SUPREME COURT OF QUEENSLAND

CITATION:	*Team Dynamik Racing P/L v Longhurst Racing P/L* [2007] QCA 314
PARTIES:	**TEAM DYNAMIK RACING PTY LTD** ACN 101 654 620 (plaintiff/respondent) **v** **LONGHURST RACING PTY LTD** ACN 011 022 834 **(**first defendant/appellant) **ANTHONY LAWRENCE LONGHURST and KAREN NARELLE LONGHURST** (second defendant/not party to the appeal)
FILE NO/S:	Appeal No 3527 of 2007 SC No 10801 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2007
JUDGES:	McMurdo P, Cullinane J and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	MORTGAGES – MORTGAGES AND CHARGES GENERALLY – THE MORTGAGE – TRANSACTIONS AMOUNTING TO MORTGAGES – RELEVANT PRINCIPLES – where the respondent borrowed money from the appellant and provided two motor sports racing licences as security – where the licences were transferred to the appellant – where one licence was resold by the appellant – whether the licenses were assignable property – whether the transactions were mortgages which gave rise to an equity of redemption *Argo Fund Ltd v Essar Steel Ltd* (2005) 2 Lloyds Rep 203, cited *Kreglinger v New Patagonia Meat and Cold Storage Company Limited* [1914] AC 25, cited *Noakes & Co v Rice* [1902] AC 24, cited

Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, cited
Olsson v Dyson (1969) 120 CLR 365, cited
Postle v Sengstock (1994) Qd R 290, considered
Santley v Wilde [1899] 2 Ch 474, cited

COUNSEL: H B Fraser QC, with M A Hoch, for the appellant
A J H Morris QC, with V G Brennan, for the respondent

SOLICITORS: Macrossan Lawyers for the appellant
Hopgood Ganim Lawyers for the respondent

[1] **McMURDO P**: I agree with Cullinane J and Wilson J that the appeal should be dismissed. Cullinane and Wilson JJ have explained the facts and issues so that my reasons may be very briefly stated.

[2] The primary judge had the difficult task of sorting out the legal effect of the written and oral contractual arrangements between the parties in circumstances where they deliberately entered into "sham" documents.[1] Additionally, the judge's task was made more challenging because Mr Kieran Wills, who controlled the plaintiff/respondent Team Dynamik Racing Pty Ltd ("Team Dynamik"), and Mr Anthony Longhurst, the second defendant/second appellant, who controlled at relevant times the first defendant/first appellant, Longhurst Racing Pty Ltd ("Longhurst Racing"), were not credible witnesses.[2] The judge's primary findings of fact are not now disputed.

[3] The issue in this appeal concerns the true effect of the contractual arrangements between Team Dynamik and Longhurst Racing. The primary judge relevantly found that Team Dynamik obtained a loan from Longhurst Racing (first for $750,000 and then for $450,000) in return for Team Dynamik assigning the licence issued to it by Touringcar Entrants Group Australia Pty Ltd and Australian Vee-Eight Supercar Company Pty Ltd entitling it to compete in the Australian V8 Supercar Championship car racing series, with Longhurst Racing holding a mortgage over the Team Dynamik licence. The appellant first contends that the true effect of the contractual arrangements was that there was no assignment of the Team Dynamik licence which was subject to mortgage because the rights under the licence were personal and unassignable. Alternatively, the appellant contended that, if the Team Dynamik licence was assignable and assigned, the assigned licence no longer existed and so cannot be subject to Team Dynamik's equity of redemption: the arrangement under which Longhurst Racing replaced Team Dynamik as licensee constituted a novation. The appellant accept that if the primary judge was correct in his construction of the contractual arrangements, Team Dynamik as mortgagor was entitled to the benefit of its equity of redemption and the return of the licence after the repayment of the loan in the terms agreed.

[4] The true effect of the contractual arrangements between the parties is not entirely easy to fathom. The terms of the Teams' Licence Agreement and the related Deed of Accession do lend themselves to competing arguments supporting both parties' contentions as to their effect. When those two documents are read together with the

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1 *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors* [2007] QSC 032; BS No 10801 of 2005, 22 February 2007, paras [14], [22].

2 Above, paras [29]-[30].

Memorandum of Understanding and considered in the context of the undisputed facts found by the primary judge, the better view of their effect is that Longhurst Racing's loan was secured by a mortgage over Team Dynamik's licence.

[5] As to the appellant's first contention, the rights under the licence although personal in nature were not inherently unassignable. Although any assignment of the licence was subject to Touringcar Entrants Group Australia's consent, that consent could not be unreasonably withheld: see Teams' Licence Agreement cl 12.6. The licence was assignable, first because that is what Team Dynamik and Longhurst Racing agreed in the Memorandum of Understanding and orally, and second because cl 12 of the Teams' Licence Agreement made provision for this.

[6] As to the appellant's alternative contention, even if Longhurst Racing's entering into the Deed of Accession amounted to a novation with it replacing Team Dynamik as licensee, any novation was the direct result of its agreement to lend money to Team Dynamik with a mortgage over Team Dynamik's licence. In the circumstances, any novation would not affect Team Dynamik's entitlement to the benefit of the equity of redemption and the restoration to it of ownership of the licence after repaying the money advanced under the agreement. The primary judge correctly identified this in his reasons.[3]

[7] The appeal should be dismissed with costs.

[8] **CULLINANE J**: This is an appeal against a finding that certain dealings between the parties in relation to rights arising under a contract (a Teams' Licence Agreement – TLA) between the respondent and two companies (Touring Car Entrants Group Australia Pty Ltd – TEGA – and Australian V8 Super Car Company Pty Ltd – AVESCO) which conducted the Australian V8 Super Car Championship resulted in the grant of a mortgage over the rights arising under the TLA in favour of the appellant. The learned trial Judge concluded that there was such a mortgage and granted relief in consequence.

[9] The appeal raises issues concerning the nature of a mortgage.

[10] There is no challenge to the findings of fact made by the learned trial Judge. In the judgment the factual background is set out at considerable length and it is not necessary to set it out for the purposes of this appeal.

[11] The most important rights which arose under the agreement were two licences to participate in the Australian V8 Super Car Championship. Each licence permitted the respondent to race one car in the competition and the TLA obligated the holder of the licence to compete in races with failure to do so carrying certain consequences.

[12] The respondent had incurred substantial losses in this endeavour and approached a marketing consultant because of the respondent's need for funding. This in turn lead the respondent (through one Kieran Wills) into contact with the appellant (through the second defendant Anthony Longhurst).

[13] It seems that an agreement was reached and in February 2005 a solicitor acting on behalf of the appellant and the second defendants prepared certain documents. The

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[3] Above, para [56].

purported effect of these are set out in paragraphs [10] to [13] inclusive of the reasons. The learned trial Judge found that these documents were shams and were not intended to have legal effect.

[14] At that meeting however there was a memorandum prepared which His Honour found did set out in part what the parties had actually agreed upon. His Honour found that the agreement was constituted partly by this memorandum and partly by certain oral terms.

[15] His Honour found that the parties had agreed orally that:

(a) one licence would be transferred to the appellant by the respondent.

(b) in order to regain title to the licence the respondent had to exercise a call option and pay the appellant $750,000 on a certain day.

[16] His Honour found that the agreement concerning the second licence was in similar terms but the amount involved was $450,000 and there was no obligation on Longhurst to drive as appears in the memorandum of understanding.

[17] The memorandum of understanding is a brief one:

"MEMORANDUM OF UNDERSTANDING

This is to confirm the overriding understanding and agreement notwithstanding the Sale Agreement, Service Agreement and Put and Call Option Deed between the parties:

1. Longhurst provides $750,000.00 repayable on 1 December 2005;

2. TD provides 20% return on the $750,000.00;

3. Tony Longhurst is to drive during 2005;

4. TD to provide a competitive car to Longhurst for 2005;

5. Kieran Wills guarantees TD's obligations;

6. If TD defaults, Longhurst may retain the licence; and

7. The net TEGA funds after racing costs and prize money, to be paid to TD."

[18] It should be pointed out that the issue between the parties raised on the pleadings was whether (as the respondent contended) there was a transfer of the respondent's interests to the appellant by way of security or, (as the appellant contended) there was a transfer by way of sale.

[19] In the course of argument the appellant raised certain other issues which are pressed on this appeal.

[20] Before His Honour turned to those issues he dealt with the agreement just referred to in terms of the issues between the parties in the pleadings:

"[36] The defendants rely on a number of matters outside the

Memorandum of Understanding and the words used by the parties when reaching agreement to support their proposition that the true nature of the transaction was one of sale and purchase. The first such matter is the evidence of Speairs as to his telephone conversation with Mr Wills and Mr Longhurst after they had reached agreement. Mr Speairs spoke of his understanding that Longhurst had bought the licence for $750,000. Tingela issued its tax invoice on that basis in a letter dated 30 March 2005 and its wording did not provoke any comment from Mr Wills.

[37] In a letter from Mr Wills to Mr Davison, a driver with whom Team Dynamik was in dispute, it is asserted that Wills told Davison that "the licence had been sold to Longhurst". Mr de Vere drafted the letter but the accuracy of its contents was not queried by Mr Wills.

[38] In the "overview" attached to his email to Mr Speairs of 8 April 2005, Mr Wills stated that Team Dynamik's "only debt position is that of the exercisable call option with Tony Longhurst." He confirmed in cross-examination that his understanding at the time of the email was that if he wanted to get the licence back, he had to exercise his call option and that if Team Dynamik wished to reacquire the licence, it "had something like a contingent debt of $750,000 on the books."

[39] There is extrinsic evidence which points in the other direction. Team Dynamik paid for all of the costs associated with obtaining TEGA's approval and half the costs of Longhurst's solicitor. Mrs Longhurst, who looked after Longhurst's financial affairs, described the two amounts of money provided in the two transactions as being "principal" in an email to Mr de Vere of 21 November 2005. She also calculated the "interest" on those sums. It is likely that Mrs Longhurst's understanding of the transactions was derived from discussions with her husband.

[40] The provisions of the Memorandum of Understanding are much more compatible with a loan transaction than with an agreement for sale coupled with an option to repurchase. The Memorandum does not state that TD sells and Longhurst purchases. It does not state that Longhurst lends and TD borrows either. But the use of the word "repayable" in Item 1 is much more suggestive of a loan than a sale. The "...20% return on the $750,000..." to be provided by TD is more consistent with a loan than a sale as is the obligation on Longhurst in Item 7 to pay to TD the "...net TEGA funds..." after deducting "...racing costs and prize money..." Item 6, which provides that Longhurst may retain the licence if TD defaults, is also more indicative of a loan than a sale.

[41] In my view, the matters relied on by the defendants are not

> sufficient to change the complexion of the transaction manifested in the Memorandum from that of a secured loan to an agreement for sale coupled with an option to repurchase. In talking to Mr Speairs about the transaction, neither Mr Wills nor Mr Longhurst would have given consideration to the proper legal categorisation of their transaction. Nor would Mr Speairs have been concerned with the way in which the transaction had been structured. He did not participate in the negotiations in February 2005 and had the understanding based on his earlier dealings that the agreement was one of sale and purchase.
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> [42] The letter to Mr Davison's lawyers of 21 March 2005 is not particularly persuasive. Both Mr Wills and Mr de Vere would have been more interested in advancing the best possible argument rather than accurately stating the true nature of the transaction between Team Dynamik and Longhurst. To refer to the transaction as a secured loan would have exposed Longhurst and Team Dynamik to the possibility of the matter being referred to TEGA.
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> [43] Nor does it seem to me to be decisive in the defendants' favour that Mr Wills had the understanding that, in order to recover the licences, he had to exercise a call option and pay the sums advanced on 1 December 2005. Such requirements are not compatible with secured loans and Mr Wills did not subject the transactions to any legal analysis. Finally, the fact (which I find) that the value of each licence was considerably in excess of the amount advanced in respect of it and was believed by Mrs Wills and Longhurst to be so, is more consistent with a transaction by way of secured loan than with one of sale and purchase. If the parties had considered the transaction to be one of sale and purchase with an option to re-purchase it is likely that the consideration would have been more reflective of market value. For the above reasons I find that the subject transactions were by way of mortgage rather than sale."

[21] Senior counsel for the appellant before this Court contended that in order for any characterisation of the dealings between the parties to be made it was necessary to consider not only the agreement to which I have already referred but also the nature of the rights which arose under the TLA and the effect of the agreement (described as a Deed of Accession) which TEGA and AVESCO required the appellant and respondent to enter into and pursuant to which the respondent ceased to hold the licences and the appellant became the holder of them.

[22] It is the appellant's claim that:

(a) the rights of the respondent under the TLA were not assignable and thus could not be the subject of a mortgage; or

(b) if assignable the deed of accession effected a novation and not an assignment and thus no mortgage of the respondent's interests arose. It was only by entering

into such a deed that the licences could be alienated by the respondent and come to be held by the appellant.

[23] His Honour dealt with these matters after reaching the conclusions set out in paragraph [43] of the reasons.

[24] As to the first of these he disposed of it at paragraphs [46] and [47] of the reasons:

> "[46] Accepting for the purposes of argument that the licence agreements create personal obligations and personal relationships of the sort which would normally render the rights under the TLAs unassignable, the rights are nevertheless assignable because that is the parties' agreement.[4] Clause 12 of the TLAs makes specific provision for the assignment and sub-licensing of licences.
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> [47] Consequently, if the defendants are to succeed on the point under consideration, it must be on the basis that the Deeds of Accession extinguished the licences and, by novation, brought new licences into existence."

[25] Before us considerable emphasis was placed by the appellant upon those parts of the TLA which might be regarded as suggesting the existence of or giving rise to personal relationships thus tending to militate against an assignability or transferability of such licences. Particularly the obligations contained in clause 7 (which imposed an obligation to compete) were relied upon whilst reference was also made to clause 2.

[26] On the other hand, clause 12 makes the provision for the transfer of licences and does so in language which is in my view unequivocally the language of transferability. It should not be overlooked that the property concerned included shares in TEGA which were to be transferred pursuant to the deed.

[27] In my view His Honour's conclusions on this issue were correct.

[28] As to the second matter raised His Honour did not express any concluded opinion, taking the view that even if there was a novation the respondent was entitled to succeed. For reasons which appear hereunder I think this conclusion also was correct.

[29] The appellant's starting point was what was described as the classic test of a mortgage found in *Santley v Wilde* [1899] 2 Ch 474:

> "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law."

[30] On the other hand the respondent contended for a more expansive view of a mortgage taking the statement found in Francis and Thomas "Mortgages and Securities" third edition page 1:

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[4] *C B Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1863] NZLR 576 at 582-3.

> "According to the modern concept, a 'mortgage' is a conveyance, assurance, transfer, or assignment of real or personal property either operative at law or enforceable in equity, for the purpose of securing the payment of money or the performance of a monetary or pecuniary obligation in respect of which it is given."

[31] The appellant in its written outline of argument in reply does not take issue with this more expansive view but argued that the transaction in this case does not meet that test contrasting a novation with what is involved in a "conveyance, assurance, transfer or assignment".

[32] It is axiomatic that equity in this field looks at the substance and effect of a transaction rather than its form. There have been many instances in which the courts have concluded that a transaction which on its face was of a different kind was in fact a mortgage. See for example cases *Re Watson; Ex parte Official Receiver in Bankruptcy* (1890) 25 Q.B.D 27 and *Grangeside Properties Ltd v Collingwood Securities Ltd* (1964) 1 W.L.R. 140.

[33] This is one area in which parol evidence is permitted to show that an agreement which on the face of it was unequivocally of a particular kind was in fact intended by the parties to be by way of security.

[34] The right of a mortgagor to redeem secured property is central to the nature of a mortgage and equity jealously guards against any attempt to deprive the mortgagor of it or to limit such a right. See cases such as *Noakes & Co v Rice* [1902] A.C. 24 at 30 and *Kreglinger v New Patagonia Meat and Cold Storage Company Limited* [1914] A.C. 25 at 35.

[35] I have already referred to the more extensive definition of a mortgage relied upon by the respondent and taken from Francis and Thomas "Mortgages and Securities". To this passage I would add the following which appears immediately after it:

> " Its essential elements are two: first, the obligation, and secondly the alienation, or at least the right of the mortgagee to procure the alienation of the property. "

[36] I would adopt the statement that appears in Francis and Thomas taken as a whole as an accurate statement of the requirements of a mortgage.

[37] Much of the argument of the appellant focussed on the differences between the legal nature of an assignment and a novation. It was as I have said, the appellant's contention that the latter is the proper construction of the deed of accession which was the means by which the respondent ceased to be the holder of the licences and the appellant became the holder of them.

[38] Senior counsel for the appellant referred to the explanation by Windeyer J in *Olsson v Dyson* (1969) 120 C.L.R 365 of the nature of a novation. At pages 388 – 389 His Honour said:

> " In *Scarf v Jardine* Lord Selbourne said novation 'means this – the term being derived from the civil law – that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge

> of the old contract'. In that sense novation means simply a new contract standing in the place of the old".

[39] The statement of the same judge in *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R 9 at p 26 is generally adopted as an accurate description of an assignment: "--- the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee."

[40] I do not think that the outcome of the issue here turns on whether the transaction involved can be characterised as falling into one or other of these legal categories.

[41] Rather I think it turns upon whether what occurred in this case meets the requirements of a mortgage, as that term is defined in the manner I have indicated I have proposed to adopt.

[42] In my opinion the question of whether a mortgage exists does not admit of a narrow or technical approach.

[43] That an overly prescriptive approach to the second element of a mortgage should be avoided is illustrated by cases such as *Postle v Sengstock* (1994) Qd. R 290.

[44] In that case no transfer or assignment of the legal title was possible because the alleged mortgage was, on one view of the transaction, already the holder of it. At page 296 the court in its joint judgment said:

> "The view that the security amounted to a mortgage was the position most favourable to the appellant. Had it not been a mortgage but only a charge by way of security or less, the appellant would still not have been entitled to retain the title to the property against the respondents if they proffered the repayment of the debt for which the security was held. The point is that whatever the form of security held as at 2 October 1990, the contract had been substantially performed except for repayment of the loan.
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> In order to have the sale and the repayment of the loan regarded as related parts of a single transaction, it was argued for the appellant that the arrangement could not have amounted to a mortgage for that requires an assignment of the legal title in the property to the mortgagee; and in the present case there is no such assignment because the legal title was already and remained in the vendor. It is true that mortgages are usually affected by the assignment of the legal title to the mortgagee but that there is no reason why such an assignment is necessary when the mortgagee already holds the legal title in trust for the mortgagor. That would have been the case here upon the payment of the purchase money by means of the notional loan.
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> No authority was cited in support of this argument of the appellant. In *Quarrell v Beckford* (1816) 1 Madd. 269 at 278; 56 E.R. 100 at 103; [1814-1823] All E.R. Rep. 618 at 621, Plumer V.C. said: "What is a mortgage? Everybody knows, it consists of 2 things; it is a personal contract for a debt, secured by an estate, and in equity, the estate is no more than a pledge or security for the debt; the debt is the principal – the estate is the accident …". The essential feature

> of the mortgage lies not in the conveyance or assignment of the legal title but the fact of its being vested in the mortgagee by way of security. If that can be achieved by permitting the mortgagee to retain the legal title which is already vested in his name, then the necessary result is achieved in respect of this element without the need for an assignment."

[45] Also worth noting are cases (albeit in a context not concerning mortgages) in which a party has covenanted not to transfer or assign rights or obligations without approval and the term transfer has been held to mean or to include a novation. See Tolhurst, "The Assignment of Contractual Rights", page 258 and *British Gas Trading Ltd v Eastern Electricity PLC* (unreported English Court of Appeal 18 December 1986) and *Argo Fund Ltd v Essar Steel Ltd* (2005) 2 Lloyds Rep 203.

[46] Returning to the criticism of the learned trial judge's approach referred to in paragraph [14] of these reasons, it seems to me that His Honour necessarily had to focus on what the parties had agreed upon as their bargain in order to determine what they intended to be its nature and effect. The rights which arose under the TLA and in the deed of accession were of course relevant to what is at issue here – was there a mortgage? – but the primary evidence of the parties' intention was the agreement constituted by the memorandum of understanding and the oral terms already referred to. His Honour then considered the TLA and the deed of accession in terms of the arguments advanced by the respondent in order to determine whether any of those matters affected the question of whether there was a mortgage. There is in my view nothing objectionable in this approach nor anything to indicate that His Honour did not have regard to the TLA and the deed of accession in order to determine the primary issue. In my view His Honour's analysis and conclusions as to the parties' intention in reaching the agreement referred to were correct.

[47] I am of the view that consistent with the approach I have referred to; that the transaction here should not be denied the character of a mortgage because of the means by which the licences came to be held by the appellant.

[48] His Honour in my view accurately dealt with the matter in paragraph [56]:

> "[56] In my view there was no impediment to treating what has occurred in this case as giving effect to the extension of the parties that the licences be transferred for the purposes of security and that the respondent was entitled upon payment of such monies to have the appellant to do all within its power to retransfer the licenses."

[49] No authority was cited which would stand as an impediment to the conclusion that a mortgage arose in this case and it is consistent with the approach of equity in emphasising the substance rather than the form of a transaction.

[50] Nor in my view does it matter that it is not within the power of the appellant alone to reconvey the licenses and that the approval of TEGA and AVESCO will be required.

[51] I would dismiss the appeal with costs to be assessed.

[52] **WILSON J**: I respectfully agree with the reasons for judgment of Cullinane J, and wish to add the following.

[53] In 2005 the appellant and the respondent entered into two transactions each concerning a licence issued by TEGA and AVESCO to the respondent entitling it to compete in the Australian V8 Supercar Championship Series car races and giving it various other rights including entitlements to shares in TEGA.[5]

[54] The issue on the appeal was whether His Honour erred in finding that the transactions were by way of mortgage rather than by way of sale.[6] Submissions were advanced in relation to the first transaction, on the basis that while there were some differences between the transactions, the arguments on this issue were the same.[7]

[55] The trial judge found that the agreement concerning the first licence was partly written and partly oral. In so far as it was written, it was in a Memorandum of Understanding in these terms –

> "MEMORANDUM OF UNDERSTANDING
>
> This is to confirm the overriding understanding and agreement notwithstanding the Sale Agreement, Service Agreement and Put and Call Option Deed between the parties:
>
> 1. Longhurst provides $750,000.00 repayable on 1 December 2005;
>
> 2. TD provides 20% return on the $750,000.00;
>
> 3. Tony Longhurst to drive during 2005;
>
> 4. TD to provide a competitive car to Longhurst for 2005;
>
> 5. Kieran Wills guarantees TD's obligations;
>
> 6. If TD defaults, Longhurst may retain the licence; and
>
> 7. The net TEGA funds after racing costs and prize money, to be paid to TD."

The oral terms were –

(a) that the first licence be transferred by the respondent to the appellant; and

(b) that in order to regain title to the licence, the respondent had to exercise a call option and pay the appellant $750,000 on 1 December 2005.[8]

[56] Counsel for the appellant submitted that in characterising the transaction as a mortgage (and in giving relief according to equitable doctrines peculiar to

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5 Clause 4 of the Teams' Licence Agreement (TLA).

6 *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors* [2007] QSC 32, [43].

7 Transcript of the appeal, pp 7-8.

8 *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors* [2007] QSC 32, [26].

mortgages), the trial judge erred in not considering the totality of the parties' dealings. They submitted that the Teams' Licence Agreement ("TLA") and the Deed of Accession (which was required as a condition of TEGA's consent to the transaction) most accurately reflect the true legal nature of the transaction, and that the trial judge erred –

(a) in concluding that the rights under the TLA are assignable; and

(b) in failing to conclude that, even if the rights are assignable, there was nevertheless no mortgage because there was, in fact, no assignment of those rights by way of security or otherwise.

[57] Clause 12 of the TLA is in these terms –

"**12. SALE OR SUB-LICENCE OF RIGHTS**

12.1 Rights Specific to Team

The rights and obligations created by this Agreement are specific and personal to the Team.

12.2 Change of Control

The Team may not allow or undergo a change of Control (direct or indirect) without the prior written consent of TEGA. A Team's failure to obtain consent for a change of Control will constitute a breach of this Agreement.

12.3 Restriction

No Team can Sell its Rights or Sub-licence its Racing Entitlements unless:

(a) in accordance with the terms of this Agreement; and

(b) with approval of the TEGA Board in accordance with clause 12.6.

12.4 Sale of Category Level One or Category Level Two

If a Team with a Category Level One or Category Level Two Licence proposes to Sell its Rights the following procedure will apply:

(a) the Team must inform TEGA in writing of its intention to Sell its Rights;

(b) TEGA will, within fourteen (14) days notify all Teams of the proposed Sale; and

(c) the Team, upon notifying TEGA pursuant to clause 12.4(b) may notify any other party whatsoever.

12.5 Sub-licence of Category Level One or Category Level Two

If a Team with a Category Level One or Category Level Two Licence proposes to sub-licence its Racing Entitlements the following procedure will apply:

(a) the Team may notify any party it chooses of its intention to sub-licence its Racing Entitlement; and

(b) the Team is not obliged to notify other Teams or TEGA of its intention to sub-licence its Racing Entitlements.

12.6 TEGA approval of transferee or Sub-licensee

(a) TEGA will not unreasonably withhold its consent to a Sale of a Team's Rights or a Sub-licence of Racing Entitlements if the Team has complied with its obligations under this Agreement and if:

(i) the Team provides TEGA with full details of the proposed Sale or Sub-licence and proposed assignee or Sub-licensee;

(ii) the proposed assignee or Sub-licensee is considered by the TEGA Board to have or to have access to sufficient experience, knowledge of the Category and the financial resources to operate the Team's Racing Entitlement;

(iii) the proposed assignee or Sub-licensee is considered by the TEGA Board to have the ability to add to the reputation of the Category and be of good character;

(iv) the proposed assignee has indicated in writing to TEGA that it will enter into the Deed of Accession attached at Schedule Two;

(v) the proposed assignee or Sub-licensee is not:

(A) a person or Entity that has within the last 2 years breached an agreement with TEGA in respect of the restrictions set out in clause 5 (***Breaching Entity***);

(B) related to or is not a Related Entity of a Breaching Entity; or

(C) a person or Entity in which a Breaching Entity has an Interest;

(vi) all obligations of the Team are assumed by the proposed assignee entering into the Deed of Accession;

(vii) the relevant Team has paid or has made reasonable provision to pay all reasonable legal and administration costs and disbursements necessarily incurred by TEGA in effecting the Sale or Sub-licence; and

(viii) both the relevant Team and the proposed assignee or Sub-licensee sign all documents and do all things necessarily required by TEGA to effect the Sale or Sub-licence, which includes the execution of the Sub-licence where appropriate.

(b) TEGA's consent to any Sale or Sub-licence pursuant to clause 12.6(a) will not constitute a waiver of any claim TEGA may have against the Team.

(c) Notwithstanding any other provision of this Agreement, TEGA may withhold its consent in its absolute discretion to a Sale of a Team's Rights or a Sub-license of Racing Entitlements to an Entity Controlled by a company, which is a vehicle manufacturer.

(d) In circumstances where Racing Entitlements have been Sub-licensed pursuant to this Agreement any rights associated with voting at a general meeting of TEGA will remain with the Team.

(e) Upon the approval by TEGA of the Sale of a Team's Rights or a Sub-licence of Racing Entitlements the TEGA Board shall amend the Register. The TEGA Board shall advise the Teams of any amendment of the Register in writing within fourteen (14) days of the amendment.

12.7 Two Year Limit on Sub-licensing

(a) A Team is only permitted to Sub-licence its Racing Entitlements once. The Sub-licence of the Racing Entitlements is for a maximum period of two (2) consecutive years.

(b) Any Sub-licence of a Team's Racing Entitlements for a period greater that [sic] two (2) consecutive years will be deemed to be a material breach of the Agreement pursuant to clause 11.3.

(c) If a Licensee fails to commit to Race Meetings as required in clause 7.2 after sub-licensing its Racing Entitlements for two (2) consecutive years, the Team agrees it will:

(i) no longer be entitled to be involved with the Category insofar as the Licence is concerned; and

(ii) attempt to sell the Licence pursuant to this clause 12.

(d) If the Team is unable to sell the Licence within three (3) months then the Rights and Racing Entitlements shall be handed back to TEGA pursuant to clause 13.2.

12.8 TEGA Board Option to Purchase

(a) Despite clause 12.4 before a Team may enter into an agreement for the sale of a Category Level One Licence or Category Level Two Licence, the Team must offer the Licence to TEGA on the same terms and conditions as those negotiated with the proposed purchaser.

(b) TEGA may, in its absolute discretion:

(i) elect to enter into an agreement for sale on the same terms and conditions referred to in clause 12.8(a) in which case TEGA may buy-back, redeem or direct the Shares held by the Team to be transferred to TEGA's nominees; or

(ii) introduce another purchaser who may enter into an agreement with the Team for the purchase of the Licence in priority to any other purchaser."

[58] While it begins by providing that the rights and obligations created by the TLA are specific and personal to the Team, clause 12 goes on to provide for the negotiability of those rights. In restricting the sale of rights or the sub-licensing of racing entitlements to transactions in accordance with the terms of the TLA and with the approval of the TEGA board, sub-clause 12.3 is premised on such rights and entitlements being alienable by sale or sub-licence respectively. Sub-clauses 12.4 and 12.5 prescribe procedures to be followed where such a sale or sub-licence is proposed. Importantly, sub-clause 12.6 imposes restrictions on TEGA's withholding its consent to a sale or sub-licence. TEGA covenanted not to withhold its consent unreasonably if the proposed assignee indicated in writing to it that it would enter into a Deed of Accession in the form in schedule 2 to the TLA and if all obligations of the Team were assumed by the proposed assignee entering into the Deed of Accession (sub cl 12.6(a)(iv) and (vi)). As senior counsel for the respondent submitted, all of the language is the language of a negotiation of rights between one party and another.

[59] I respectfully agree with the trial judge's conclusion that the rights are assignable.[9]

[60] Counsel for the appellant submitted that the Deed of Accession[10] effected a novation of the TLA – that is, that it extinguished the licence and brought a new

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9 *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors* [2007] QSC 32, [46].

10 dated 11 March 2005.

licence into existence. This is a matter which the trial judge found not entirely clear, but ultimately unnecessary to decide.[11]

[61] The Deed of Accession should not be considered in isolation, but rather as part of the web of provisions in clause 12 of the TLA relating to the sale of rights. TEGA covenanted not to withhold its consent unreasonably to a sale of a Team's rights if (inter alia) all the obligations of the Team were "assumed" by the "proposed assignee".[12] That language is consistent with a transfer of rights and obligations rather than their extinguishment and the creation of new ones.

[62] The parties to the Deed of Accession were the appellant ("the New Party"), the respondent ("the Transferor") and AVESCO and TEGA. It began with the following recitals –

> "The Transferor is currently the holder of 50 Shares in the capital of TEGA.
>
> The Transferor, AVESCO, the Teams and TEGA are parties to an Agreement dated _____ day of _____, 2004.
>
> The Transferor has agreed to sell and transfer to the New Party and the New Party has agreed to purchase and take a transfer of the Sale Shares and to assume the liabilities of the Transferor in respect of the Sale Shares.
>
> By clause 12.6 of the Agreement, the parties to the Agreement are obliged to ensure that a person enter into a deed in the form of this Deed before it is registered as a holder of any Share and that TEGA does not register a person as the holder of any share until the deed has been executed.
>
> The Transferor wishes to be released from its obligations under the Agreement in respect of the Sale Shares as from the Effective Date.
>
> The Continuing Parties have agreed to consent to the transactions referred to in this Deed on the terms of this Deed."

By clauses 2, 3 and 4 –

> "**2. New Party Assumes Liability**
>
> 2.1 The New Party covenants and agrees with each Continuing Party as from the Effective Date to be bound by the Agreement so that from the Effective Date the New Party will be deemed to be a party to the Agreement and to be a holder of Shares.
>
> 2.2 The New Party acknowledges that it has been provided with a copy of the Agreement.
>
> **3. Consent of Continuing Participants**
>
> Each Continuing Party:

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11 *Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors* [2007] QSC 32, [48]-[50].

12 TLA, cl 12.6(a)(vi).

(a) irrevocably and unconditionally consents to the New Party becoming a party to the Agreement and a holder of _____ Shares on and from the Effective Date and assuming obligations in accordance with (and to the extent referred to in) clause 2 of this Deed; and

(b) agrees that the New Party will be entitled to exercise all of the rights, privileges and benefits of the Transferor in respect of the Sale Shares and agrees to be bound by the terms of the Agreement as if the New Party were named in the Agreement as a party instead of the Transferor.

4. Transferor Released

With effect on and from the Effective Date, each Continuing Party releases and forever discharges the Transferor to the extent specified in the Agreement."

[63] The deed involved a transfer of shares and an accession to an existing body of legal rights and obligations. Its operative clauses were cast in terms of transfer and continuity, rather than extinguishment of existing rights and obligations and creation of new ones. I am unpersuaded that it effected a novation.

[64] In my view the licence was assignable and it was assigned. Considering the totality of the parties' dealings, including the Memorandum of Understanding and the oral terms of which the trial judge was satisfied, that assignment was by way of mortgage rather than sale.

[65] Senior counsel for the appellant conceded that if the transaction were properly characterised as a mortgage, the relief granted by the trial judge was appropriate.

[66] I would dismiss the appeal and order that the appellant pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.