Case Note:
Sirius Shipping Corporation v The Ship Sunrise
[2006] NSWSC 398

John Tarrant*

Background

Sirius Shipping Corporation (Sirius Corp) commenced in rem proceedings against the ship *Sunrise* claiming ownership of the *Sunrise*. Sirius Corp is controlled by Mr Peter Sirius. Sirius Corp had sold the *Sunrise* to Mr Richard Evans (Evans). A finance company, Capital Finance Australia Ltd (Capital Finance) provided part of the purchase price on the understanding that it was to be the purchaser of the *Sunrise* from Sirius Corp and that it was granting possession of the *Sunrise* to Evans pursuant to a hire purchase agreement. Unfortunately for Capital Finance a contract to document the sale and purchase was never finalised or entered into. At the time of the proceedings the *Sunrise* was in the possession of Capital Finance after it had repossessed it from Evans. Both Sirius Corp and Capital Finance claimed that they had the best title to the *Sunrise*.

The facts

On 21 December 2000 Sirius Corp agreed to sell the *Sunrise* to Evans. This agreement was replaced by a revised sale agreement made on 21 February 2001. The consideration for the sale in this second agreement was $600,000 and the transfer of shares to the value of $400,000 from Evans to Sirius Corp. The shares forming part of the consideration were to be in a company or companies associated with Evans not relevant for current purposes.

Evans was unsuccessful in raising finance from the National Australia Bank and decided to seek assistance from a finance broker, Hunt Pacific Finance Pty Ltd (Hunt Pacific). Hunt Pacific introduced Evans to Capital Finance who agreed to provide the $600,000 required for the purchase of the *Sunrise*.

In *Sirius Shipping Corporation v The Ship Sunrise*[1] *(Sirius Shipping)* Young CJ noted that it appeared that Capital Finance paid the $600,000 in respect of the transaction 'in the belief that there was to be a sale from Sirius Corp to Capital Finance and then a hire purchase agreement between itself and Mr Evans'.[2] However, he noted that 'the documentation of such a transaction is incomplete'.[3] The $600,000 was duly paid to Sirius Corp prior to the end of February 2001 but after settlement the ship was delivered not to Capital Finance but to Evans. Young CJ noted that the $400,000 of shares were not transferred to Sirius Corp at settlement.[4] Evans entered into a hire purchase agreement with Capital Finance with a commencement date of 16 February 2001. The agreement provided for Evans to hire the *Sunrise* from Capital Finance.

On 11 March 2003 Sirius Corp executed a deed with Evans which contained a retention of title clause. The clause provided that notwithstanding delivery of the *Sunrise* to Evans, the legal title to the *Sunrise* was to remain with Sirius Corp until Evans' debt with Sirius Corp was paid in full. Evans still owed Sirius Corp $400,000 of the purchase price. On 17 June 2003 Sirius Corp issued a notice of default on Evans for failure to pay the balance of the purchase price and gave notice that it would recover the *Sunrise*.

During the time between when the deed was signed in April 2003 and Sirius Corp issued its notice in June 2003, Capital Finance had issued its own notice on 17 April 2003, as a result of default by Evans under the hire purchase agreement, advising that it had taken possession of the *Sunrise* on 16 April 2003. On 18 July 2003 Sirius Corp gave Capital Finance notice of its alleged proprietary interest in the ship. Sirius Corp claimed that it had the best title to the *Sunrise* and argued that pursuant to its contract

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1 [2006] NSWSC 398 (unreported, Young CJ, 10 May 2006)

2 Ibid, [26]

3 Ibid

4 Ibid, [33]

with Evans title of the *Sunrise* was not to pass to Evans until full payment had been made. In addition Sirius Corp sought to rely on the retention of title clause in the March 2003 deed. To assert title to the *Sunrise* Capital Finance produced a tax invoice purporting to be issued by Sirius Corp to demonstrate that they had purchased the *Sunrise* from Sirius Corp. In addition they argued that title to the *Sunrise* passed when the $600,000 was paid at settlement.

The decision

Young CJ noted that the *Sunrise* was an unregistered ship and that transfer of 'property in physical personal property is usually by delivery'.[5] Young CJ could not identify any special requirements for the sale of unregistered ships and noted that in *The James W Elwell*[6] Hill J held that a sheriff could sell and transfer at common law an unregistered ship like any other chattel.[7] In addition Young CJ noted that there is abundant modern authority to support the proposition that a ship is "goods" and therefore the *Sale of Goods Act 1923* (NSW) (the Act) would be applicable.[8]

As the Act was applicable Young CJ commenced his analysis with an examination of the relevant provisions that might impact on whether title to the *Sunrise* had ever passed from Sirius Corp. Section 22(1) of the Act provides that property passes when the parties intend it to pass. Section 23 provides a number of rules for ascertaining the intention of the parties unless a different intention is expressed. Rule 1 provides that property in the goods passes when the contract is made and the time of payment and delivery are immaterial. Capital Finance contended that it was the intention of the parties that property would pass in accordance with this rule. Sirius Corp argued that rule 1 did not apply because the parties had a different intention. Young CJ concluded that on the evidence he was only able to arrive at a 'best guess' that property 'was to pass on completion'.[9] Young CJ concluded that completion had taken place when Sirius Corp received the $600,000 and had handed control of the *Sunrise* over to Evans.[10] As a result, leaving aside the possible effect of the March 2003 deed, title to the *Sunrise* passed from Sirius Corp to Evans pursuant to their contract when constructive delivery occurred in either February or March 2001.[11]

In dismissing Capital Finance's argument that title to the *Sunrise* passed to them as evidenced in the tax invoice, Young CJ accepted the evidence from Mr Sirius that Sirius Corp had not issued the tax invoice. Young CJ concluded that Evans had most likely issued the tax invoice and the document had no value 'as the title to the ship is concerned'.[12]

Despite failing on the issue of the tax invoice Young CJ concluded that Capital Finance could demonstrate that it had better title to the *Sunrise* than Evans in three ways. First, the hire purchase agreement included an acknowledgment by Evans that he was the hirer of the *Sunrise* and Capital Finance was the owner.[13] The agreement did not explain by what transaction Capital Finance acquired title but it was clear acknowledgment by Evans that Capital Finance had title to the ship.

Secondly, Capital Finance could rely on s 28(2) of the Act to demonstrate that title to the ship had passed to them. Section 28(2) provides as follows:

> Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for that person of the goods or documents of title under any sale pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent intrusted by the owner with the goods or documents of title.

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5 Ibid, [65]
6 [1921] P 351
7 *Sirius Shipping,* above n 1, [69] referring to *The James W Elwell* [1921] P 351, 368
8 Ibid, [71] citing a number of cases including *Tisand Pty Ltd v The Cape Moreton* (2005) 143 FCR 43
9 Ibid, [74]
10 Ibid, [78]
11 Ibid, [79]
12 Ibid, [103]
13 Ibid, [106]

The purpose of the section is to ensure that if the first buyer acquires possession but the seller retains some proprietary interest in the goods, then a second buyer acquiring the goods from the first buyer will acquire good title. As Lord Pearce explained in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd,*[14] the object of the section 'is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose'.[15] Young CJ noted that the operation of s 28(2) can be 'most complicated' and concluded that in this case it operated so that 'if Mr Evans had possession with the consent of Sirius Corp then he could validly transmit the Ship to Capital Finance even if he did not have title'.[16] His honour concluded that Evans, by entering into the hire purchase agreement, had acknowledged 'that there had been a transfer of the ownership of the *Sunrise* to Capital Finance'.[17] Therefore, even if Evans did not have title when he entered into the hire purchase agreement with Capital Finance he was able to transfer Sirius Corp's title to Capital Finance because he had possession of the *Sunrise* with the consent of Sirius Corp.

Thirdly, Capital Finance could rely on a common law exception to the nemo dat rule that is unaffected by the Act. Young CJ explained that the exception is available 'where a seller without good title subsequently acquires title to the chattel, the seller's title is fed to the second person, and any subsequent purchaser'.[18] His Honour explained that in the current case the requirements were that 'the purchaser (Capital Finance) must act without notice of the defect in title, and the seller (Mr Evans) must acquire a clear title prior to the termination (by Sirius) of the contract between the original seller (Sirius) and the first buyer (Mr Evans)'.[19] Under this third method of acquiring title it would appear that the hire purchase agreement is operating to transfer title from Evans to Capital Finance. If Evans acquired title after entering into the hire purchase agreement then when he later acquired title from Sirius Corp that title was then fed to Capital Corp.

Finally, Young CJ considered the effect, if any, of the May 2003 deed. He concluded that a reservation of title clause agreed to after title had already passed had no legal effect.[20] In reaching this conclusion Young CJ agreed with Hallett J's view in *Dennant v Skinner*[21] that a reservation of title clause made after title had already passed is not effective to retain title.[22]

Conclusion

Because issues concerning title are resolved based on relative title it was not necessary for Young CJ to determine precisely when title passed and under which of the alternative ways title did pass. The result of Young CJ's analysis is that 'Capital Finance has a better title than Mr Evans who has a better title than Sirius Corp'.[23] That is, Capital Finance did not have to demonstrate precisely how it acquired title only that it acquired title by one of a number of alternative means. It either acquired title from Sirius Corp or from Evans. As Young CJ noted in his conclusion, the evidence suggested that in all of the circumstances title to the ship was intended to pass at settlement to either Evans or Capital Finance.[24] The case also demonstrates the complexity that can arise where a buyer of a ship does not have documentary evidence that clearly shows how they obtained title to the ship. The buyer will need to rely on potentially complex provisions in the Act and common law exemptions to the nemo dat rule to prove they have a better title than other parties to the litigation.

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14 [1965] AC 867. See also *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236.

15 Ibid, 886

16 *Sirius Shipping,* above n 1, [108]

17 Ibid, [109]

18 Ibid, [110]. See also *Patten v Thomas Motors Pty Ltd* (1965) 66 SR (NSW) 458; and *Lucas v Smith* [1926] VLR 400 referred to by Young CJ

19 Ibid, [111]

20 Ibid, [123]

21 [1948] 2 KB 164

22 Ibid, 172. Cited by Young CJ at [119]

23 *Sirius Shipping,* above n 1, [113]

24 Ibid, [122]