obscurities will be clarified in the future, one cannot help agreeing with Professor Fleming that this particular area of tort law makes more sense as a product of practical politics than logic.[27]

M. LEIBLER

MOTOR CREDITS (HIRE FINANCE) LIMITED v. PACIFIC MOTOR AUCTIONS PTY LIMITED[1]

Sale of goods—Unauthorized sale—Estoppel of true owner—Sale of Goods Act 1923-1953 (N.S.W.), sections 26 and 28

The appellants, a finance company, entered into a 'display plan' or 'floor plan' with M, a motor dealer. In practice M bought cars in its own name and then sought the appellants' approval to bring them under the arrangement. If the appellants approved it would then pay M ninety *per centum* of the purchase price. The title to the cars thereupon passed to the appellants, M remaining in possession as bailee for the purpose of resale. In November the appellants revoked M's authority to deal with any cars held under the 'display plan'. Unaware of this the respondent, another motor dealer and a creditor of M, purchased a number of cars (including some held under the arrangement) from M on the understanding that they would be returned if three cheques of M's were honoured. M represented that the cars were its sole, absolute and unencumbered property.

The appellants brought an action in detinue for the recovery of those vehicles held under the 'display plan', or, alternatively claimed to recover their value and damages for detention. The respondent relied primarily on section 26 (1) of the Sale of Goods Act 1923-1953 (N.S.W.),[2] alleging that the appellants were by their conduct precluded from denying M's authority to sell. At first instance the Supreme Court of New South Wales,[3] (Walsh J. sitting alone), accepted this argument, but on appeal the High Court (Taylor and Owen JJ., McTiernan J. dissenting) rejected it.

The majority proceed upon the basis that had the sale been one in the ordinary course of M's business as a motor dealer the appellant could not have succeeded, for, by allowing the cars which it owned to be in M's possession the appellant unquestionably held that company out as having authority to sell them in the ordinary course of its business as a dealer.[4] The reason is that a purchaser of goods from one whose business it is to buy and sell goods of that description is entitled to assume

[27] Fleming, *The Law of Torts* (2nd ed. 1961) 185.

[1] (1963) 37 A.L.J.R. 120. High Court of Australia; McTiernan, Taylor and Owen JJ.

[2] The provisions of this section are substantially the same as those contained in section 27 of the Goods Act 1958 (Vic.) s. 26 (1) 'Subject to the provisions of this Act, 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'.

[3] *Motor Credits (Hire Finance) Ltd v. Pacific Motor Auctions Pty Ltd* 79 W.N. (N.S.W.) 684.

[4] (1963) 37 A.L.J.R. 120, 125, *per* Owen J.

that the seller has authority to sell, in the ordinary course of his business, goods of that description which are in his possession.[5]

However the sale to the respondents was not a sale in the ordinary course of M's business, and the question was therefore whether this altered the position. McTiernan J. (adopting *verbatim* the judgment of Walsh J.) took the view that the limitation as to 'ordinary course',

> is not an essential requirement for the application of the common law principle, as expounded in the *Eastern Distributors Case*. . .[6] It is essential only that the dealing should have been in good faith. . .[7]

Thus McTiernan J. disregarded the unusual circumstances and concluded that under section 26 (1) the appellants were precluded from denying M's authority to sell, for in his view the respondents are in the same position as ordinary purchasers.

On the other hand the majority regard these circumstances as being most material, and this view is preferable for to disregard such facts is to take an unreal view of the situation. As for *Eastern Distributors Ltd v. Goldring*,[8] Taylor J. points out, that it does not require him to disregard the unusual circumstances.[9] Firstly, as there was not in that case any suggestion that the transaction, there in question, was not in the ordinary course of the dealer's business. And secondly, and most important, that case was essentially one of 'ostensible ownership' not 'ostensible agency'. The difference being that:

> in the former case 'some person has appeared to be the owner of property when in reality he was not', whilst in the latter type of case 'some person has appeared to have authority to do something, when he in reality he has not'.[10]

Accordingly, in the latter case, it is essential to determine what apparent authority an ostensible agent has.

The point of this distinction therefore seems to be that if the question is one of ostensible agency you must consider whether or not his apparent authority extended to a sale outside the ordinary course of his business. If, however, he appears to be the owner, one would assume that his ability to sell was not limited to a sale in the ordinary course of his business. Thus in a case like *Eastern Distributors*[11] the absence of any reference to 'ordinary course' is not conclusive.

Thus taking all the circumstances into consideration Owen J. concludes that in order to succeed under section 26 (1):

> It was necessary . . . for the defendant to show that it had been induced by the plaintiff's conduct to believe that Motordom was entitled to deal with the cars in a manner which was outside the ordinary course of a dealer's business.[12]

[5] *Ibid.*; Owen J. states that had the sale been one in the ordinary of M's business it would have fallen within the terms of s. 5 of the Factors (Mercantile Agents) Act 1923 (N.S.W.). This section is identical with s. 67 of the Goods Act 1958 (Vic.).
[6] [1957] 2 Q.B. 600, 607. [7] 79 W.N. (N.S.W.) 684, 692. [8] [1957] 2 Q.B. 600.
[9] (1963) 37 A.L.J.R. 120, 123. [10] *Ibid.* [11] [1957] 2 Q.B. 600.
[12] (1963) 37 A.L.J.R. 120, 125.

But in this case:

> the plaintiff did no more than hold out Motordom as having authority to dispose of its cars in the ordinary course of its business as a dealer.[13]

Taylor J. reaches the same conclusion for he can see no reason for supposing that Motordom appeared to have a wider authority than that which it would actually have had if its authority had not been revoked, and M's authority would not have covered the sale to the respondent.[14]

The majority also reject the argument that the case is one of 'ostensible ownership', for although M professed to sell as owner there was nothing in the evidence to justify the conclusion that the appellant was privy to the representation.[15] The appellants neither authorized it nor was it made with their knowledge or consent.[16] That leaves simply the fact that M was in possession and in answer to this Taylor J. points out:

> the mere fact that the goods of one person are seen to be in the possession of another does not, of itself, create a situation of ostensible ownership.[17]

In any event the respondent knew of the existence of the 'display plan' and with his knowledge of the trade this was the clearest intimation that M was dealing with cars which though in its possession were not its property. Taylor J. concedes that had the respondent not known of the arrangement M would have appeared to be the owner.[18]

Therefore, in the opinion of the majority, it is essential that in considering section 26 (1) all the circumstances surrounding the sale be taken into account. Whether or not they affect the ultimate conclusion will depend on the circumstances of each particular case.

The respondents also sought to rely on section 28 (1) of the Sale of Goods Act (N.S.W.)[19] but this argument was unanimously rejected by the High Court. The court relied on *Staffs Motor Guarantee Ltd v. British Wagon Co. Ltd*[20] and *Eastern Distributors Ltd v. Goldring*[21] for the proposition that:

> this section has no application where the character of a seller's possession has changed and he does not remain in possession merely as seller but by virtue of his rights as a bailee.[22]

The argument that the revocation of M's authority was ineffective was also unanimously rejected.

[13] *Ibid.* 126. [14] *Ibid.* 124. [15] *Ibid.* 125, *per* Owen J. [16] *Ibid.* 123, *per* Taylor J.

[17] *Ibid.* 124; The same can also be said of ostensible agency, *Central Newbury Car Auctions Ltd v. Unity Finance Ltd.* [1957] 1 Q.B. 371, 396, though, as Morris L.J. points out the position is different if the person to whom possession is given is a mercantile agent or a purchaser; *Johnson v. Credit Lyonnais Co.* (1877) 3 C.P.D. 32, 36; *General Distributors Ltd v. Paramotors Ltd.* [1962] S.A.R.S. 1, 17.

[18] (1963) 37 A.L.J.R. 120. 123-124.

[19] The provisions of this section are substantially the same as those contained in s. 30 of the Goods Act 1958 (Vic.). S. 28 (1) 'Where a person having sold goods continues or is in possession of the goods . . . the delivery or transfer . . . of the goods . . . under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized to make the same'.

[20] [1934] 2 K.B. 305.

[21] [1957] 2 Q.B. 600.

[22] (1963) 37 A.L.J.R. 120, 124 *per* Taylor J.

Two points arising out of the judgment of McTiernan J. remain to be considered. Firstly, he agreed with Walsh J.[23] that the statement of Ashurst J. in *Lickbarrow v. Mason*[24] goes too far in that it places responsibility on the person who 'enabled' the third party to occasion the loss. *Lickbarrow v. Mason*[25] has been frequently criticized mainly on the grounds that the word 'enable' is too wide, for as has been pointed out, in one sense every employer by employing a servant 'enables' him to steal.[26] This must therefore be qualified and in *R. E. Jones Ltd v. Waring and Gillow Ltd*[27] Lord Summer suggested this qualification:

> There was no duty between Jones Ltd, and Waring and Gillow, and without that, the wide proposition of Ashhurst J. in *Lickbarrow v. Mason*[28] would not apply . . .[29]

This qualification was accepted by the Privy Council in *Mercantile Bank of India, Ltd v. Central Bank of India, Ltd*[30] and led to their disapproval of *Commonwealth Trust Ltd v. Akotey*[31] for in the latter case the court accepted *Lickbarrow v. Mason*[32] without qualification. However McTiernan J., whilst accepting the need for some qualification, is not free from doubt in his acceptance of the duty test.[33] On the other hand Taylor J.[34] can see no difference in principle between *Commonwealth Trust v. Akotey*[35] and the *Mercantile Bank*[36] case. This is hard to reconcile with the actual decisions and cannot really be accepted, and it obscures the opinion of Taylor J. on the 'duty' question. Owen J. does not discuss this question but this is probably because he can find no basis for an estoppel. The High Court has therefore reached no definite conclusion on this point, but should it arise later the Privy Council decision will almost certainly be followed.

The other point concerns the exact nature of the principles contained in section 26 (1). One approach is to regard it as a form of estoppel,[37] whilst the other approach regards it as a separate and distinct principle derived from mercantile convenience.[38] In the instant case McTiernan J. adopts the latter view,[39] whereas Taylor J. appears to favour the estoppel approach. The opinion of Owen J. on this point is not clear. Both approaches have their difficulties for if it is taken as estoppel there is the idea, accepted by the Court of Appeal in *Eastern Distributors v. Goldring*,[40] that estoppel does not transfer a real title.[41] But even if the Court

[23] 79 W.N. (N.S.W.) 684, 690. [24] 2 T.R. 63. [25] *Ibid.*
[26] *Farquharson Brothers v. King* [1902] A.C. 325, 342.
[27] [1926] A.C. 670. [28] 2 T.R. 63. [29] [1926] A.C. 670, 693.
[30] [1938] A.C. 287, 299; it is also accepted by Denning L.J. in *Central Newbury Car Auctions v. Unity Finance* [1957] 1 Q.B. 371, 385.
[31] [1926] A.C. 72. [32] 2 T.R. 63.
[33] Compare 79 W.N. (N.S.W.) 684, 692, *per* Walsh J.
[34] (1963) 37 A.L.J.R. 120, 123. [35] [1926] A.C. 72. [36] [1938] A.C. 287.
[37] Some examples of this approach are, *Mercantile Bank* case [1938] A.C. 287; *Commonwealth Trust v. Akotey* [1926] A.C. 72; *Central Newbury Car Auctions v. Unity Finance* [1957] 1 Q.B. 371; *Farquharson v. King* [1902] A.C. 325; *Lowther v. Harris* [1927] 1 K.B. 393. [38] *Eastern Distributors v. Goldring* [1957] 2 Q.B. 600.
[39] Compare 79 W.N. (N.S.W.) 684, 691-692, *per* Walsh J. [40] [1957] 2 Q.B. 600.
[41] This is based on the statement of Brett L.J. in *Simm v. Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 188, 206; however at page 215 Cotton L.J. reaches the opposite conclusion.

of Appeal approach is adopted there is still the question of whether the various elements of estoppel must be present before the section can operate.[42] However it is clear that the section does actually transfer a real title and many decisions require that the elements of estoppel be present. A possible explanation is that the principle, now embodied in the section, originated in mercantile convenience but as it developed had engrafted on to it the requirements of a valid estoppel.[43]

From a practical point of view the significance of the case lies in the unanimous acceptance by the High Court of the proposition that had the respondent been simply a member of the public, present at Motordom's premises during regular business hours, the appellants would have failed.

I. MALKIN

COONEY AND OTHERS v. THE COUNCIL OF THE MUNICIPALITY OF KU-RING-GAI[1]

Local Government—Restriction imposed on use of land—Validity of restriction as an exercise of delegated power—What constitutes 'trade or industry'—Availability of injunctions to restrain breach of restriction.

Early in 1962 Mrs Olga Cooney applied to the Ku-ring-gai Council for permission to renovate premises on which she had been conducting a small and intermittent catering business. Thus was started a chain of events which led ultimately to the clarification of one of the most confused areas of Australian administrative law—the jurisdiction of a court to grant an injunction to restrain interference with a public right at the suit of the Attorney-General acting on behalf of the public. For by a proclamation of the sixteenth of January 1952 made pursuant to section 309 Local Government Act[2] the Ku-ring-gai Council had zoned as residential the area in which the Cooney premises were situated. This proclamation prohibited the use of any land in this area 'for the purposes of any trade, industry, manufacture, shop or place of public amusement. . . .'[3] Previously unaware of Mrs Cooney's activities, the Council now commenced proceedings to obtain an injunction restraining Mrs Cooney and two others from using the premises 'for the purpose of the trade or business of providing at cost refreshments and entertainments at social functions held therein'.[4] They were able to adopt this procedure by virtue of section 587 Local Government Act, which provides that in any case in which the Attorney-General might take proceedings at the relation of a municipal council with respect to securing the observance of a provision of the Local Government Act, that council is

[42] Goodhart, 'The nature of the Title passed by a Mercantile Agent at Common Law' (1957) 73 *Law Quarterly Review* 455.

[43] Another suggestion is that of Chamberlain J. who regards both approaches as being simply different ways of reaching the same conclusion. *General Distributors Ltd v. Paramotors Ltd* [1962] S.A.S.R. 1, 21.

[1] (1963) 37 A.L.J.R. 212. High Court of Australia: Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

[2] Local Government Act 1919 (N.S.W.), s. 309 as amended.

[3] *N.S.W. Government Gazette* 25 January 1952.

[4] (1963) 37 A.L.J.R. 212, 216.