



Précis Paper

Consumer Law and Sales of Goods

An interesting discussion about a recent case involving the sale of a collector edition car.

Discussion Includes

- Background facts
- Decision at first instance
- Legislation governing the transaction & jurisdictional issues
- Sales by description versus sales by inspection
- Grounds of appeal
- Common mistakes about value
- Costs

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Consumer Law and Sales of Goods

1. In this edition of BenchTV, Joe Blackshield (Solicitor, Albury Legal Pty Ltd, Albury) and Blaise Prentice-Davidson (Doctoral Student, University of Sydney) discuss the recent Federal Court decision in *Walker v Sell* [2016] FCA 1259.

Background and Material Facts

2. A purchaser, Mr Lyle Walker, entered into a contract with a vendor, Mr Glen Sell, to buy a car for \$135,000. A deposit of \$10,000 was paid on that day, with the balance to be paid over the following eight months. The car remained with Mr Sell until the final payment was made by Mr Walker. Payments were made over a 12 month period, during which time Mr Walker had indicated that he would have the car inspected prior to the sale being finalised. This inspection was not, however, arranged during the 12 month period during which payments were made to Mr Sell.
3. It was the common belief of Mr Walker and Mr Sell that the car was a genuine 1970 GTHO model Ford Falcon Sedan. That common belief of genuineness proved to be wrong. A week after taking possession of the car, Mr Walker arranged for it to be inspected with a view to having it restored. The car was put on a hoist and the person inspecting it immediately identified that it was not genuine because there were about 20 things that he could already see were not correct.
4. Mr Sell honestly believed that the car was in fact a genuine 1970 Ford GTHO Falcon Sedan because as a part of his divorce settlement several years earlier, his ex-wife insisted on the car being valued. The valuation obtained at that time incorrectly confirmed its identity, albeit upon the rather unsatisfactory basis of simply taking at face value the affixed vehicle identification number (VIN) plate and a letter from Ford confirming identity upon that basis of only that VIN. As part of the divorce settlement, Mr Sell sold his house and paid his ex-wife \$48,000, in part upon the basis of him retaining what was thought to be a valuable car.
5. Mr Walker also believed the car was a genuine GTHO Falcon prior to taking possession of the car. One of the primary reasons for this was that he had been in contact with his expert and had received tips on how to identify a genuine model.
6. Immediately after Mr Walker discovered that the car was not in fact a 1970 Ford GTHO Falcon Sedan, he rang Mr Sell to let him know that the car was not genuine and subsequently sought a refund. When that was not successful he commenced proceedings in the Federal Circuit Court of Australia.

7. It was agreed between the parties that rather than the car being a 1970 Ford GTHO Falcon Sedan, it was a different model Ford Falcon with a lesser market value of \$25,000, leaving a loss of \$110,000 to be incurred by either Mr Sell or Mr Walker. It apparently was not in doubt that both parties were innocent victims of a fraud perpetrated by someone on Mr Sell when he bought the car some 30 years earlier. The key issue was who, between the parties, should bear the loss.

Jurisdictional Issues

8. One issue was whether the relevant sale of goods legislation that governed the dispute was the Victorian or NSW legislation. This was because the transaction took place in Wodonga, on the border of Victoria and NSW, and the purchaser was from Sydney. Ultimately, it was determined that the *Goods Act 1958* (Vic) applied because the offer was made and accepted in Victoria.
9. In addition, the jurisdiction of the Federal Circuit Court was questioned in the proceedings. This was because the issue arose as to whether the sale of the car was "in trade or commerce", thereby attracting the operation of the *Australian Consumer Law*. If the sale did not attract the operation of the *Australian Consumer Law*, the question was whether the Federal Circuit Court would have jurisdiction over the dispute.
10. The Court found that even if the sale was found not to be in trade or commerce such that the claim under the *Australian Consumer Law* failed, the Federal Circuit Court would not be deprived of jurisdiction just because that was the sole basis for enlivening federal jurisdiction. That is because the claim was still genuine, even if erroneously made, and therefore not colourable (meaning made for the improper purpose of fabricating federal jurisdiction): *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 76 ALR 173. The Court was therefore not prevented from determining the balance of the controversy, based upon State legislation.

Consumer Law Issues

11. The key question in the case was whether the sale was a sale by inspection or a sale by description. If it was a sale by description, implied warranties were enlivened under s 18 of the *Goods Act* and the vendor would have borne the loss.
12. This issue was determined by reference to case law. In *Grant v Australian Knitting Mills Limited* (1935) 54 CLR 49, the Court considered the sale of woollen undergarments that subsequently caused itching and scratching to the purchaser. There, the Court determined

that the sale was a sale by description as there was no opportunity for the purchaser to inspect the goods prior to the transaction.

13. The primary judge found in favour of the vendor. The judge found that the sale was a sale by inspection, not a sale by description, and Mr Walker had not relied upon any representations by the vendor as to the genuineness of the vehicle. This was because the purchaser had relied upon his own inspection, including a consideration of a letter from Ford confirming the genuineness of the car and the VIN, rather than any representation made by the vendor. Because he had not relied upon the description of the car as a GTHO, but rather inspected it himself, he was not objectively in reliance upon the vendor's description.

The Proceedings on Appeal

14. On appeal, Mr Walker relied upon the following grounds:
 - The trial judge erred in holding that the sale that was the subject of the proceedings below was not a sale by description.
 - The trial judge erred in finding that the Appellant did not rely on any representations made by the Respondent.
 - The trial judge erred in finding, if he did so find that any reliance on the representations made by the Respondent was not reasonable.
 - The trial judge's finding that a reasonable inspection by the Appellant would have discovered that the vehicle was not, in fact, a 1970 Ford GTHO Falcon Sedan was not supported by the evidence.
 - The trial judge did not determine the Appellant's claim for breach of an express term of the Contract.
15. The critical question on appeal was whether the purchaser had relied upon any representations by the vendor and if so, whether that reliance was reasonable. The purchaser argued that the sale should be seen as a sale by description because of the comments made by the vendor about the genuineness of the vehicle. Another factor, he argued, was that the vendor was considerably older than the purchaser, and the purchaser was therefore in a weaker position. The vendor, in response, relied upon the agreement to have the car inspected.
16. The Court cited *Beale v Taylor* [1967] 3 All ER 253, a case in which a purchaser relied upon a representation made by the vendor that a low-value car would run. *Beale v Taylor* was distinguished on the basis that in *Walker v Sell*, there were opportunities for inspection over

the period of one year, and the expert was able to quickly identify that the car was not genuine.

17. Ultimately, the Federal Court dismissed the appeal, holding that the primary judge was correct in finding that there was no objective reliance by Mr Walker on anything written or said by Mr Sell as to the genuineness of the car so as to render this a sale by description. Ultimately, where the purchaser has an opportunity to inspect the vehicle, it is not a sale by description. An important point was also that this was an honest mistake by the vendor, and there was no wrongdoing on his part.
18. In addition, the description of the vehicle in the contract was an "identification" rather than a description, identifying the specific vehicle.
19. The Court also found that this was a common mistake, and it was a common law principle that where both parties make a common mistake about the value of an object, the purchaser wears the loss.

BIOGRAPHY

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Joe Efreem Blackshield was admitted to practice in 2014. Joe is currently employed at Albury Legal, a generalist firm based on the border with Victoria. He focuses on legal history, litigation, criminal, estate and commercial law, though practices in all fields.

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Blaise Prentice-Davidson was admitted as a solicitor in 2016. He is currently tutoring in philosophy at the University of Sydney and volunteers at the Aboriginal Legal Service. Blaise's focus is on legal history, commercial and criminal law.

BIBLIOGRAPHY

Focus Case

Walker v Sell [2016] FCA 1259

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_28-10-2016_banking.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/FCA/2016/1259.html>

Cases

Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation (1987) 76 ALR 173

Grant v Australian Knitting Mills Limited (1935) 54 CLR 49

Beale v Taylor [1967] 3 All ER 253

Legislation

Goods Act 1958 (Vic)

Australian Consumer Law