SUPREME COURT OF QUEENSLAND

CITATION:	*Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd* [2018] QCA 353
PARTIES:	**GARMIN AUSTRALASIA PTY LTD** **ACN 129 153 448** **(appellant)** **v** **B & K HOLDINGS (QLD) PTY LTD** **ACN 092 133 858** **(respondent)**
FILE NO/S:	Appeal No 6865 of 2018 SC No 12910 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 117 (Mullins J)
DELIVERED ON:	18 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2018
JUDGES:	Holmes CJ and Philippides JA and Henry J
ORDERS:	**1. The appeal is allowed in part.** **2. Paragraphs 6(b) – (e) of the Second Further Amended Defence are struck out.** **3. The parties are to file and serve submissions on costs by 21 January 2019.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the appellant appeals against the primary judge's dismissal of its application for summary judgment of its claim for the price of goods delivered to the respondent under a contract of sale – where, in the alternative, it appeals against the primary judge's refusal to strike-out parts of the defence – where the primary judge refused summary judgement and the strike-out because it was to be inferred that there must have been further, undisclosed agreements between the parties – whether the inference was correctly drawn PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY

– SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the appellant appeals against the primary judge's dismissal of its application for summary judgment on its claim for the price of goods delivered to the defendant under a contract of sale – whether the appellant was entitled to bring an action for the price or was limited to an action for damages for breach of contract – whether an action for the price was available under s 51(2) of the *Sale of Goods Act* (NSW) – whether the contract impliedly permitted an action for the price – whether there was a serious issue as to whether the price was recoverable, requiring a trial

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the appellant appeals against the primary judge's refusal to strike out parts of the defence in its action for the price of goods delivered to the respondent – where the respondent pleaded in the defence that by the terms of the parties' agreement, it held as a bailee unsold goods to which the appellant had a right of immediate possession, giving it a right of set-off in respect of their value – where the respondent did not seek to support the defence on appeal – whether the defence was tenable – whether the defence should have been struck out

Sale of Goods Act 1923 (NSW), s 6, s 31, s 51
Sale of Goods Act 1896 (Qld), s 4, s 30, s 50
Sale of Goods Act 1893 (UK) 56 & 57 *Vict., c.* 71
Uniform Civil Procedure Rules 1999 (Qld), r 292(2)

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266; [1977] UKPCHCA 1, considered
Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd [2014] 1 All ER 785; [2012] EWHC 2477 (Comm), cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, considered
Consolidated Rutile Limited v China Weal Pty Ltd [1998] QSC 170, distinguished
Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd [2018] QSC 117, referenced
Harry & Garry Ltd v Jariwalla Unreported, 16 June 1988, referenced
Ledger v Cleveland Nominees Pty Ltd [2001] WASCA 269, followed
Martin v Hogan (1917) 24 CLR 234; [1917] HCA 75, cited
Minister for Supply & Development v Servicemen's Co-operative Joinery Manufacturers Ltd (1951) 82 CLR 621; [1951] HCA 15, distinguished
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, considered
PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The

Res Cogitans) [2016] AC 1034; [2016] UKSC 23, followed
Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2) [1994] 2 Qd R 159, followed
Style Finnish (Qld) Pty Ltd v Abloy Security Pty Ltd [1994] 2 Qd R 203, referenced
White and Carter (Councils) Ltd v McGregor [1962] AC 413; [1961] UKHL 5, cited

COUNSEL: M S Trim for the appellant
M D Martin QC, with M Barnes, for the respondent

SOLICITORS: Herbert Smith Freehills for the appellant
Mills Oakley for the respondent

[1] **HOLMES CJ:** The appellant, Garmin Australasia Pty Ltd, was the plaintiff in an action for the price of goods brought against the respondent, B & K Holdings (Qld) Pty Ltd. It appeals against the primary judge's dismissal of its application for summary judgment on its claim, and, in the alternative, against her Honour's failure to strike out parts of the defence. Garmin had argued at first instance, and argues here, that B & K Holdings had made sufficient admissions as to the existence of an agreement and its failure to pay for goods delivered and invoiced to entitle Garmin to recover the relevant amount as a debt owed. B & K Holdings, on the other hand, alleged that by the terms of the parties' agreement, it held as a bailee unsold goods to which Garmin had a right of immediate possession, giving it (B & K Holdings) a right of set-off in respect of their value. (This was the part of the defence which Garmin sought to have struck out.) B & K Holdings also contended at the hearing of the application that Garmin had actually elected to retake possession of the unsold goods and that in any case Garmin was limited to recovering in damages, with an obligation to mitigate by retrieving and reselling the goods.

The pleadings and the parties' agreement

[2] By a Further Amended Statement of Claim, Garmin alleged that "in or about June 2012" it entered what it described as the "Dealer Agreement" with B & K Holdings, under which the latter was to deal in Garmin products. The Dealer Agreement was particularised as being contained in a "Domestic Dealer Agreement" executed at about that time and another document entitled "2017 Garmin Australasia Authorised Dealer Program". Both the Domestic Dealer Agreement and the 2017 Authorised Dealer Program were annexed to an affidavit, but the basis on which the latter document formed part of the Dealer Agreement was not particularised, nor was it explained in any affidavit.

[3] The relevant payment terms of the Dealer Agreement were pleaded as follows:

> "4.
> …
> (c) the Defendant shall make full payment for all Products ordered by the Defendant from the Plaintiff:
> (i) within 45 days from the date of the Plaintiff's invoice (by operation of the text under "Payment Terms" on page 4 of the document entitled "2017 Garmin Australasia Authorised Dealer Program"); or

(ii) alternatively that full payment must be made in advance (by operation of clause 3.3 of the "Domestic Dealer Agreement")".

Clause 3.3 of the Domestic Dealer Agreement provided, inter alia,

> "… Unless other payment terms are previously agreed in writing by Garmin, Dealer shall make full payment in advance for all Products ordered from Garmin by Dealer…".

[4] Clause 3.1 of the Domestic Dealer Agreement made orders for products subject to the terms of that agreement and also the terms of the current "Dealer Program Document", which was incorporated by reference. The "Dealer Program Document" was defined as

> "the document entitled "Authorised Dealer Program" supplied by Garmin to the Dealer, setting out information, rules, regulations, standards and guidelines, as revised by Garmin from time to time".

(One infers that Garmin would assert that the 2017 Authorised Dealer Program fell within this description.) As to payment, the "text under 'Payment Terms' on page 4", referred to in sub-paragraph 4(c)(i) of the statement of claim, relevantly said this:

> "**Payment Terms**
> 3% 20 days/NET 45 days from invoice.
> A three percent (3%) settlement discount may be deducted from the total amount of each invoice if Garmin receives payment within 20 days of the delivery date ... Invoices will be issued at the time of shipment."

[5] According to the statement of claim, the stock of which Garmin now claims the price was ordered, sold, delivered and invoiced to B & K Holdings between 24 January 2017 and 30 May 2017. It was then pleaded that B & K Holdings had breached its obligations under the Dealer Agreement by failing to pay Garmin the invoiced amounts on the due dates for payment as specified in a schedule annexed to the pleading. However, although the schedule sets out order dates prior to 30 May 2017, all of the "Invoice & Shipment" dates which it lists fall after 30 May 2017: between 5 June 2017 and 18 August 2017. In each instance, those dates are 45 days before the date identified in the schedule as the "Payment Due Date". The total invoiced amount, of some $1,100,000, was claimed as a debt.

[6] B & K Holdings in its defence admitted entering the Domestic Dealer Agreement, but denied that the 2017 Authorised Dealer Program document formed part of the agreement between the parties. It also denied that the terms of the parties' agreement included the payment alternatives set out in the statement of claim, on the basis that the Domestic Dealer Agreement did not contain such a provision; instead cl. 3 governed payment of invoices, and cl. 3.3 allowed Garmin to extend credit terms to the defendant. The defence did not plead what the agreement was for payment for the goods. Instead, B & K Holdings admitted that the goods were delivered and it was invoiced for them, but denied that the goods were sold to it, and said that it instead held them as bailee. It relied on cl. 3.6 of the Domestic Dealer Agreement, which provided

> "Until Dealer has paid for the Products in full and also paid all other moneys due and payable to Garmin by Dealer: (a) property in the Products remains with Garmin, (b) Dealer holds the Products as

> bailee of Garmin, (c) Dealer must store the Products separate from its own goods and those of any other third party in such a way as to clearly indicate at all times that the Products are owned by Garmin, and (d) Dealer must ensure that at all times the Products are properly stored, protected, readily identifiable and fully insured in an amount not less than the price payable to Garmin. Dealer may sell or deal with the Products in the ordinary course of business provided that any such sale or dealing is at full market value to its customers and Dealer, in its position as fiduciary, assigns to Garmin the benefit of any claim against the customers and will hold on trust in a separate identifiable account and account to Garmin for all proceeds of sale. This clause 3.6 applies even though Garmin may give credit to Dealer."

[7] B & K Holdings also pleaded that by deed dated 23 May 2016 the parties agreed that the Domestic Dealer Agreement would end on 1 June 2017. (A copy of the relevant deed was exhibited to an affidavit by Mr Brkic, B & K Holdings' Managing Director; as well as providing for the termination of the Domestic Dealer Agreement, it amended that agreement in respects not material here.) B & K Holdings alleged that it still held products shipped by Garmin of a value of approximately $1,000,000. Once the agreement terminated, Garmin was entitled to possession of the unsold goods, and B & K Holdings had made them available for collection, but Garmin had refused to accept their return. As a matter of law, B & K Holdings was entitled to set the invoice price of those goods off against any amount owed to Garmin.[1]

[8] The Domestic Dealer Agreement contained the following provisions (relevantly for the purposes of this case) in the event of termination:

> "7.3…
>
> (h) The expiration or termination of this Agreement shall not release Dealer from the payment of any sums then owing or from any other obligations herein provided to be performed after such expiration or termination.
>
> (i) Garmin shall have no obligation to repurchase or to credit Dealer for any Products in Dealer's stock which are unsold at the date of expiration or termination of this Agreement. …
>
> (j) If Garmin should continue to sell its products to Dealer after the termination of this Agreement, such sales shall be subject to the terms and conditions hereof, and such additional sales by Garmin shall not constitute a renewal of this Agreement."

Clause 7.5 of the Domestic Dealer Agreement provided for survival of certain clauses, including cl. 3 and cl. 7.3.

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[1] B & K Holdings also asserted a right of set-off under cl. 3.12 of the Domestic Dealer Agreement, but that pleading seems misconceived; the clause relates to Garmin's right to set-off amounts owed by B & K Holdings against any credits due. Nothing was said about that clause or the pleading in relation to it on the hearing of the summary judgment application or on this appeal.

The arguments at first instance

[9] The application proceeded before the learned judge at first instance on the basis that it was unnecessary to resolve whether the 2017 Authorised Dealer Program document formed part of the Dealer Agreement. Garmin's primary argument was that it should be granted judgment because B & K Holdings admitted: its obligation to pay for goods ordered; that it had ordered, been invoiced for and received the relevant goods; and that it had not paid the invoiced amounts for them. However, B & K Holdings' position had moved substantially beyond what was pleaded. It now contended that because property in the goods had not passed, the effect of cl. 3.6 was, at least arguably, that there had been no sale of goods and Garmin's property claim was one of damages for breach of contract, rather than in debt. Garmin ought to mitigate its loss by accepting the return of the goods, but it had refused to take them back.

[10] Garmin relied on *Minister for Supply & Development v Servicemen's Co-operative Joinery Manufacturers Ltd*[2] for the proposition that an action could be maintained in debt where there was an agreement for payment for goods before property in them passed. Alternatively, s 51(2) of the *Sale of Goods Act* 1923 (NSW)[3] ("the NSW Act") applied. It provides that where under a contract of sale the price is payable "on a day certain irrespective of delivery", and is not paid, the seller may maintain an action for the price, notwithstanding that property in the goods has not passed. Consequently, Garmin said, it was entitled to sue for debt rather than damages, notwithstanding that the goods were held by the purchaser as bailee.

[11] In the alternative, Garmin sought to strike out the parts of the defence which alleged that B & K Holdings held the goods as bailee, that Garmin was immediately entitled to possession of the goods that it still held and that it had a right of set-off in respect of those goods. In an endeavour to make good its argument that the bailment entailed some obligation in Garmin to accept the return of goods, B & K Holdings relied on statements in *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)*.[4] In that case, it claimed, this court accepted an argument that a supplier in a case where the relevant contract contained a retention of title clause was obliged to retake possession of unsold goods. In addition, B & K Holdings expanded on its argument by contending that there was an issue as to whether Garmin had elected, by an offer made in May 2017, to seek return of the unsold goods.

The judgment at first instance

[12] Rule 292(2) of the *Uniform Civil Procedure Rules* confers on a judge a discretion to give summary judgment where he or she is satisfied that the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim and there is no need for a trial of the claim or the relevant part of the claim. The primary judge identified the issues as: what constituted the contract pursuant to which the retained goods had been sold; whether the retention of title clause precluded characterising the transactions as sale of goods; whether Garmin's claim was in debt or damages; whether Garmin was obliged to accept the return of the retained goods; whether B & K Holdings was entitled to set off the value of the retained goods against

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2 (1951) 82 CLR 621.

3 The equivalent of s 50(2) of the *Sale of Goods Act* 1896 (Qld); the parties had agreed that the law of New South Wales would govern the agreement.

4 [1994] 2 Qd R 159.

Garmin's claim; and whether Garmin had elected to re-take the goods. Her Honour, while expressing some doubt about the argument based on *Puma*, observed that determining the questions of law which had emerged and applying them to the facts was impeded by the unsatisfactory state of the pleadings.

[13] Her Honour continued:

> "It is fundamental to a claim that is based on a contract that the contract is particularised appropriately in the statement of claim. Putting to one side the "2017 Garmin Australasia Authorised Dealer Program" document, the only written document the plaintiff relied on was the dealer agreement made on or about 18 June 2012, but that agreement was relevantly amended by the deed between the parties dated 23 May 2016 by fixing the termination date on 1 June 2017. Even without the conversations and correspondence referred to in Mr Brkic's affidavit, it is a matter of inference that there must have been further dealings between the parties in anticipation of the termination date, as the plaintiff is suing for products delivered after the agreed termination date. If the plaintiff wishes to sue for the price of those goods, it should disclose any further agreements between the parties that are relevant to their continuing relationship after the termination date. The plaintiff's general reliance on the course of dealings between the parties since June 2012 cannot satisfy disclosure of relevant further agreements, when it has failed to identify the change effected to the parties' 2012 agreement by the deed dated 23 May 2016. The material disclosed in Mr Brkic's affidavit is sufficient to raise a real possibility that there were additional contractual arrangements, rather than a mere reliance on clause 7.3(j) of the dealer agreement."[5]

[14] Garmin's entitlement to sue for the price of the products would depend on the terms of the contract which applied after the termination of the written Dealer Agreement. Because the operative contract terms were not clearly identified, her Honour was not satisfied that there was no need for a trial of Garmin's claim. In any event, she said, she would have exercised her discretion against the granting of judgment; it would not be appropriate to give judgment on the basis of the pleaded terms of the contract when it was inconsistent with other material produced. Garmin would have to

> "amend the statement of claim to identify the variation to the dealer agreement or the further agreement between the parties that resulted in the delivery of the retained products after the termination date of the dealer agreement".[6]

Because it was necessary for Garmin to amend its statement of claim, it was not appropriate to strike out the identified paragraphs of B & K Holdings' defence.

The parties' arguments on the appeal

[15] Garmin appeals, essentially, on the ground that the primary judge fell into error in inferring that there were any other agreements. It contended that, B & K Holdings having admitted the terms of the contract and not having pointed to any other terms, and there being no inconsistency between the pleaded contractual terms and the

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5 *Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd* [2018] QSC 117 at [34].

6 At [37].

other material, there was no basis for inference; or, in consequence, for the primary judge to conclude there was any need for the amendment of the statement of claim. In addition, the primary judge had erred in dismissing the application on a basis which had not been raised with the parties and for which neither had contended. In any event, her Honour had erred in failing to determine the question of the bailment defence's viability in Garmin's favour and, accordingly, in not striking out the defence to that extent.

[16] Garmin asserted in its written submissions that while its primary case was that the obligation to pay arose 45 days after invoice (under the 2017 Authorised Dealer Program payment terms), it had also advanced an alternative case, that payment was required in advance. It further contended that although B & K Holdings denied that the 2017 Authorised Dealer Program was part of the agreement, having admitted that the payment obligation fell within clause 3.3, it must be taken to have accepted that payment was to be made in advance, since there was no other credit arrangement identified. On either basis, there was an existing obligation to pay. Garmin was entitled under s 51(2) of the *Sale of Goods Act* 1923 (NSW) to sue in debt, because the price was payable on a day certain irrespective of delivery; alternatively, its right to sue for the price was to be implied from the terms of the parties' agreement.

[17] B & K Holdings did not seek to support the primary judge's reasoning, but rather focussed its submissions on whether summary judgment ought now be granted. It contended that there was a factual dispute between the parties as to the precise agreement between them and it reiterated its position that there was an arguable case that Garmin had no right to sue for the price of the goods because of the retention of title clause. It did not seek to maintain its argument that Garmin was obliged to accept return of the unsold goods merely because it was a bailor by virtue of the retention of title clause, although it did contend that it was arguable that Garmin had elected to do so.

Was there a necessary inference as to the existence of a further agreement?

[18] Garmin pleaded that the parties' agreement allowed of alternative forms of payment term - payment within 45 days, under, or in advance, under the Domestic Dealer Agreement - but it did not plead any obligation to pay in advance in respect of the transactions in question, whether as its primary or alternative case. Having set out the alternative payment terms, it did not descend to any identification of which term actually governed the relevant transactions, but by pleading a failure to pay on the due dates for payment and by particularising those dates as falling 45 days after the order date, it placed its reliance on the 2017 Authorised Dealer Program. That was the document which B & K Holdings pleaded did not form part of the parties' agreement. B & K Holdings did not by its defence concede that payment was required in advance; rather, it pointed out that the statement of claim did not identify all the payment options, which included scope for other credit agreements than the 45 days prescribed in the 2017 Authorised Dealer Program.

[19] But Garmin is correct (and B & K Holdings did not contend otherwise) in saying that the primary judge erred in drawing the inference that there must have been some further agreement under which the goods were supplied, which required disclosure and amendment of the statement of claim. Her Honour seems to have drawn that inference because the goods were delivered after 1 June 2017, the termination date agreed in the May 2016 deed. But the agreement between the parties had not come to an end when B & K Holdings placed its orders, and in any

event, cl. 7.3(j), which was expressly agreed to survive termination, provided that any sales thereafter would be subject to the terms and conditions of the Domestic Dealer Agreement. Garmin was entitled, therefore, to rely, as it did, on the payment provision contained in the 2017 Authorised Dealer Program, which on its case formed part of its agreement with B & K Holdings. The question, then, is whether it would have been entitled to relief had the primary judge not erred in this regard, and whether this court should now make the orders sought at first instance.

The Sale of Goods Act argument

[20] It is convenient to deal first with Garmin's *Sale of Goods Act* argument. Garmin contended that it was entitled to sue for the price of the goods under s 51(2) of the NSW Act because the payment obligation was for cash in advance or within 45 days of invoice, amounting to an obligation to pay irrespective of delivery. Under the *Sale of Goods* legislation, delivery and any obligation to pay are concurrent unless otherwise agreed,[7] and the general rule is that the seller's remedy for a breach of a contract of sale is in damages.[8] Section 51[9] of the NSW Act creates exceptions:

> "**51. Action for price**
>
> (1) When under a contract of sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.
>
> (2) Where under a contract of sale the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

Lord Keith of Avonholm characterised the latter exception in *White and Carter (Councils) Ltd v McGregor*[10] as the case of a "contractual debt unconditioned by any question of performance by the other party".[11]

[21] In *Martin v Hogan*,[12] Isaacs and Rich JJ described a provision in the same terms in the Imperial *Sale of Goods* legislation[13] (which was not then in force in New South Wales) as representing the common law. They continued by outlining the common law position:

> "The common law proceeds on a just principle. If the consideration for price passes, the price can be recovered *simpliciter*. But in a sale of goods the consideration does not pass unless the property passes. If, again, there has been an agreement to pay the money on a day fixed by the contract, irrespective of the consideration passing – then,

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7 Section 31 *Sale of Goods Act* 1923 (NSW); s 30 *Sale of Goods Act* 1896 (Qld).
8 *Ledger v Cleveland Nominees Pty Ltd* [2001] WASCA 269.
9 Section 50 *Sale of Goods Act* 1896 (Qld).
10 [1962] AC 413.
11 At 437.
12 (1917) 24 CLR 234.
13 *Sale of Goods Act* 1893 (UK) 56 & 57 *Vict., c.* 71.

> again, the sum can be recovered. But apart from that exception, the common law says, however strictly a man may have promised to pay the price on any given event, his failure to pay on that event is to be compensated for by ascertaining the amount of damage the promisee has sustained. That is fair."[14]

[22] Neither party suggested that their agreement, whatever its terms, was other than a contract of sale of goods, as defined in s 6 of the NSW Act, so as to attract the application of s 51(2) of that Act; but there is a question in that regard. The retention of title clause in this case adds a complication, because although property did not pass until all monies owed by B & K Holdings were paid, it had the right to sell the goods, provided it held the proceeds of sale on trust and accounted to Garmin for them. In that circumstance, there is a question as to whether goods on-sold would ever vest in B & K Holdings, as opposed to the ultimate purchaser.

[23] As does its Queensland equivalent,[15] s 6(1) of the NSW Act defines a "contract of sale of goods" as

> "a contract whereby the seller transfers or agrees to transfer the property and goods to the buyer for a money consideration called the price".

Section 6(3)[16] provides

> "(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell."

An "agreement to sell" is by definition a contract of sale.[17]

[24] In *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)*,[18] Puma, the appellant, had delivered goods to Sportman's under an agreement which provided that property would not pass until all goods supplied to the company were paid for in full, although Sportman's was at liberty in the interim to sell them, accounting to Puma for the proceeds. Although it was unnecessary to decide the point, McPherson ACJ expressed doubt that there had been a contract for the sale of goods, because it was accepted in that case that upon Sportsman's selling the goods, title in them vested directly from Puma in the purchaser, rather than property passing in that event to Sportsman's; which, his Honour said, "would appear to preclude a claim for the invoice amounts" under s 50 of the *Sale of Goods Act* 1896 (Qld).[19] (His Honour noted that the precise character of Puma's claim had not been thoroughly analysed during the appeal, but he was disposed to think that it was for damages only.) Williams J, however, considered that because the contract contemplated that property would pass in the event of all charges being paid, it was an agreement for the transfer of the property in the goods "at a future time", and hence was an "agreement to sell".[20] Shepherdson J expressed no view on the point.

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14 At 262.
15 Section 4(1).
16 Section 4(3) of the *Sale of Goods Act* 1896 (Qld).
17 Section 5 of *Sale of Goods Act* 1923 (NSW); s 3 of the *Sale of Goods Act* 1896 (Qld).
18 [1994] 2 Qd R 159.
19 At 165.
20 At 176.

[25] The issue was considered again, this time at first instance, in *Style Finnish (Qld) Pty Limited v Abloy Security Pty Limited*,[21] in which the buyer sought an injunction against the seller to prevent it from proceeding with a winding-up application on the basis of an alleged debt constituted by the price of goods sold and delivered to it. The contract in question contained a retention of title clause with a power (implied in that case) in the buyer to on-sell the goods, notwithstanding that payment had not been made for them; payment being required by the end of the month following the month in which the invoice was delivered. Cooper J, referring to the differing views expressed in *Puma*, concluded that there was a serious question to be tried in the case before him about whether there was a contract for the sale of goods. B & K Holdings relied also on Cooper J's further reasoning in that case, as to the position if the contract were one for the sale of goods. If so, it did not, his Honour considered, fall within s 50(2) of the *Sale of Goods Act* 1896 (Qld) (the equivalent of s 51(2) of the NSW Act). Its terms contemplated delivery concurrent with invoicing, with the obligation to pay the price not arising until a time subsequent to delivery. The price was not, therefore, payable "on a day certain irrespective of delivery".

[26] In contrast, most courts in the United Kingdom have until recently proceeded on the basis that contracts containing similar retention of title terms were contracts for the sale of goods for the purposes of the United Kingdom *Sale of Goods* legislation (which is in the same terms as the Australian legislation); the most recent example being *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd*.[22] The Supreme Court departed from that approach in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)*.[23] That case concerned the supply of bunker fuels to the owners of a vessel under a contract which required payment to be made within 60 days of delivery, on presentation of an invoice. The contract between the sellers and the buyers provided that title in the fuel remained vested in the sellers until full payment was received, and the fuel was in the possession of the buyers as bailees, although they could use it to power the vessel. In fact, the fuel was consumed for that purpose, without payment having been made. The buyers argued that because property had not passed to them – and now never could – and there was no agreement for payment of the price on a "day certain", the seller could not bring an action for the price.

[27] The Supreme Court held that the contract was not one for the sale of goods at all, but a *sui generis* contract for the supply of goods, with liberty in the buyers to consume the goods supplied prior to payment. The fact that on payment of the price there was an obligation in the seller to pass property in any fuel not consumed, did not make the agreement as a whole a contract of sale. The lower court's suggestion to that effect amounted, impermissibly, to dividing up the single agreement covering the supply of the goods. In reaching that conclusion, Lord Mance, with whom the other members of the court agreed, noted with approval an unreported decision of the Court of Appeal in *Harry & Garry Ltd v Jariwalla*,[24] in which it was held, where goods had been delivered pursuant to a retention of title clause, with the buyer at liberty to sell them as the agent of the seller, that the contract was not one for the sale of goods.

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21 [1994] 2 Qd R 203.
22 [2014] 1 All ER 785.
23 [2016] AC 1034.
24 Unreported, 16 June 1988.

Conclusions as to the applicability of s 51(2) of the Sale of Goods Act (NSW)

[28] I would construe cl. 3.6 of the Domestic Dealer Agreement, which permitted B & K Holdings to sell the goods delivered by Garmin, although they were not yet paid for, as contemplating the passing of title direct to the ultimate purchaser. In *Puma*, the parties proceeded on that basis in respect of a similar clause, an approach which met with no disapproval from the court, and was specifically adopted by Williams J.[25] The alternative, of regarding such a clause as impliedly contemplating the passing of property to the buyer under the contract immediately before or at the time of on sale[26] is highly artificial; described by Lord Mance in *The Res Cogitans* as "the theory of a nanosecond transfer of property",[27] it was rejected by both the Court of Appeal and the Supreme Court in that case.

[29] As to the character of the arrangement, I would, with respect, regard the better view as that taken by Williams J in *Puma*. Although this contract contemplated the possibility that title would never pass to the buyer (in the event of on-sales prior to payment), because it was an agreement to transfer the property in the goods in the future, conditional on payment before on-sale, it was an agreement to sell, and thus a contract of sale of goods. That conclusion seems to me consistent with a proper construction of both the *Sale of Goods Act* definitions and the contract itself. Commercial reality militates against the alternative, of construing agreements containing such terms as not within the *Sale of Goods Act*, and thus rendering the entire machinery of the legislation inapplicable to all transactions under agreements containing such terms.[28]

[30] Proceeding, then, on the basis that s 51(2) of the NSW Act applied, Garmin's argument was that the obligation to pay was fixed irrespective of delivery, whether the relevant provision was for payment in advance or within 45 days of invoice. As I have already observed, its pleaded case was that the obligation was for payment within 45 days of invoice, which arose under the 2017 Authorised Dealer Program. However, the payment terms of the 2017 Authorised Dealer Program related payment to delivery, by providing for the issue of invoices at the time of shipment, and also by linking the amount to be paid (whether a discount was available) to the timing of payment in relation to the delivery date (whether payment was made within 20 days of delivery). The price was not "payable on a day certain irrespective of delivery". Garmin is unable to bring itself within s 51(2).

Contractual right to sue in debt?

[31] However, in Minister for Supply and Development v Servicemen's Co-operative *Joinery Manufactures Ltd*,[29] the High Court held that parties could reach their own agreement as to when the price was payable and could be recovered as a debt,

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25 At 175.

26 The construction preferred, for example, by the judges in the minority in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* (at 793), consistent with earlier authority.

27 At 890.

28 This consequence of the decision in the *The Res Cogitans* has been the subject of criticism by academic commentators: see M Bridge, "The UK Supreme Court decision in *The Res Cogitans* and the cardinal role of property in sale law" [2017] Sing J L S 345 (Professor Bridge is the General Editor of *Benjamin's Sale of Goods*); L. Gullifer, "Sales" on retention of title terms: is the English law analysis broken? (2003) 113 L.Q. R 244.

29 (1951) 82 CLR 621.

notwithstanding the *Sale of Goods Act* provisions. In that case, the buyers were tenants of premises which contained machinery belonging to the Commonwealth, and were permitted to use it. The relevant Minister entered a contract to sell the tenants the machinery; it included the term "Net cash before delivery". The price was not paid, and the Commonwealth ultimately retrieved the machinery and sought to recover the price."

[32] The "cash before delivery" payment term, the majority in the High Court held, excluded the ordinary rule that payment and delivery were concurrent conditions. Since the buyers were already in physical possession of the goods, "delivery" could only mean constructive delivery: a change in the character of the buyer's possession from possession as bailee to possession in consequence of the contract of sale. Latham CJ held that because

> "…there was an express contract that the price should be payable before the delivery of the goods…the Commonwealth was therefore entitled to demand, and, if it chose to do so, to sue for, the price before any delivery of goods had been made under the contract".[30]

Williams J expressed his opinion that

> "…the term 'net cash before delivery' imposed a condition that the goods were to be paid for before the property should pass by delivery. The delivery was to be a delivery which passed the property in the goods and such delivery was to be conditional upon prior payment."[31]

His Honour went on to observe

> "…[u]nless a different intention appears, the price of goods is not payable unless and until the property therein has passed to the buyer. Until this happens the seller cannot sue for the purchase money. His remedy is to sue for damages for breach of contract. But the parties can make any contract they please with respect to the payment of the price and if they provide that it is to be paid before the property passes the seller can sue for the price as soon as it becomes payable, for the payment of the price is a condition precedent to the passing of the property."[32]

Webb J, while agreeing in the result, regarded the "cash before delivery" clause as making delivery conditional upon prior payment, but not as entitling the Commonwealth to recover the price before delivery.

[33] Garmin relied on that case, which, it said, stood for the proposition that an action could be brought for the price of goods even when title had not passed, where the parties had contracted for payment independent of the passing of property. The second case which it said supported its argument was a single judge decision, *Consolidated Rutile Limited v China Weal Pty Ltd*.[33] There, the buyer sought the setting aside of a statutory demand for monies owed under a contract for the shipment of zircon, in which title passed on payment. Payment was to be made 45 days from the bill of lading date, unless the buyer revised the shipping schedule, in which event payment was due 28 days after the invoice date. In fact, the shipping

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30 At 636.
31 At 640.
32 Page 642.
33 [1998] QSC 170.

schedule was changed, the shipment being deferred. The seller invoiced for the zircon not shipped and sought to recover the price, notwithstanding that delivery had not been made.

[34] White J observed that the day for payment was uncertain, because it depended on whether and when the seller decided to invoice. However, parties could agree that the price could be recovered prior to delivery or the passing of title; the question was whether the contract supported an entitlement to action. Her Honour referred to a statement from the then current edition of *Benjamin's Sale of Goods*, which, after quoting the reasoning of the High Court in *Minister for Supply & Development*, continued:

> "[T]he terms of the contract must permit the seller to recover the price by action and not merely specify when the price is payable; the buyer's duty to pay the price is not identical with the seller's entitlement to sue for the price."[34]

Insofar as the contract provided for payment 45 days from the bill of lading date, it entailed payment linked to delivery. But by virtue of the agreement that if the shipping schedule changed, the seller was entitled to be paid 28 days after invoice, payment was no longer linked to the loading of the zircon. In consequence, an agreement that the seller could sue for the price of the goods was to be implied.

[35] Garmin also referred to *The Res Cogitans*[35] in this regard. It will be recalled that in that case, the Supreme Court concluded that the *Sale of Goods Act* provisions did not apply to a contract under which title in the fuel remained vested in the sellers until full payment was received, although the buyers were entitled to use the fuel, and did. Lord Mance went on to express the view that even if the *Sale of Goods* legislation had applied, it was not a code on the point. He speculated that the English equivalent of s 51(2) of the NSW Act might have been directed to the position where delivery had not been made. It was not, he suggested, directed to the circumstance where delivery was made, title reserved but the price agreed to be paid, with the buyer permitted to dispose of the goods. Although courts ought to be cautious about recognising claims to the price of goods in cases which were not within the relevant provision, there was

> "at least some room for claims for the price in other circumstances than those covered by [the section]".[36]

[36] Lord Mance's (obiter) view was that the price of goods could be recovered, notwithstanding that they remained the seller's property, where they were at the buyer's risk and were by the express terms of the contract able to be consumed. And, his Lordship observed, that was not the necessary limit of the circumstances in which the price might be recoverable outside the *Sale of Goods Act* provision. He alluded to obiter in the decision of the Court of Appeal in *Harry & Garry Ltd v Jariwalla*,[37] in which it was said that even if the contract were one for the sale of goods, "having regard to the agreement as a whole" (including a term that the goods belonged to the seller until the full amount was paid) the seller was entitled to claim the price of the goods.

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34 That observation is not repeated in the current edition of *Benjamin*, because the United Kingdom case law has moved in a different direction with the decision in *The Res Cogitans*.

35 [2016] AC 1034.

36 At 898.

37 Unreported, 16 June 1988.

[37] B & K Holdings, on the other hand, relied again on Cooper J's judgment in *Style Finnish*. Having concluded that the relevant provision of the *Sale of Goods Act* (Qld) did not apply, his Honour turned to consider whether the seller had a common law right to bring an action for price, which depended on whether the buyer had contracted

> "a contractual debt in the amount of the invoiced price unconditioned by any question of performance by [the seller]".[38]

His Honour noted the observation by the authors of *Benjamin's Sale of Goods* to the effect that the terms of the contract must do more than specify a time for payment, a duty to pay the price not being synonymous with a right to recover it by action.[39] In the case before him, payment was conditioned, at the least, upon delivery of possession of the goods, notwithstanding the retention of title clause. The contract gave no express power to bring an action for price after delivery and the expiration of the credit period, and there was an issue as to whether there was any such implied right, as opposed to the contract's merely setting a date when the buyer was obliged to pay. There was, then, a serious question to be tried as to whether the seller had any right to sue for the price.

[38] B & K Holdings also referred to the decision of the Full Court of the Supreme Court of Western Australia in *Ledger v Cleveland Nominees Pty Ltd*,[40] in which the question of whether a seller could sue for the price of goods similarly arose. The agreement in question was for provision of a racing car which was to be taken to the buyer's premises. The purchase price was payable on or before 1 June 1997, more than two years after the contract date, and the contract provided that the title to the vehicle remained with the seller pending full payment of the purchase price. In that case, the buyer failed to take delivery. The court held that because the contract contemplated delivery before payment, the payment obligation was not irrespective of delivery, so that the equivalent provision to s 51(2) of the NSW Act did not apply. The contract contained no exception to the normal rule that delivery and payment were concurrent conditions. As Cooper J had done, the court considered whether the agreement contained anything which would render the obligation to pay, in the words of Lord Keith, "a debt unconditioned by any question of performance by the other party". It did not; so that the seller was limited to a claim for damages.

Serious question as to whether price is recoverable

[39] No express term of the contract in this case provided for recovery of the price in advance of property passing; the question is whether the agreement for payment before the passing of property impliedly did so. In general terms, it is plain that the obligation to pay does not automatically mean a corresponding right to recover; otherwise s 51(2) of the NSW Act and its equivalents would have virtually no application. It may be easier to equate the two, though, where payment is required independent of a seller's having taken any step to perform its obligations under the contract; as in *Minister for Supply & Development* and *Consolidated Rutile*. Garmin contended that the facts in both those cases were indistinguishable from those in the present case. But that is not really so. In each of those cases, payment was prescribed, in the words of Lord Keith, as a "contractual debt unconditioned by any question of performance" by the seller. That might have been true in the

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38 At 209.
39 At 208.
40 [2001] WASCA 269.

present case had Garmin sold the goods on the basis that full payment was to be made in advance, pursuant to cl. 3.6 of the Domestic Dealer Agreement; but instead it sold pursuant to a term which, by linking payment to the delivery date, made it plain that it would first perform the contract to the extent of physical delivery, albeit without passing property.

[40] There is another important feature of this case which distinguishes it from those on which Garmin relies. The retention of title clause required B & K Holdings to hold the proceeds of any sale of goods in trust for Garmin and to account to the latter for the proceeds. That gives rise to an obvious question as to whether a term should be implied entitling Garmin to recover the price of goods, when it had an express right to require B & K Holdings to account for the proceeds of their sale. At the least, the question may require a consideration of the *Codelfa*[41] criteria, particularly the business efficacy of such an agreement; and in turn, may necessitate consideration of extrinsic evidence of the surrounding circumstances in order to ascertain the commercial purpose of the contract.[42] For those reasons, it could not be said that there was no need for a trial of this action. Summary judgment ought not be granted.

Should the bailment defence have been struck out?

[41] B & K Holdings did not, on appeal, attempt to maintain what was described as its bailment defence: its pleading that because Garmin was entitled as bailor to re-take the goods it was obliged to do so, thus giving B & K Holdings the right to claim a set-off. That implicit concession was correctly made. The defence was untenable; it rested on the mistaken premise that *Puma* was authority for the proposition that a seller with the benefit of a retention of title clause creating a bailment in the buyer was obliged, as opposed to entitled, to re-take possession of unsold goods. The argument overlooked the fact that Puma, the seller in that case, had actually sought the return of the relevant goods, thereby asserting its right to re-take possession of them. The pleading of the right of set-off contained in the relevant paragraphs of the defence should have been struck out, and the trial judge erred in not making that order. It should be made now.

[42] B & K Holdings did, however, repeat in its written submissions its position that an election had arisen on the evidence. At its highest, the evidence seemed to show that Garmin gave an indication of preparedness to "purchase...back" the inventory at the end of May 2017, which might on a generous view of the relevant email have extended to orders not then fulfilled. I would not have regarded this argument as of sufficient strength to warrant sending the matter to trial; but for the reasons already given, it is unnecessary to decide this point.

Orders

[43] I would, then, allow the appeal in part by ordering that paragraphs 6(b) – (e) of the Second Further Amended Defence be struck out. Given the mixed success of their arguments, the parties should provide written submissions as to where the costs should fall, to be filed and served by 21 January 2019.

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41 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347; *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.

42 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117.

[44] **PHILIPPIDES JA:** I agree with Holmes CJ.

[45] **HENRY J:** I have read the reasons of Holmes CJ. I agree with those reasons and the orders proposed.