this reasoning, reiterating the strict traditional principle "that to constitute an estoppel, a representation must be clear and must unequivocally state the fact that ultimately the maker is to be prevented from denying".[9] No such representation had been made as H.P.I.'s response had to be construed strictly in the light of its statement of aims which made it clear that their answer conveyed nothing more than information as to the state of their records — it neither said nor purported to say anything about the ownership or lack of ownership by any finance house member of H.P.I.[10]

At any rate, Lord Edmund-Davies was of the view that Browne, L.J.'s construction of H.P.I.'s response could not be sustained as no evidence was adduced as to how the words would have been understood in the trade.[11]

(b) On the question of agency, Browne, L.J.[12] had opined that the establishment of H.P.I. and its method of operation warranted the imputation that it was an agent for the appellants in answering enquiries from dealers. Once more Lord Wilberforce disagreed holding that H.P.I. were not, in giving answers, agents for the appellants. He added that "they were acting on their own account as suppliers of information to the trade. They set out to provide a service for dealers and others . . . and were not understood to act on behalf of finance company members".[13]

Lord Russell[14] remarked that if H.P.I. were to be regarded as agents for the appellants, they were only so when answering enquiries in the exact form and upon the exact terms which they did answer. In any case their answers, as noted above, did not amount to a representation sufficient to constitute an estoppel. Lord Edmund-Davies[15] commented that even if one was to share Browne, L.J.'s view of H.P.I.'s response, H.P.I. could still not be regarded as agents for the appellants. H.P.I. provided their information with a warning that was known to all that "H.P.I. does not warrant or guarantee that it has a complete record of every vehicle the subject of a hire purchase agreement". Therefore their known authority did not extend to the type of representation which Browne, L.J. considered to be made.

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[8] *Supra* n. 4 at 247.
[9] *Supra* n. 3 at 902.
[10] *Ibid.*
[11] *Id.* at 917.
[12] *Supra* n. 4 at 246.
[13] *Supra* n. 3 at 902.
[14] *Id.* at 930.
[15] *Id.* at 918.

II. Estoppel by Negligence

It is well established that mere carelessness on the part of an owner in allowing another to take and wrongfully dispose of his goods, will not prevent the owner from asserting title to those goods.[16]

As to what constitutes negligence in this context, there appears to have emerged a dichotomy of views. On the one hand there is the traditional approach as enunciated in *Bell* v. *Marsh*,[17] where it was said that a "man may act so negligently that he must be deemed to have made a representation which in fact he did not make, but because he has acted negligently he is deemed to have made it".[18] Clearly negligence here is viewed as a species of representation: the negligent conduct being insufficient to raise the defence unless it amounts to a representation that the seller is the owner or has authority to sell.

On the other hand there is the view expressed by the Privy Council in *Mercantile Bank of India Ltd.* v. *Central Bank of India*.[19] There Lord Wright[20] cited and approved Lord Blackburn's dictum in *Swan* v. *North British Australasian Co. Ltd.*[21] and held that in order to establish estoppel by negligence three requirements must be satisfied:

(1) the party sought to be estopped must owe a duty to the person who has been misled either as an individual or a member of the general public;

(2) there must be a breach of that duty; and

(3) the breach must be a proximate cause of the person being misled.

The divergent views were well illustrated in the case of *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.*[22] The essential elements of the facts were as follows. The plaintiff car dealer had allowed a rogue to take possession of a car and its registration book before the formal completion of the hire purchase agreement. As it happened, the hire purchase company refused to go ahead with the transaction. In the meantime, the rogue had sold the car to the defendant. The plaintiff upon discovering what had happened brought an action for damages for conversion. The defendant pleaded estoppel by negligence, arguing that the plaintiff had permitted the rogue to take possession of the car without even having made cursory enquiries.

Denning, L.J., in a dissenting judgment, upheld the defence. He examined the question of negligence from the point of view of a duty and concluded that in the circumstances the plaintiff owed a duty to the defendant as he had handed over the goods to a stranger with the intention to part with the property in them. He ought to have foreseen the

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[16] *Farquharson Brothers & Co.* v. *King & Co.* [1902] A.C. 325.
[17] (1903) 1 Ch. 528.
[18] *Id. per* Collins, M.R., at 541.
[19] [1938] A.C. 287.
[20] *Id.* at 299.
[21] (1863) 2 H. & C. 175 at 182.
[22] [1957] 1 Q.B. 371.

possibility that the stranger might try and dispose of them for his own benefit to someone or other. Accordingly, he owed a duty to any person to whom the stranger might try and dispose of them.[23] The majority in the Court of Appeal, Hodson, L.J.[24] and Morris, L.J.[25] took the more traditional approach holding that there was no estoppel as the owner's negligence did not amount to a representation that the rogue had authority to sell or that he was the owner. This was particularly so when regard was had to the fact that the registration book was not a certificate of title.

Strictly speaking the diverging views on estoppel by negligence have no bearing on the circumstances that prevailed in *Moorgate*. The cases referred to above dealt with positive conduct whereas *Moorgate* dealt with an omission; a failure to register the hire purchase transaction with H.P.I. As Lord Wilberforce plainly stated, in the case of silence or inaction it was settled law that there could be no estoppel by negligence in the absence of a duty. His Lordship explained that in contrast to positive conduct, an omission was colourless and could not influence a person to act upon it to his detriment unless it acquired a positive content. It would do so if there was a duty to speak or act in a particular way, owed to the person prejudiced, or to the public or to a class of the public to which he, in the event, belonged.[26] Lords Salmon, Fraser and Russel concurred with this view.[27]

Significantly, however, Lord Edmund-Davies went further, drawing a distinction between intentional and negligent conduct and commenting in *obiter* that the latter, whether it involved positive action or an omission, could not give rise to an estoppel in the absence of a duty of care.[28]

Having decided that there must be a duty in order to establish the defence, the decision of their Lordships in *Moorgate* shed precious light on the crepuscular area of when a duty would be implied and its extent. Lord Wright in the *Mercantile Bank of India Case* seemed to apply a restrictive test, limiting the duty to cases where there was a relationship of contract or agency between the parties. He also noted that it would be implied where the party owing the duty had reason to believe that the other party would become involved.[29] Denning, L.J., however, framed his duty in very broad terms in *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.* where he spoke of a duty being owed to the whole world.[30]

In *Mercantile Credit Co. Ltd.* v. *Hamblin*[31] the Court of Appeal declined to follow this example couching the duty in terms which were

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[23] *Id.* at 385.
[24] *Id.* at 389-390.
[25] *Id.* at 396.
[26] *Supra* n. 3 at 903.
[27] *Id.* Lord Salmon at 908, Lord Fraser at 924 and Lord Russel at 930.
[28] *Id.* at 919.
[29] *Supra* n. 19 at 300.
[30] *Supra* n. 22 at 385.
[31] [1965] 2 Q.B. 242.

more consonant with Lord Wright's view. Notably, the nature and extent of the duty in this case was determined by the rules of the ordinary law of negligence — the duty being owed to those members of the general public likely to be affected by the negligent conduct. So also in *Moorgate* was the duty issue canvassed in terms of modern day negligence principles. By a majority of three to two, the House of Lords[32] held that the appellants did not owe the respondents a duty to take reasonable care to register the hire purchase transaction.

The dissentients were Lord Salmon and Lord Wilberforce. Lord Salmon felt that although the case was concerned with economic loss it was well within the principle laid down by Lord Atkin in *Donoghue* v. *Stevenson*[33] as extended by *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[34] The requisite relationship of "propinquity" subsisted between the parties as "Moorgate would necessarily be aware that their omission to register the hire purchase agreement with H.P.I. would be likely to cause financial loss to any member dealers to whom the vehicle the subject matter of such agreement might be offered".[35]

Lord Wilberforce expressed reservations about determining the question by recourse to an exclusive application of the "neighbour" principle. He added that the consequence of doing so would be to stretch the duty of care so widely as to make it a universal duty on the part of the property owner to safeguard others against loss. Accordingly, he posited the duty in restrictive terms, placing great emphasis on the fact that Moorgate knew that Twitchings would rely on the information supplied to H.P.I.[36] His Lordship was at pains to point out that the duty was owed only to dealer members and the question as to whether it extended to non members or members of the public was altogether separate.[37] Lord Salmon, however, intimated that the duty would not so extend as the relationship of "propinquity" would be less compelling.[38]

The majority, on the other hand, rejected the criterion of foreseeability as being sufficient to determine the existence of a duty. Lords Edmund-Davies and Fraser felt that a duty thereby established would be too wide as it would extend to non members and members of the public. Although, in that instant, the propinquity link would not be as strong as that existing between members of H.P.I., nevertheless it would be real and substantial.[39] The thrust of the majority's decision predicated an overriding policy consideration.

H.P.I. was a voluntary organisation established primarily for the protection of finance companies. A necessary concomitant of its purpose was the protection of dealers and others who had access to its records

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[32] Majority: Lords Edmund-Davies, Fraser and Russel.
[33] [1932] A.C. 562 at 580.
[34] [1964] A.C. 465.
[35] *Supra* n. 3 at 908.
[36] *Id.* at 906.
[37] *Ibid.*
[38] *Id.* at 909.
[39] *Id.* Lord Edmund-Davies at 920 and Lord Fraser at 927.

of purchase of vehicles which were subject to hire purchase agreements. At the time the action was brought it was not obligatory for a hire purchase company to become a member of H.P.I. To have imposed a duty on members of H.P.I. to take reasonable care in the registration of hire purchase transactions would have given rise to an anomaly in that members would have been placed at a disadvantage *vis à vis* non members. This would have encouraged them to resign from H.P.I. and thus thwart the workings of a system which quite effectively had filled a hiatus in the law.

The significance of their Lordships' decision is that henceforth, when confronted with a novel situation, the duty issue in the defence of estoppel by negligence, as in an action for negligence, will be resolved not only by reference to the facts of a case and the application thereto of the "neighbour" principle but also by reference to pertinent matters of policy. As was evident in Lord Reid's judgment in *Home Office* v. *Dorset Yacht Co.*[40] the question of policy is whether a duty ought to be implied given the existing framework of the law and the ramifications on the operation of the law occasioned by a decision one way or the other.

Conclusion

It is here submitted that the decision of the House of Lords in *Moorgate*, whilst acknowledging the conceptual validity of estoppel by representation and estoppel by negligence as exceptions to the *nemo dat* rule, has nonetheless severely limited the operation of those principles by the adoption of relatively strict tests.

In the case of estoppel by representation, the majority's rigid adherence to the requirement of clarity and unambiguity suggests that where the representation is by words alone, there will be few occasions for estoppel based upon the representee's interpretation where another interpretation appears reasonably arguable as an alternative. It would appear that in such circumstances it becomes possible to require a degree of precision that would be impracticable if the estoppel were based wholly or partly upon conduct. It is open to question whether this test is unnecessarily narrow. The putative underpinning of the doctrine of estoppel was expressed by Dixon, J. in *Grundt* v. *Great Boulder Pty. Gold Mines Ltd.*[41] where he said that the law should not permit an unjust departure from a statement upon which another party relies to his detriment.

It is therefore submitted that when considering a representation, emphasis ought to be placed on the notion of detrimental reliance and given that estoppel has developed to temper the *nemo dat* rule in relation to commercial transactions, a *bona fide* purchaser for value and without notice who has so relied ought not to be penalised merely because the

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[40] [1970] A.C. 1004 at 1025-1033.
[41] (1938) 59 C.L.R. 641 at 674.

words of the representation were capable of a meaning other than as he reasonably understood them.

As for estoppel by negligence, the decision of the Court of Appeal in *Hamblin's Case*[42] has cast doubt on whether the defence can be raised in *nemo dat* cases as these cases by their very nature involve the interposition of a fraudulent third party. There it was held that such interposition relieved the defendant of liability as it broke the chain of causation between her acts and the damage suffered by the plaintiff company[43] *Moorgate* places a further hurdle in the way of a party seeking to rely on the defence. The establishment of the first requirement — that of a duty of care — has been made somewhat more onerous as it is now susceptible to the judicial safety valve of policy which can be used to strike down a duty in circumstances where one would be held to exist by an application of Lord Atkin's "neighbour" principle.

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[42] *Supra* n. 31.
[43] *Id. per* Pearson, L.J. at 275.