

# SUPREME COURT OF QUEENSLAND

CITATION: *Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd*  
[2019] QCA 54

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 – Further Order

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 117 (Mullins J)

DELIVERED ON: 5 April 2019

DELIVERED AT: Brisbane

HEARING DATE: 18 September 2018

JUDGES: Holmes CJ and Philippides JA and Henry J

ORDER: **The appellant is to pay 50 per cent of the respondent’s costs of the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant’s appeal was allowed in part – where the appellant was unsuccessful in its principal argument but successful in its alternative argument – whether either party should have part or all of its costs at first instance – whether either party should have part or all of its costs of the appeal

*Appeal Costs Fund Act 1973 (Qld)*  
*Sale of Goods Act 1896 (Qld)*

*Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd*  
[\[2018\] QCA 353](#), referenced

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:** On 18 December 2018, this court gave judgment on the appeal of Garmin Australasia Pty Ltd, allowing it in part. Garmin had appealed against the primary judge's refusal to grant summary judgment against the respondent, B & K Holdings (Qld) Pty Ltd, or, in the alternative, against her Honour's refusal to strike out part of the defence. It was successful only in respect of the latter. Leave was given to both parties to make submissions as to the costs orders which should be made.
- [2] Garmin submitted that B & K Holdings should pay 70 per cent of Garmin's costs of the application below, with the balance reserved or made costs in the cause. B & K Holdings should pay Garmin's costs of the appeal, with the Court, if it thought it appropriate, providing B & K Holdings with an indemnity certificate under the *Appeal Cost Fund Act 1973* (although how that was to be done without any application by B & K Holdings was not made clear). B & K Holdings' submission was simpler: it was that it should have its costs of the appeal, or alternatively, those costs with a very small discount. It said nothing as to the costs below.

### *The history of the matter*

- [3] The reason for the distance between the two submissions lies in the chequered history of the matter, which involved changes of position (on B & K Holdings' part) and a mix of defeat with success (mainly on Garmin's). Garmin had unsuccessfully sought summary judgment in an action for the price of goods delivered to B & K Holdings. B & K Holdings in its defence denied that the document on which Garmin relied as containing the relevant terms of the parties' agreement formed part of the agreement between them. It advanced a positive defence that because of a retention of title clause in the agreement, Garmin was bailor of unsold goods in B & K Holdings' possession and was therefore obliged to accept their return, so that B & K Holdings had a right of set-off in respect of their value (the "bailment defence").
- [4] Before the learned judge at first instance, B & K Holdings advanced a further argument not raised on the pleadings: that because of the retention of title clause, property in the relevant goods had not passed and there had been no sale of goods; so that Garmin's only claim was for damage for breach of contract, rather than in debt. Garmin in response argued that, the agreement being one under which payment for the goods was required before property in them passed, it had an implied right to sue for their price; or, alternatively, it could rely on *Sale of Goods* legislation. In the alternative, it sought to strike out the bailment defence as bad at law.
- [5] The primary judge, however, reached a conclusion for which neither party had really contended: that it was to be inferred that there was in existence some other agreement between the parties which governed the delivery of the goods in question. In those circumstances, her Honour concluded, she could not be satisfied there was no need for a trial of the claim. Because it would be necessary for Garmin to amend its statement of claim to identify the agreement by which goods were delivered, it was not appropriate to strike out parts of the defence. Garmin's application was dismissed in its entirety, with costs reserved.
- [6] On appeal, B & K Holdings did not seek to support the primary judge's reasoning, but maintained its contention that there was an arguable case that Garmin was not entitled to sue for debt. It no longer contended that Garmin was obliged to accept return of the unsold goods, but it did submit that it was arguable that Garmin had

elected to do so. In the event, it was unnecessary for the Court to reach any conclusion on the latter point.

- [7] This Court held that the primary judge's reasoning was erroneous as to there being an inference that some further agreement had been made. However, the Court concluded that the *Sale of Goods* legislation did not apply and that there was a question requiring trial as to whether there was any implied right to recovery of the price in advance of property passing. For that reason, summary judgment ought not to be granted; and the appeal in this regard was dismissed. On the other hand, the pleading of a right of set-off, on the mistaken premise that the bailment somehow required Garmin to retake possession of goods, ought, the court concluded, to have been struck out. That order was made.

*The costs below*

- [8] Garmin ought to have succeeded at first instance on its alternative application (to strike out the bailment defence), but it was rightly (although for the wrong reason) refused summary judgment, its primary application. On the other hand, B & K Holdings seems to have raised the issue about the availability of an action in debt for the first time in its written outline of argument for the hearing below. Given that set of circumstances, I would make no order as to the costs of the application at first instance.

*The costs of this appeal*

- [9] B & K Holdings did not explicitly concede that Garmin ought to succeed in its appeal against the refusal to strike out its bailment defence, but it did not actively argue the point, either in its written outline or at the hearing of the appeal. The point did not occupy very much of Garmin's written argument, and it did not feature to any large extent in oral argument. The chief concern was whether summary judgment should have been granted. Since it was unsuccessful in the principal matter of argument, I would order that it pay 50 per cent of B & K Holdings' costs of the appeal.
- [10] **PHILIPPIDES JA:** I agree with the reasons of Holmes CJ and the order proposed by her Honour.
- [11] **HENRY J:** I have read the reasons of Holmes CJ. I agree with those reasons and the order proposed.