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Précis Paper

Fitness for Purpose in the Sale of Goods

A discussion of the recent decision of *Marvoe Management Pty Ltd v Plantation Management Services (WA) Pty Ltd (No 5)* [2017] NSWSC 1167.

Discussion Includes

- Facts of the case
- Gathering evidence
- Contract for goods vs. contract for services
- Determining the extent of liability of the Defendants
- Mitigating Loss

Précis Paper

Fitness for Purpose in the Sale of Goods

1. In this edition of BenchTV, Greg McNally SC (Barrister – Nine Wentworth Chambers, Sydney) and Peter Long (Solicitor – Rural Law, Gunnedah) discuss the requirement of fitness for purpose in the sale of goods in the recent decision of *Marvoe Management Pty Ltd v Plantation Management Services (WA) Pty Ltd (No 5)* [2017] NSWSC 1167.

Facts of the case

2. In this case the Plaintiff had purchased a property just below Darwin at Humpty Doo. The idea was to purchase a property and run it as a cucurbit production enterprise.

3. The enterprise began in 2008 with their first crop, and progressively had more successful crops as the years passed. In 2011, the Plaintiffs ordered 468,000 watermelon seedlings from a nursery in the Northern Territory. The first four batches were delivered and slowly exhibited symptoms of some disease, with each batch being worse than the one before. It was subsequently diagnosed that those seedlings had fusarium wilt (FON). FON is a fungus that has spores and lives in the soil

4. The Northern Territory was naïve to FON before this event, as was this farm. FON had contaminated the fields of the Plaintiffs, and of the watermelon that did grow, some died and some died in part. The watermelons were low yielding and low quality, so the Plaintiffs had to abandon its whole program of watermelons.

5. Proceedings were then commenced against the nursery. The claim was one of a sale of goods for breach of implied warranty as to fitness for purpose and merchantable quality.

6. The Defendants in this case ran the argument that they were providing a service rather than a good, this is because strict liability does not apply to services as it does for goods. The benefit of proceedings under the Sale of Goods Act is that the implied warranties as to fitness for purpose and merchantable quality are implied into the contract, and you do not have to prove that anyone was negligent.

7. Deciding whether this was a contract for the sale of goods or for a service became a primary issue in this case. The contract was formed via a telephone conversation which came from the Plaintiff who operated their headquarters from Sydney, to the nursery who had its office and headquarters in the Northern Territory. Then there was a confirmation order facsimile that was sent back to Sydney and was signed by one of the directors of the Plaintiff, then the confirmation order was faxed back to the Defendant. Therefore his Honour, Justice

Campbell, found that the contract had been formed when the fax was received in the Northern Territory.

8. The claim was originally brought under the *Sale of Goods Act 1923* (NSW), but upon reflection at the commencement of proceedings, it was determined that it was prudent to amend the claim to be brought under the Northern Territory legislation (*Sale of Goods Act 1972* (NT)), given that the contract was found to be formed in the Northern Territory. This was unproblematic as the Sale of Goods legislation is virtually identical in all Australian states.

9. As the seeds were ordered by the Plaintiff and supplied to the Defendant, the Defendant never actually purchased the seeds and therefore argued that they provided a service of growing and nurturing by providing the seedlings. This then brought forward the issue of whether the disease was on the seed when it was supplied, or was the disease picked up in the nursery?

Gathering evidence

10. There was scientific evidence that had been tested by the Northern Territory Department of Agriculture and Primary Industry which showed that both the seedlings that were delivered in trays, and the plants growing in the field from those seedlings had FON.

11. The nursery had most of the other documentation as to its production and what its processes were, so with discovery the Plaintiffs were hopeful that this might assist to identify where the source of contamination was.

12. There was argument from the Defendants that the Plaintiffs had expended all of the seed from the packets in growing the seedlings, and there was nothing left that could be tested to rule out that the seed itself was not contaminated. However upon consideration of all of the evidence presented by both parties, his Honour found on the balance of probabilities that it was more probable than not that the nursery was the source of infection.

13. Cross-examination of the witnesses revealed that the streamer at the nursery which was incredibly important for sanitation was broken, so they were not able to deliver the level of sanitation expected.

14. Both the Plaintiff and the Defendant had expert witnesses. Professor Martin, for the Defendant, said that the disease was on the seeds themselves, whereas the expert for the Plaintiff, Professor Everts stated that in her opinion, on the balance of probabilities, FON was picked up in the nursery.

15. One of the most important assumptions for the Plaintiffs made by Professor Martin was that there was a batch of the Plaintiff's seeds that tested positive to FON. However, during cross-examination, it emerged that the seeds that he thought were from the same batch that tested positive, were in fact from a different batch.

16. About a week before the hearing commenced, the Defendant made further discovery including a spreadsheet. It was clear from the spreadsheet that the sample of seed the Plaintiff's representative had picked up from the nursery when the incident occurred and which was sent away from testing, was actually from an opened bag of the seed that had been used to make seedlings for the Plaintiff. The testing of that seed found that it was negative to the presence of FON. This meant there was proof that the seedling from the Plaintiff's bags was not contaminated.

Contract for goods vs contract for services

17. If it was a contract for services, then quite arguably there are no implied terms as to quality or fitness for purpose. Reference was made to the case of *Pangallo Estate Pty Ltd & ors v Killara 10 Pty Ltd* [2007] NSWSC 1528 which concerned a delivery of grapes to a winemaker for crushing. The question was whether the property passed in the grapes or not, and when it was turned into wine. Brereton J held the property did not pass and it was not a contract for the sale of goods because the wine was then sold back to the producer.

18. Applying that to the current case, the seeds were provided to the Plaintiffs and then they were turned into something completely different, meaning it was a sale of goods rather than a bailment as was seen in *Pangallo*. However, even if it was a bailment, a bailment can have implied terms.

19. There are two types of implied terms:
    1) Implied ad hoc terms, i.e. to give business efficacy to the contract as seen in *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266
    2) Terms that are implied by law in two special classes of contract

20. However his Honour found that it was a sale of goods contract, so he did not decide on this bailment issue. Bryson J stated in *Associated Alloys Pty Limited v CAN 001 452 106 Pty Ltd* (2000) 202 CLR 588; [2000] HCA 25 that if you are getting something different back from what it is you provided, then generally speaking that is a contract for the sale of goods.

21. After finding that it was a sale of goods and that the contamination was not on the seed, his Honour was happy to make a finding that there was a breach of implied warranties under the *Sale of Goods Act 1972* (NT).

Determining the extent of the liability of the Defendants

22. There was a suggestion that there may have been other disease which was the source of the FON, being banana plants that had been planted on the Plaintiffs land before they had acquired the property, however the experts were able to dismiss this.

23. There was not a lot of past history to consider when determining the yield as production had only begun in 2008 at this location. The yields of both 2009 and 2010 were averaged to determine the average yield that could have been expected in 2011 had the crop not been infected. There was changes to the spacing between crops in 2013 and 2014 which made those years incomparable and therefore unable to be considered in determining the yield.

24. In the year of lost production, there were record cold temperatures in the Northern Territory, particularly around Humpty Doo. The generally accepted expert evidence was that the cold weather impacts the growth and development of the watermelon plant, and can impact upon the size and quality of sweetness of the watermelon. It was difficult to quantify the effect of the weather upon the yield; his Honour held that there was no scientific answer but felt there was an impact, so he discounted the yield by 10%.

25. His Honour then had to determine what the expected average price would have been for the watermelons that were not grown, or were grown but were low quality. It was a matter of looking at what the actual price received by the Plaintiff was in both the Sydney and Brisbane markets. He decided upon a price of $1.44, then deducted a 10% commission to the selling agent, then considered production costs as well. Ultimately he found what the actual net profit of the enterprise was, and what it would have been but for this disaster.

26. His Honour was happy to consider averages over a period of time in order to understand what might have been the expected yield, but he was adamant that the Court was only to take the average price of the particular year because that was the relevant year, and was to only consider the weather of the relevant year.

Mitigating Loss

27. The defendants argued that the Plaintiffs did not mitigate their losses by failing to plant rockmelons in the bare 70 acres that they had. The agronomist agreed that the Plaintiff could have grown another 70 acres of rockmelon, but one of the marketers for the Plaintiffs gave evidence that the reason they did not do that was because in this industry it is very prudent to have pre-sales before you go ahead and plant, so that you can grow a particular amount.

28. The evidence was that the contracts of these sort of cucurbits are put in place up to 12 months beforehand with various supermarkets. The Plaintiffs did grow more rockmelon than initially planned and took a risk in doing so, however this did pay off financially for the Plaintiffs.

29. This was taken into account in that they had mitigated their loss, and that income came off their damages that they were awarded. Relying on the High Court authority of Hayne J in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1988) 192 CLR 603, his Honour found that you do not have to everything you can to mitigate your loss, you just have to do what is reasonable.

BIOGRAPHY

Greg McNally SC

Barrister – Nine Wentworth Chambers, Sydney

Greg has over 30 years' experience as a barrister, having been admitted to the Bar in 1986. He was appointed to Senior Counsel in 2007. Greg has broad commercial and equity practice and is frequently briefed to appear in wills and estate, family provision, employment, building and construction and general contractual disputes.

Peter Long

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Peter Long, director and senior lawyer, is a winner of the Australian Plaintiff Lawyers Association National Civic Justice Award. Over 29 years of practice, Peter has represented a range of small businesses and rural enterprises and written articles relating to issues such as rural practitioners and product liability.

BIBLIOGRAPHY

Focus Case

Marvoe Management Pty Ltd v Plantation Management Services (WA) Pty Ltd (No 5) [2017] NSWSC 1167

Benchmark Link

Marvoe Management Pty Ltd v Plantation Management Services (WA) Pty Ltd (No 5) [2017] NSWSC 1167

Judgment Link

Marvoe Management Pty Ltd v Plantation Management Services (WA) Pty Ltd (No 5) [2017] NSWSC 1167

Cases

Entores Limited v Miles Far East Corporation [1955] 2 QB 327

Pangallo Estates Pty Ltd & ors v Killara 10 Pty Ltd [2007] NSWSC 1528

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Derbyshire Building Co Pty Ltd v Becker [1962] HCA 14; (1962) 107 CLR 633

Associated Alloys Pty Limited v CAN 001 452 106 Pty Ltd (2000) 202 CLR 588; [2000] HCA 25

Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603

Legislation

Sale of Goods Act 1923 (NSW)

Sale of Goods Act 1972 (NT)