Kennedy v Newman [2013] NTSC 38

PARTIES:	KENNEDY, Robert v NEWMAN, Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 10 of 2012 (21217570)
DELIVERED:	17 July 2013
HEARING DATES:	4 and 11 January 2013
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

LOCAL COURT APPEAL – Appeal dismissed

CONTRACT OF SALE FOR PANTECHNICON – Conditional contract – seller to undertake and complete unfinished work – intention of parties interpreted according to natural or plain meaning – interpretation of reasonable person in position of parties – commonsense approach taken – unfinished work included removal and relocation of items in pantechnicon

SALE OF GOODS ACT – Property passed following payment, waiver of unfinished work condition and delivery

DEMAND FOR GOODS TO BE RETURNED TO PROPERTY – Seller had no contractual right to demand return – property had passed, therefore buyer

could exercise property rights – buyer bailee at will of seller's workshop equipment and tools

BREACH OF CONTRACT – Time for completion of unfinished work by the seller and delivery of the essence – failure to deliver on time – breach of condition – waiver of condition

Sale of Goods Act (NT) s 16(1), s 23, Rule 2

Hartley v Hyman [1920] 3 KB 475
J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores [1942] 66 CLR 116
Marcus Clark (Vic) Ltd v Brown (1928) 40 CLR 540
Purcell v Bacon (1914) 19 CLR 241
Wallace v Safeway Caravan Mart Pty Ltd (1975) QL 224

REPRESENTATION:

Counsel:

Appellant:	Self Represented
Respondent:	Self Represented

Solicitors:

Appellant:	Self Represented
Respondent:	Self Represented

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kennedy v Newman [2012] NTSC 38
No. LA 10 of 2012 (21217570)

BETWEEN:

ROBERT KENNEDY
Appellant

AND:

PETER NEWMAN
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 17 July 2013)

Introduction

[1] This is an appeal from the Local Court in Darwin. Both the appellant and the respondent appeared as litigants in person.

[2] On 27 September 2010 the appellant and the respondent entered into a written contract of sale pursuant to which the appellant agreed to sell an unregistered Dodge pantechnicon and a trailer to the respondent for $19,500.00. The contract of sale was a conditional contract as the appellant agreed to undertake and complete certain unfinished work on the pantechnicon, which was specified in the contract of sale, in order to put the pantechnicon in a deliverable state. The unfinished work was to be done on a block of land where the pantechnicon was kept. The land was owned by a

third party, Mr Smith, who had allowed the appellant to keep the pantechnicon, the trailer, a caravan and a container on the land during the period that he was owner of the land.

[3] At the time the contract of sale was made, the appellant had been using the pantechnicon as a workshop and storage facility for his workshop equipment and tools. The unfinished work included the removal and relocation of the appellant's workshop equipment and tools and, according to the appellant, storage racks that were built into the pantechnicon. The appellant was going to use some of the equipment and tools to complete the unfinished work on the pantechnicon and then he planned to transfer all his items to the caravan and container which were located on the same land as the pantechnicon.

[4] It was a term of the contract that the unfinished work was to be completed and the pantechnicon was to be delivered to the respondent in early 2011. The respondent paid the full purchase price of $19,500.00 in 2010 but the appellant failed to complete the unfinished work by early 2011.

[5] While the pantechnicon was on the land owned by Mr Smith, the land was sold by Mr Smith to Mr Charlie Riley. After he purchased the land, Mr Riley demanded that the pantechnicon and trailer be removed from the land. Mr Riley's demand was relayed to the respondent by Mr Smith. In accordance with Mr Riley's demand, the respondent moved the pantechnicon from the back of the block of land to the front of the block and then onto the road in October 2011 and finally to the premises of a truck repairer in

December 2011. When he did so, the unfinished work had still not been completed by the appellant and the appellant's items were still in the pantechnicon.

[6] The respondent requested the appellant to remove his items from the pantechnicon but the appellant refused to do so. Instead, the appellant demanded that the respondent return the pantechnicon to the land owned by Mr Riley until he completed the work that was necessary to be undertaken on the caravan and container so that his workshop equipment and tools could then be removed from the pantechnicon and relocated in the caravan and container. The parties were unable to resolve this dispute and on 2 May 2012 the appellant commenced proceedings in the Local Court in Darwin. It was alleged by the appellant that by removing the pantechnicon from Mr Riley's land, without removing the workshop equipment and tools, the respondent had breached the contract of sale and the appellant claimed damages, being the replacement value of all his workshop equipment and tools that were stored in the pantechnicon. The appellant maintained that, as a result of the respondent removing the pantechnicon from the land owned by Mr Riley, he did not have the capacity to transfer his items to the caravan and container and, ultimately, he lost the right to use the land and thereby he lost the use of his items that were stored in the pantechnicon.

[7] On 12 November 2012 Lowndes SM dismissed the appellant's claims on the following basis. The only cause of action pleaded by the appellant in his particulars of claim was breach of contract. However, the terms of the

contract of sale about the removal and relocation of items in the pantechnicon were incomplete. Under the contract of sale, the removal and relocation of the appellant's items were to be the subject of further agreement. Consequently, that part of the contract of sale was unenforceable. The appellant's claim must fail as he did not plead a cause of action in either detinue or conversion.

[8] Lowndes SM also found that it was clear on the evidence before him, in particular the evidence of the respondent, that the respondent was at all material times willing to deliver up the workshop equipment and tools. His Honour stated that, although for a short period of time in October 2011 the respondent imposed a condition that he would only return the appellant's workshop equipment and tools if the appellant returned some parts that had gone missing, the respondent subsequently changed his mind and he told the appellant that he was willing to return the workshop equipment and tools unconditionally. He maintained that position during the course of the hearing in the Local Court. In his Honour's opinion, there was no evidence of detinue or conversion. There had been no disposal or sale of the workshop equipment and tools and there had been no withholding of possession or failure to return the workshop equipment and tools contrary to the appellant's rights. The respondent has taken reasonable care of the contents of the pantechnicon and at all material times he has been willing to have the workshop equipment and tools returned to the appellant. However, the appellant declined to accept the offer. He did so, on the grounds that, at

the time the offer was made, he was not in a position to take the workshop equipment and tools back. He did not have the capacity to store the items, nor did he have the capacity to remove the items from their present location.

[9] The appellant has appealed against the whole of the judgment of Lowndes SM. The principal grounds of appeal may be summarised as follows.

1. The trial magistrate erred in holding there was no agreement to transfer the appellant's items out of the pantechnicon before the pantechnicon left the appellant's allocated tenancy site.

2. The trial magistrate erred in failing to find that it was a term of sale agreement that the appellant's items would be transferred out of the pantechnicon, at the site where it had been parked since 2010, before the pantechnicon could be delivered to the respondent.

[10] Grounds 3, 4 and 5 of the Notice of Appeal merely pleaded certain evidentiary matters which are of little or no relevance to the substantive grounds of appeal.

The contract of sale

[11] Where parties have entered into a written contract, the intention of the parties is to be interpreted according to the natural or plain meaning of the words used in the written document.[1] The words are to be interpreted according to the view which would be taken by a reasonable person in the

[1] *Purcell v Bacon* (1914) 19 CLR 241 at 264.

position of the parties.[2] A common sense approach is to be taken.[3] The expression of the intention of the parties governs the contract.

[12] The operative terms of the contract of sale of the pantechnicon are:

> AGREEMENT TO PURCHASE
>
> Inspected by Peter Newman (the purchaser) and agreed to purchase 23 September 2010 on the following terms:
>
> 1. The combination of the Pantechnicon and Trailer for the sum of $19,500.00 (Nineteen thousand and five hundred dollars) as described above.
>
> 2. On payment of the deposit of $5000.00 (five thousand dollars) enabling unfinished work to proceed and bind the sale to Mr Peter Newman.
>
> 3. Unfinished work and hand over to Mr Newman to be completed early 2011.
>
> 4. Further progress payments as agreed and balance at handover early 2011 or before if it can be achieved and mutually agreed.
>
> 5. In the case of the sellers prior death to be paid in full to his estate.
>
> Signed by – Peter Newman witness – Robert Kennedy
>
> AGREEMENT TO SELL
>
> Supplied as previous owner Robert E Kennedy (the seller) unencumbered of any other ownership.

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2 *Marcus Clark (Vic) Ltd v Brown* (1928) 40 CLR 540 at 548 – 9.
3 *J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores* (1942) 66 CLR 116 at 124 – 5.

6. The combination of the Pantechnicon and Trailer for the sum of $19,500.00 (Nineteen thousand and five hundred dollars) as described above.

7. On payment of the deposit of $5000.00 (five thousand dollars) enabling unfinished work to proceed and bind the sale to Mr Peter Newman.

8. Unfinished work and hand over to Mr Newman to be completed early 2011.

9. Further progress payments as agreed and balance at handover early 2011 or before if it can be achieved and mutually agreed.

10. In the case of the sellers prior death to be paid in full to his estate.

Signed by – Peter Newman Robert Kennedy

List of unfinished work as at 23 September 2010

- Finish painting body
- Finish painting cabin
- Supply and fit an additional 12 volt battery
- Fit new muffler
- Attach and connect lights and mirrors
- Reseal injector pump shaft
- Remove and relocate items within the pantechnicon as mutually agreed.

- General tidiness of cabin and body.

Agreement on work to be completed

Signed by Peter Newman Robert Kennedy

[13] In my opinion, it was the intention of the parties that:

1. The unfinished work included the removal and relocation of the items within the pantechnicon. They were not part of the contract of sale. The words "as mutually agreed" do not indicate that term of the contract is incomplete in the sense that the removal and relocation was subject to further mutual agreement. The words mean the removal and relocation was to occur in the manner which had already been mutually agreed or according to what had already been mutually agreed. The words are used in the same manner as the words "as scheduled" are commonly used.

2. The unfinished work was to be undertaken by the appellant.

3. The unfinished work including the removal and relocation of items within the pantechnicon was to be completed by the appellant by early 2011.

4. The pantechnicon was to be delivered to the respondent by early 2011.

5. Subject to any waiver by the respondent of the condition that the unfinished work be completed by the appellant, the property in the pantechnicon and the trailer would pass after the unfinished work was completed by the appellant.

[14] Section 22 of the *Sale of Goods Act* (NT) provides, where there is a contract of sale for specific goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard shall be had to the

terms of the contract, the conduct of the parties and the circumstances of the case. Section 23, Rule 2 of the *Sale of Goods Act* (NT) provides that unless a different intention appears, where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.[4]

[15] In my opinion, no different intention to that specified in s 23, Rule 2 of the *Sale of Goods Act* (NT) appears in the contract of sale the subject of this appeal. Handover to the respondent was to occur upon the completion of the unfinished work and the balance of the purchase price was to be paid at handover. Clauses 3 and 8 state that "unfinished work and handover to Mr Newman to be completed in early 2011" and clauses 4 and 9 state, "further progress payments as agreed and balance at handover early 2011 or before if it can be achieved and mutually agreed."

[16] Further, time is prima facie of the essence with respect to delivery in the contract of sale that is the subject of this appeal.[5] If the time for delivery is fixed by the contract, then failure to deliver at that time will be a breach of a condition, which justifies the buyer in refusing to take the goods. The time for delivery under the contract of sale was fixed as "early 2011". The ordinary meaning of 'early' is within the first part of the relevant division of time, which, in this case, would mean within the first half of 2011.

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4 *Wallace v Safeway Caravan Mart Pty Ltd* (1975) QL 224.
5 *Hartley v Hymans* [1920] 3 KB 475 at 484.

However, under s 16(1) of the *Sale of Goods Act* (NT) where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such a condition as a breach of warranty and not as a ground for treating the contract as repudiated.

The proceedings in the Local Court

[17] The appellant's claim in the Local Court may be summarised as follows.

1. The appellant agreed to sell the respondent a pantechnicon.

2. At the time the appellant and the respondent made the agreement to sell the pantechnicon, it was parked on the land of a third party, and it was being used as the appellant's workshop and contained engineering and other equipment owned by the appellant.

3. The entire contents of the pantechnicon remained the property of the appellant and were not part of the sale to the respondent.

4. It was a term of the agreement to sell the pantechnicon that the contents of the pantechnicon were to be transferred out of the pantechnicon before the pantechnicon was delivered to the respondent and removed from the land of the third party.

5. It was also a term of the agreement to sell the pantechnicon that the appellant was to do further specific work on the pantechnicon in an unspecified time before it was delivered to the respondent.

6. On 5 September 2011, without notice to the appellant, the respondent towed the pantechnicon away while it still contained all of the items belonging to the appellant.

7. The respondent refuses to return the pantechnicon to the third party's land and has revoked the terms of the agreement to sell

the pantechnicon which placed an obligation upon the appellant to complete the further specific work.

8. The third party is no longer agreeable to allowing the appellant to place the pantechnicon and/or its contents on the third party's land for no consideration and the appellant cannot afford the cost of alternative storage of his engineering and other equipment that are in the pantechnicon.

9. The appellant claims $23,000 as a fair replacement value of his engineering and other equipment that are in the pantechnicon.

[18] It is apparent from the text of the particulars pleaded in the Statement of Claim that was filed in the Local Court that the appellant's claim was based solely on breach of contract. He did not plead causes of action in detinue or conversion.

[19] The respondent's defence to the plaintiff's claim may be summarised as follows.

1. The respondent denies that he refused to return the appellant's property to the appellant.

2. At all material times, the appellant had the ability to remove his property from the pantechnicon.

3. In October 2011 the third party owner of the land on which the pantechnicon was parked withdrew his permission for that parking and required the respondent to move the pantechnicon from the land on which it had been parked.

4. In October 2011 the respondent moved the pantechnicon from the land on which it had been parked.

5. On 6 October 2011 the respondent wrote to the appellant and invited him to remove his equipment from the truck but the

appellant refused to do so. He demanded that the respondent return the pantechnicon and its contents to the land on which it had been parked.

6. In December 2011 the respondent moved the pantechnicon to the premises of a truck repair company as the third party owner of the land required the respondent to remove the pantechnicon completely from the third party's land.

7. The appellant continues to refuse to take advantage of the opportunity to remove his equipment.

[20] The respondent also filed a counterclaim seeking damages for breach of contract. However, on 5 November 2012 the solicitor for the respondent advised the appellant and Lowndes SM that the respondent abandoned his counter claim.

The issues in the appeal

[21] The principal issues in this appeal are: (1) When did property in the pantechnicon pass? (2) Did the appellant have a contractual right to demand that the pantechnicon be returned to the land owned by Mr Riley? (3) Did the respondent breach the contract of sale? It is only if the property in the pantechnicon had not passed to the respondent that the appellant could have required the respondent to return the pantechnicon.

[22] In my opinion, for the reasons set out below, the appeal should be dismissed and the answer to each of the above questions is: (1) Property in the pantechnicon had passed to the respondent before he removed it from Mr Riley's land. (2) The appellant did not have a contractual right to

demand that the respondent return the pantechnicon to Mr Riley's land.

(3) The respondent did not breach the contract of sale.

Consideration

[23] Having perused the evidence of the appellant and the respondent in the Local Court, it is apparent that it was common ground between the parties that:

1. The respondent paid the whole of the purchase price of $19,500.00 in 2010.

2. The appellant failed to complete all of the unfinished work by early 2011 or at all.

3. The appellant failed to deliver the pantechnicon and trailer to the respondent by early 2011.

4. The respondent removed the pantechnicon and trailer from the land owned by Mr Riley in September or October 2011 and took it to the yard of a truck repairer in about December 2011.

[24] In addition, Lowndes SM made the findings that I have referred to in par [8] above. I find that he was correct in doing so. The evidence before the Local Court strongly supported the findings made by his Honour.

[25] In the circumstances, it is apparent that **the appellant** [emphasis added] breached the contract of sale by failing to complete the unfinished work and deliver the pantechnicon to the respondent in a deliverable state by early 2011. However, the respondent did not repudiate the contract of sale as a result of the appellant's breach of contract; instead, the respondent waived the condition that the appellant complete the unfinished work.

[26] The respondent did not breach the contract of sale by removing the pantechnicon and trailer from Mr Riley's land. Property in the pantechnicon and the trailer had passed to the respondent by the time that he removed the pantechnicon and trailer from Mr Riley's land. Property in the pantechnicon had passed to the respondent as (1) he had paid the purchase price in full, (2) he had waived the condition that the unfinished work be completed by the appellant, and (3) he had accepted delivery of the pantechnicon. During his evidence in the Local Court, the appellant stated that property in the pantechnicon had passed to the respondent. He said on a number of occasions that he had transferred the ownership of the pantechnicon to the respondent. He had signed a transfer of registration document. The respondent did what he could legally do. He took the pantechnicon. As property in the pantechnicon had passed, the respondent was entitled to exercise his rights over the pantechnicon and have it repaired so that he could use it for the purpose for which it was purchased. The respondent became a bailee at will of the workshop equipment and tools in the pantechnicon.

[27] The appellant had no right to require the respondent to return the pantechnicon to Mr Riley's land until the appellant completed the work on the caravan and container so that the workshop equipment and tools could be removed from the pantechnicon and placed in the caravan and the container. The appellant's argument in this regard was totally misconceived. He was required to remove the workshop equipment and tools from the pantechnicon

by 30 June 2011 at the latest. This was the effect of the contract of sale which he had drafted. The appellant should have completed any work that was required on the caravan and container prior to 30 June 2011 and he should have ensured that the workshop equipment and tools were removed from the pantechnicon and relocated prior to 30 June 2011.

[28] It is the appellant's breach of the contract of sale that has resulted in him losing the capacity to store his workshop equipment and tools in the caravan and container.

[29] Although Lowndes SM erred in finding that the contract of sale was incomplete in the sense that the removal and relocation of the workshop equipment and tools was to be the subject of further agreement, his Honour did not err in holding that there was no agreement to transfer the appellant's items out of the pantechnicon before the pantechnicon left the appellant's allocated tenancy site. Nor did his Honour err in failing to find that it was a term of the contract of sale that the appellant's items would be transferred out of the pantechnicon, at the site where it had been parked since 2010, before the pantechnicon could be delivered to the respondent. His Honour was correct in finding that the respondent had not unlawfully dealt with the appellant's workshop equipment and tools which are in the pantechnicon.

[30] The term of the contract was that the appellant was to remove and relocate the items within the pantechnicon by early 2011. The appellant breached this term of the contract of sale and he has suffered the consequences of

doing so. The appellant may still go and collect his workshop equipment and tools from the pantechnicon but he is going to have to incur the costs of making arrangements to do so and he is going to have to find an alternative place to store his goods.

Conclusion

[31] The appeal is dismissed. As the parties were self represented, I make no order as to costs.

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