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COURT OF APPEAL

Decision given; Reasons reserved: 14th January, 1994.
Reasoned Judgment: 21st June, 1994.

Before: Sir Godfray Le Quesne, Q.C., (President).
Lord Carlisle, Q.C., and
Sir Charles Frossard, K.B.E.

BETWEEN:	Richard Hughes	APPELLANT
AND:	Vail Blyth Clewley	RESPONDENT

Appeal by the Appellant (the Plaintiff in the Court below) from so much of the Order of the Royal Court (Samedi Division) of 12th May, 1993, as ordered that: (1) the Order made under s.30 of the Merchant Shipping Act 1894 prohibiting for a period of one year any dealing by the Respondent with the yacht "Siben", and the interim injunction, set out in the Appellant's Order of Justice of 7th December, 1992, prohibiting for a period of one year any sale, gift, transfer, disposal, charging or mortgaging of the said yacht, be discharged; and (2) the Appellant pay to the Respondent the costs of the Appellant's application in the court below, be discharged.

Advocate N.F. Journeaux for the Appellant.
Advocate A.D. Hoy for the Respondent.

REASONED JUDGMENT.

THE PRESIDENT: At the conclusion of the hearing we announced that this appeal would be allowed, and an order under the Merchant Shipping Act, 1894, s.30 prohibiting any dealing with the yacht 'Siben' would remain in operation. The order had been discharged by the Royal Court. We said we should give our reasons later and this we now proceed to do.

The 'Siben' is a yacht of gross tonnage of 52 tons. She is registered in Jersey. She was formerly owned by Whistling Wind Yachts Ltd., which is a company controlled by the Appellant. That company, by a bill of sale dated the 24th September, 1991 transferred the 'Siben' to the Respondent.

This transfer was made in execution of a contract between the Appellant and the Respondent. In 1991, the Respondent was living in Portugal. In the issue for August, 1991, of a periodical called 'Yachting World' he placed an advertisement offering for sale a discotheque in the Algarve. It was described in the advertisement as a *'purpose built FREEHOLD discotheque...producing £1500 per weekend net'*.

The price asked in the advertisement was £350,000. These words followed: *'Part exchange quality sailing yacht or English property, mortgage available'*. The Appellant saw this advertisement, and after negotiations a written agreement was made between him and the Respondent on the 21st August, 1991. By this agreement the Respondent agreed to transfer to the Appellant the discotheque and a villa in Portugal; the Appellant agreed to transfer to the Respondent the 'Siben', the company Whistling Wind Yachts Ltd., a De Lorean car and £85,000, of which £50,000 was to be paid within 12 months of collection of the 'Siben' by the Respondent and meanwhile was to be a charge on the discotheque.

The Appellant delivered the 'Siben' and the De Lorean car to the Respondent. Whistling Wind Yachts Ltd., transferred the 'Siben' to the Respondent by the bill of sale of the 24th September, 1991, but the company was not transferred because the Respondent said he did not want it. The Appellant alleges that the Respondent was unable to transfer to him title to the discotheque because it was not owned freehold by the Respondent but stood on land belonging to a third party. He also alleges that the discotheque did not produce £1500 per weekend net, the books and accounts had been removed from the discotheque before the transfer and there were outstanding liabilities for liquor, electricity and the telephone.

On the 5th November, 1991, the Appellant issued a writ in the High Court in England claiming from the Respondent damages for breach of contract and negligent misrepresentation. He arrested the 'Siben', which was then in Portugal, but this arrest was subsequently lifted because, as the Appellant says, he could not pay to institute proceedings in Portugal. On the 10th December, 1991, he issued an order of justice here, naming the Respondent as defendant and the Registrar of British Ships for St. Helier as party cited. Service of this order of justice upon the Registrar was to operate as an order under s.30 of the Merchant Shipping Act prohibiting any dealing with the 'Siben' for one year. On the 20th December, 1991, the Registrar appearing but the Respondent not having been served, the Royal Court confirmed the order as regards the Registrar only.

On the 9th March, 1992, the Appellant's action against the Respondent in England was stayed by order of the Court, apparently on the ground of want of jurisdiction. On the 7th December, 1992, the Bailiff signed a second order of justice at the instance of the Appellant, again naming the Respondent as defendant and the Registrar as party cited. Service of this order of justice on

the Registrar again operated as an order under s.30 prohibiting any dealing with the 'Siben' for one year. The order of justice recited that the 'Siben' had been moved to Southampton, where she had been arrested at the instance of a creditor of the Respondent. It was also stated in the order of justice that the Appellant had applied for legal aid for an appeal against the order of the English Court of the 9th March, 1992, staying his action.

On the 2nd March, 1993, the Respondent issued a summons in the Royal Court for discharge of the order imposed by the order of justice of the 7th December, 1992. This summons was supported by two affidavits sworn respectively by the Respondent and by his solicitor in England. It is a conspicuous feature of these affidavits that neither of them contains any denial of any of the Appellant's allegations of breach of contract and misrepresentation. The only reference to events giving rise to the dispute is the following passage in the Respondent's affidavit:

> *"After the yacht had been transferred to me [the Appellant] became of the opinion that he was not satisfied with the transaction and consequently placed an arrest order against the vessel 'Siben' in Portugal. I was then resident in Portugal. [The Appellant] then had thirty days within which to file his case which was not so filed."*

The Respondent also said in this affidavit that the default judgment for £162,000 obtained against him by the party who had arrested the 'Siben' in Southampton had been set aside on condition that the Respondent paid £70,000 into Court; he wanted to mortgage the yacht in order to raise this sum.

The Respondent's summons came before the Royal Court on the 12th May, 1993, and the Court discharged the order made under s.30. Before we consider the judgment of the Court it is necessary to turn to the legislation and certain cases decided upon it.

S.30 of the Act of 1894 is in these terms:

> ***"30. Each of the following courts; namely:***
> ***(a) in England or Ireland the High Court,***
> ***(b) in Scotland the Court of Session,***
> ***(c) in any British possession the court having the principal civil jurisdiction in that possession; and***
> ***(d) in the case of a port of registry established by Order in Council under this Act, the British court having the principal civil jurisdiction there, may, if the court think fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time***

specified any dealing with a ship or any share therein, and the court may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same."

This section was derived from the Merchant Shipping Act, 1854, s.65, which read:

"65. It shall be lawful in England or Ireland for the Court of Chancery, in Scotland for the Court of Session, in any British possession for any court possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such court may possess, upon the summary application of any interested person made either by petition or otherwise, and either ex parte or upon service of notice on any other person, as the court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the discretion of such court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted, with or without costs, and generally to act in the premises in such manner as the justice of the case requires; and every registrar, without being made a party to the proceedings, upon being served with such order, or an official copy thereof, shall obey the same.

S.65 was considered in two cases by the Court of Session: Roy v. Hamiltons and Co. (1867), 5 M.573 and McPhail v. Hamilton (1878), 5 R. 1017.

In Roy v. Hamiltons, a creditor of the respondents applied for an order under s.65 prohibiting any dealing with four ships belonging to the respondents. Two contentions were discussed in the judgments. The first concerned the ambit of the words 'such ship' in s.65. In the Act of 1854, s.65 followed three sections (ss.62, 63, 64) providing what was to happen when property, or a share, in a British ship became vested by transmission, on death or marriage, in a person not qualified to own a British ship. Because of this collocation, and the use in s.65 of the expression 'such ship or share', which they held to refer to 'the ship or share so transmitted' in s.64, three of the judges (the Lord President (M'Neill), Lord Deas and Lord Ardmillan) decided the case on the ground that the remedy provided by s.65 was confined

to the case of property, or a share, in a British ship being transmitted, on death or marriage, to a person not qualified under the Act to own it. The petition was therefore incompetent.

The second contention concerned the ambit of the words, 'any interested person'. The ground of the decision of Lord Curriehill was that the petitioner, being only a personal creditor, had no existing interest in the four ships such as was contemplated by s.65. Lord Ardmillan seems to have shared this view, although he decided the case on the other ground.

In McPhail v. Hamilton, the petition was presented by one part-owner of a ship against the other part-owner. The Lord President again held it incompetent on the ground that s.65 provided a remedy only in cases under ss.62-64, and Lord Deas and Lord Mure concurred. Lord Shand dissented. He held that the operation of s.65 was not so confined. He agreed with the decision in Roy v. Hamilton on the ground that a mere creditor was not an 'interested person' within the meaning of s.65, but on the facts before him held that the petitioner's interest in the ship under a contract of copartnery made him such an 'interested person'. S.30 of the Act of 1894 corresponds to s.65 of the Act of 1854. Like s.65, it follows sections (now ss.28 and 29) dealing with the consequences of transmission of property, or a share, in a British ship to an unqualified person.

There are, however, differences of arrangement and language. In particular, whereas the old s.65 referred to 'any dealing with such ship or share', s.30 refers to 'any dealing with a ship or any share therein'.

The significance of these changes was considered in Beneficial Finance Corpn. Ltd. v. Price (1965), 1 Lloyd's Rep. 556, a case in the Supreme Court of New South Wales. Moffitt J held (at p.561) that the change of language between the old s.65 and s.30 to which we have just referred.

> ***'must be taken to have been a deliberate generalizing of the power in favour of a view such as that expressed by Lord Shand [sc in McPhail v. Hamilton].***

The two Scottish cases were therefore not applicable to s.30 and s.30 was not limited in its operation to cases of transmissio of property in a ship to an unqualified person.

This view seems to have been accepted by Sheen, J in th subsequent English case of The Mikado (1992) 1 Lloyds Rep 163 Mr. Hoy did not argue before us that the operation of s.30 i limited as the operation of the old s.65 was held to be in the tw Scottish cases.

There was no argument about 'interested person' in Beneficial Finance Corpn. v. Price, because the applicant had an indisputable interest as a mortgagee of the ship. The question of interest did arise again in The Mikado. The applicants in that case were creditors of an individual whom they alleged to be the owner of the 'Mikado'. (He was not the registered owner, but proceedings were pending in Florida in which the applicants contended that property in the vessel had been transferred by him fraudulently, and so remained vested in him). Sheen, J referred to the dissenting judgment of Lord Shand in McPhail v. Hamilton and to a passage in the judgment of Lord Deas in Roy v. Hamiltons. He went on (at p.167):

> ***"Section 30 was enacted after the powerful expressions of opinion of Judges of the Court of Session as to the meaning of the words "any interested persons". In Beaman v. A.R.T.S (1949), 1 K.B 550 at p.567 Somervell, L.J. said:***
>
> > ***Where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject matter unless the context makes it clear that the word must have a different construction.***
>
> ***That canon of construction applies with even greater force when construing a phrase which has been repeated by Parliament after it has already been judicially construed. Section 30 of the 1894 Act replaced s.65 of the 1854 Act with some alterations. But the phrase "any interested person" was retained in the later Act after its meaning had been made clear by the Court of Session. I hold that the plaintiff is not an "interested person" within the meaning of s.30..."***

We now return to the proceedings in the case before us. By the time the Respondent's summons came before the Royal Court on the 12th May, 1993, the Appellant had issued a second writ against him in the High Court in England. That writ, dated the 7th May, 1993, was generally indorsed with a claim for damages for breach of contract and negligent misrepresentation.

Giving the judgment of the Royal Court, the Lieutenant Bailiff (Mr P.R. Le Cras) referred to The Mikado. He said counsel for the Respondent had submitted that the Appellant was a mere creditor, so outside the definition in that case of an interested party; there was no claim for rescission in the writ recently issued in England. Counsel for the Appellant had submitted that the Appellant had been cheated out of the yacht, which was therefore still his; he might seek to rescind the sale, so might be said to have a direct interest. Although the

Appellant was not in exactly the same position as the applicant in the The Mikado, the circumstances, in the Court's view, were not sufficiently clear cut to put him in the position of a holder of a direct interest. The case was near the border line, but the Appellant fell on the wrong side. The order made under s.30 should therefore be raised.

The Court gave the Appellant leave to appeal, and continued the order until disposal of the appeal.

Between this judgment and the hearing in this Court there was an important development. The Appellant delivered his statement of claim in the English action. In it he pleaded that he was entitled to rescind the contract between him and the Respondent and did rescind it, and claimed an order to that effect.

The latest authority on the meaning of 'any interested person' in s.30 is Sheen, J's judgment in The Mikado. He said the meaning of those words in s.65 of the 1854 Act had been 'made clear by the Court of Session', and that meaning had been adopted by Parliament by the re-enactment of those words in s.30 after the Court of Session's judgments.

This reasoning appears to us not to be altogether satisfactory. In the first place, the decision of the majority of the Court both in Roy v. Hamiltons and in McPhail v. Hamilton was on the ground that s.65 applied only to cases in which property in a British ship had been transmitted on death or marriage to a person not qualified to hold it.

It is true that Lord Curriehill in the former case based his judgment on his view that 'merely personal creditors' were not 'interested persons' for the purposes of s.65, and Lord Shand agreed with him in his dissenting judgment in the latter case; but this was not the *ratio decidendi* of the majority on either occasion. The Court did not place an authoritative interpretation on the words 'any interested person' in either case.

Even if the Court had done so, however, that would not have settled the question of how to interpret the 1894 Act. There used to be a view in England, based on Barras v. Aberdeen Steam Trawling and Fishing Co. (1933) A.C 402, that when words of a statute had been interpreted by one of the superior Courts, use by Parliament of those same words in a reenactment raised a inference that Parliament intended to adopt the judicial interpretation. However, the decision of the House of Lords in R. v. Chard (1984), A.C 279 has deprived this inference of most, not the whole, of its force.

If Sheen, J was wrong, as we respectfully think he was, and rely on supposed Parliamentary confirmation of the Scottish case for the interpretation of 'any interested person', it does not follow that his interpretation of those words was wrong. H

decision on s.30, following that of Lord Shand on s.65 in McPhail v. Hamilton, was that mere creditors are not covered by the words 'interested person'. We agree with this interpretation of those words. As Lord Shand says (at pp.1020/1), mere creditors ***'have no more immediate interest in the ship or shares of a ship belonging to their debtor than in any other property or right, real or personal, which their debtor may possess'.*** Lord Curriehill makes the same point in Roy v. Hamiltons at p.577, where he expresses it in terms of the absence of 'connection' between the mere personal creditor and a ship belonging to the debtor. We agree that it would strain the language of the Act to hold that a mere personal creditor has an interest in every asset of his debtor.

However, is this Appellant a mere personal creditor, in this sense, of the Respondent? In our judgment he is not. He clearly has an interest in, or connection with, the 'Siben' more immediate than he has in, or with, any other asset of the Respondent. As we have said, there has been an important change of the Appellant's position since the case was before the Royal Court. He is now claiming to rescind the contract of exchange which he made with the Respondent. If he establishes this claim, the contract will be nullified *ab initio* and the ownership of the yacht will revert to him. Plainly this puts him outside the class of mere personal creditors whom Lord Shand and Lord Curriehill had in mind in the Scottish cases.

This is not the end of the matter, for a person might be outside the particular class of 'mere personal creditors' yet not within the class of 'interested persons' who enjoy the statutory right.

An 'interested person' within the meaning of s.30 is not entitled to an order under the section. The section is permissive and gives the Court only a power, to be exercised if the Court think fit. The Court

> ***"may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires..."***

The great extent of this discretion seems to us to suggest that Parliament expected the section to apply to a wide variety of positions, and the words 'any interested person' to cover persons in a wide variety of situations. The Court needed the widest discretion because of the great variety of circumstances in which recourse to the section would be possible.

Both s.65 and s.30 have been used in cases in which some [illegible] the ship was claimed, but not yet established. Re Ship

(In spite of the statement to the contrary in a note to para. 57 of Temperley's Merchant Shipping (7th ed.), it is clear from this report that the application and the order were made under s.65.). The applicant claimed to be the buyer under a contract for sale of a barge; the seller claimed to be entitled to treat the contract as at an end because the buyer had abandoned it. Nevertheless, the order under s.65 was made. La Blanca and El Argentino (1908) 77 L.J.P. 91 was a case under s.30. The order was made in favour of applicants claiming to be entitled to the benefit of a mortgage, under which the mortgagees had already taken possession.

In view of these considerations, we have no doubt that this case falls within the ambit of s.30. If the appellant establishes the right to rescind which he claims, he will not merely be entitled to levy execution on the ship. Property in the ship will revert to him, and she will be deemed always to have belonged to him. His interest in the ship is direct enough, and his connection with her clear enough, to bring the section into play.

Mr. Hoy did not submit that, if the appellant was an 'interested person', the Court should in its discretion refuse to make the order. We are perfectly satisfied, in view of the respondent's failure to offer any answer to the appellant's charges of misrepresentation and his admitted desire to mortgage the yacht, that the right exercise of the discretion is to make the order. Mr. Hoy did submit that difficulties over *restitutio in integrum* might stand in the way of an order of rescission. While the position is not entirely clear, we are not satisfied that those difficulties are great enough to affect the exercise of the Court's discretion.

It was for these reasons that we allowed the appeal.

Authorities.

Merchant Shipping Act 1854: ss.62-5.

Merchant Shipping Act 1894: s.30.

N.C.N.B. Texas National Bank & Ors. -v- Evensong Company, Limited (The "Mikado") [1992] 1 L.L.R. 163.

Roy -v- Hamiltons and Company (1867) 5 M 573.

McPhail -v- Hamilton (1878) 5 R.1017.

Beneficial Finance Corporation -v- Price [1965] L.L.R. 556.

Erlanger -v- New Sombrero Phosphate Co. (1878) 3 A.C. 1218 at 1278-1279.

Chitty on Contracts (26th Ed'n.): paras. 464-79.

Compagnie Chemin de Fer Paris Orleans -v- Leeston Shipping Co. (1919) 36 T.L.R. 68.

Spence -v- Crawford [1939] 3 All ER 271.

Hulton -v- Hulton [1917] 1 KB 813.

Barras -v- Aberdeen Steam Trawling and Fishing Company (1933) A.C. 402.

R. -v- Chard (1984) A.C. 279.

Re Ship Isis; ex p. Baker (1868) 3 M.L.C. (o.s.) 52.

La Blanca and El Argentino (1908) 77 LJP 91.