SUPREME COURT OF QUEENSLAND

CITATION:	*Bell Plastics Sunshyne P/L v Sunshine Plastics P/L* [2006] QSC 102
PARTIES:	**BELL PLASTICS SUNSHYNE PTY LTD** **(ACN 010 986 768)** (applicant) **v** **SUNSHINE PLASTICS PTY LTD** **(ACN 102 548 407)** (respondent)
FILE NO/S:	BS No 1472 of 2006
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2006
JUDGE:	Holmes J
ORDER:	**1. The application is dismissed** **2. Subject to contrary submissions, the applicant is to pay the respondent's costs of and incidental to the application**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – where the applicant supplied machinery to the respondent – where respondent claims that the supply of the machinery was conditional upon the provision of work orders by the applicant to the respondent – whether contract concluded – where offer and negotiations for sale were contained in a series of letters between the parties – whether the applicant had an offsetting claim – whether a statutory notice of demand served on the applicant should be set aside SALE OF GOODS – PASSING OF PROPERTY AND RISK – PASSING OF PROPERTY – IN GENERAL – where the applicant supplied machinery to the respondent – where respondent claims that the supply of the machinery was conditional upon the provision of work orders by the applicant to the respondent – where offer and negotiations for sale were contained in a series of letters between the parties whether there was an agreement as to when price to be paid – whether property in the goods passed according to the *Sale of*

Goods Act 1896 (Qld)

Corporations Act 2001 (Cth), s 459H
Sale of Goods Act 1986 (Qld)

Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, considered
Elm Financial Services Pty Ltd v Macdougal [2004] NSWC 560, cited
Howard Smith & Company Ltd v Varawa (1907) 5 CLR 68, considered
Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd & Anor (No 2) (1994) 122 ALR, applied
JJMMR Pty Ltd v LG International Corp [2003] QCA 519, cited
Macleay Nominees v Belle Property East [2001] NSWC 743, applied
Royal Premier Pty Ltd v Taleski [2001] WASCA 48, applied

COUNSEL: I A Erskine for the applicant
A Crowe SC with B Whitton for the respondent

SOLICITORS: Carl Blumen for the applicant
Greenhalgh Pickard for the respondent

[1] **HOLMES J**: The applicant seeks to set aside a statutory notice of demand served on it on 7 February 2006. It admits debt in the amount claimed ($139,077.69) for the supply of plastic products, but contends that it has an offsetting claim, within the meaning of s 459H(5) of the *Corporations Act 2001* (Cth), which exceeds the amount claimed. The offsetting claim arises, the applicant says, from a contract for the sale by the applicant to the respondent of a plastic moulding machine at a price of $150,000. The respondent, on the other hand, denies that any contract of sale was ever concluded.

The dealings between the parties

[2] In May 2005, the respondent bought the business of Sunshine Plastics, and its director, Mr Meyer, entered some negotiations with the applicant's director, Mr Bellucci, to obtain moulding work on sub-contract. Mr Bellucci proposed that the applicant would sell its moulding machines to the respondent to enable it to carry out the work. Among the machines discussed were a Remu injection moulding machine and a Kawaguchi machine. A third company associated with the respondent in fact purchased the Kawaguchi machine for the respondent's use in June 2005. According to Mr Meyer, it was agreed that the applicant would, as part of the agreement in respect of the Kawaguchi machine, provide work orders to the respondent of a certain number of crates to be manufactured per annum; but the applicant denies that there was any such condition.

[3] Meanwhile, the second machine, the Remu, was also under discussion. Mr Bellucci on behalf of the applicant sent a facsimile to the respondent, describing the machine

and saying that the applicant would like it to be sold with moulding work. The facsimile continued,

> "The asking price is $150,000, which also includes commissioning.
> The work offered with the machine exceeded [sic] $60,000 per month. Also this work is very competitively priced."

Attached was a list setting out products and unit numbers, said to represent a monthly average of the work required, with the observation that the work would "go to a competitive price". The facsimile went on,

> "The machine payment could be arranged by amortization - on the moulded parts supplied to Bell."

Although dated 23 May 2005, the facsimile was actually received by the respondent on 15 June 2005; but nothing turns on that time lapse.

[4] According to Mr Meyer, he made some inquiries about the machine's value and formed a view that by itself, that is, without the moulds and dies designed for use with it (which were not, it seems, for sale), "it was worth nothing more than scrap value". On 18 July 2005 he advised Mr Bellucci by telephone that the respondent would put a proposal to him as to purchase of the Remu, emphasising that the respondent's interest in the purchase was driven by the prospect of work orders being provided with it. On 19 July 2005 the respondent sent a letter to the applicant by facsimile, confirming purchase "on the terms offered as outlined in the fax dated 23 May 2005", which, the letter asserts, are as follows:

> "Selling price of the machine is $150,000, including commissioning.
> We are to pay for the move from your premises and installation at our premises.
> Once installed, you will commission the machine and make sure it runs efficiently. Work offered with the machine amounts to approximately $60,000 per month for the products per the attached list and at the prices advised.
> The payment of the machine can be amortized over the future production, the details of which are yet to be agreed."

Attached was a product list setting out items for manufacture with "Agreed Prices".

[5] It is those pieces of correspondence, the facsimile dated 23 May 2005 and the respondent's letter of 19 July 2005, which the applicant says constituted the contract between the parties. The respondent, on the other hand, says that evidence of their dealings subsequent to that exchange should be examined, and shows that it was merely part of a process of negotiation. There is, of course, authority for the proposition that subsequent acts and statements conduct may be considered in order to determine whether the parties intended to contract[1].

[6] After the letter of 19 July, there was some correspondence between the parties about production of various items not expressly linked to provision of the machine. The next relevant step was a facsimile of 9 August 2005 from the applicant, which advised that the machine "would be ready for shipment probably on Tuesday, 16th August 2005." On 10 August 2005 the applicant's solicitor sent Mr Meyer a

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1 *Howard Smith & Company Ltd v Varawa* (1907) 5 CLR 68; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

guarantee and acknowledgement of debt. The guarantee was expressed to be of the respondent's indebtedness to the applicant. The acknowledgement of debt was formulated as an acknowledgement by the respondent that: it was indebted to the applicant in the sum of $150,000, the price of the Remu machine; that unless that amount was paid within 12 months, it would pay interest at 10 per cent; that the debt would be paid within 730 days; and that property would pass on full payment.

[7] Mr Meyer declined to sign the guarantee and indicated he would not sign the acknowledgement of debt unless a clause were inserted referring to the work to be provided worth $60,000 per month. An amended acknowledgement of debt was sent to him. It contained all the clauses in the previous document with an additional clause to the effect that the respondent would be provided with work to the value of at least $60,000 per month, but it went on to specify that if the work provided were not completed as required, the applicant could, in its discretion, stop providing it. Mr Meyer refused to sign that document also, because it did not make the existence of the debt conditional upon provision of the work. Nonetheless, the machine was delivered on 22 August and the respondent, according to Mr Meyer's affidavit, commenced using it on 5 September 2005.

[8] On 12 September 2005, Mr Meyer sent a facsimile to the respondent in which, amongst other things, he asserted that provision of orders to the value of at least $60,000 per month was "an express condition of accepting the machine", and that it had been agreed that the applicant would withhold 25 per cent of the invoiced value of the products produced on the Remu in payment of the purchase price. In fact, Mr Meyer now says in his affidavit, although there had been discussion of such a withholding, there had been no agreement to that effect.

[9] In November 2005, Mr Meyer began to raise the issue of outstanding invoices for work done by the respondent. Mr Bellucci responded by saying that he would adhere to the respondent's thirty-day payment requirement "if you pay the Remu as agreed at $12,500 per month for 12 month". As to that, he says in his affidavit that he "thought an agreement had been reached whereby the respondent would pay $12,500 each month." He does not explain the basis for that understanding; it presumably is based on repayment of the principal of $150,000 within 12 months.

[10] A subsequent letter from Mr Meyer to Mr Bellucci, dated 14 November 2005, maintained that there was no agreement to pay $12,500 per month, but instead an agreement to pay for the machine after 12 months and only on the condition that orders had been provided worth $60,000 per month. Since that could not be established in advance, it was necessary that the 12 months lapse in order to determine whether payment was due.

[11] Relations between the parties continued to deteriorate, with accusation and counter-accusation about whether there had been any agreement for provision of work and whether the work supplied was being adequately performed by the respondent. At the end of January 2006 Mr Bellucci complained that he would have to have the work done elsewhere at short notice, which would not give much time to remove the Remu machine and undertake manufacture. Mr Meyer responded by asking the applicant to remove the machine and settle the account. The statutory demand was served on 7 February 2006. On 14 February 2006 a statement of account dated 31 January was faxed from the applicant to the respondent; it claimed an amount of

$165,000 for the purchase of the Remu machine, being the price of $150,000 plus GST.

The supporting affidavit

[12] In his affidavit filed with and in support of the application to set aside the demand, Mr Bellucci deposed:

- that the respondent was indebted to the applicant in the sum of $165,000 (made up of $150,000 plus GST) for the machine pursuant to the agreement constituted by the facsimile and letter;
- that the respondent had failed to pay any monies in respect of the purchase price or alternatively had failed to amortise the purchase price against orders for the manufacture of goods;
- that the respondent had used the machine and done some work and that it had billed the applicant for work performed in a total of $315,023.39 of which the applicant had paid $175,945.70;
- that in January 2006 the respondent refused to carry out further works; and
- that the applicant intended to commence proceedings against the respondent for difference between the respondent's claim and the money owed in respect of the machine and "for other breaches".

Annexed to the affidavit were the notice of demand; an Australian Securities and Investment Commission search containing the details of the respondent; copies of the facsimile dated 23 May 2005 and the letter of 19 July 2005; the statement showing an outstanding balance of $165,000 for the purchase of the Remu machine; and copies of orders for work requested by the applicant in January 2006 and not undertaken by the respondent.

The applicant's submissions

[13] The applicant's submissions depend heavily on a number of the provisions of the *Sale of Goods Act 1896* (Qld). This was, it says, a contract within the meaning of s 4(1) of the Act, which defines a contract of sale as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the '**price**'". The facsimile dated 27 May 2005 and the respondent's letter of 19 July 2005 constituted a contract for the sale of the machine at a price of $150,000, plus GST, with the machine's commissioning thrown in. What was not agreed was the way in which the price was to be paid. Various options were canvassed in the correspondence: payment at the rate of $4,500 per month, possibly by way of amortisation against work performed by the respondent; payment over two years with no interest payable if the debt were paid in full within 12 months; or payment after 12 months conditional on the applicant providing at least $60,000 per month in orders.

[14] The applicant contends that because there was no agreement as to when the price was to be paid, s 30 of the Act, which is in the following terms, applies:

> "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

By virtue of s 44, the applicant says, it had lost any right of retention once the respondent had lawfully obtained possession of the machine. And under s 37 of the Act, the respondent was deemed to have accepted the machine, because it had retained it beyond a reasonable time without indicating any rejection of it.

[15] Section 21 of the *Sale of Goods Act* provides, subject to any apparent different intention, rules for determining when property in goods passes. The applicant argues that no different intention is shown: although the acknowledgement of debt had contained a *Romalpa* clause, the respondent had not signed that document. The applicant points then to Rules 2 and 3. Rule 2 provides for the situation where the seller is bound to do something to the goods in order to put them into a deliverable state; Rule 3 applies where goods are in a deliverable state but the seller is bound to do something with reference to them for the purpose of ascertaining the price. In both cases, property does not pass until the thing is done and the buyer has notice of it. But it does not appear, in fact, that Rule 3 can have any application here; there was nothing to be done in order to ascertain the price. Rule 2, arguably might apply, if one regards commissioning as part of the process of rendering the machine deliverable.

[16] The applicant can, it argues, maintain an action for the price of the machine under s 50(1) of the *Sale of Goods Act* which provides:

> "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."

Alternatively, if the applicant's action were one for damages for non-acceptance of the machine, the measure of damages was the difference between the contract price and the market price. Mr Meyer's statement in his affidavit that the machine "was worth nothing more than scrap value" justified a damages claim of $165,000.

The respondent's submissions

[17] The respondent argues that the *Sale of Goods Act* applies only to concluded contracts, and no contract was ever concluded; there were, rather, ongoing negotiations. That, it says, is obvious from the continuing correspondence. At the stage at which the letters dated 23 May 2005 and 19 July 2005 passed between the parties, no details as to how payment would be made had been agreed. The mere fact that a price had been agreed did not operate to create a contract. In any event, s 50(1) only permitted an action for the price of goods where property had passed and the buyer had refused to pay for them "according to the terms of the contract". Here there were no terms according to which the buyer was to pay, and the acknowledgement of debt in the letter of 27 January 2006 showed that the applicant's intention was to transfer property in the machine only on payment of the price.

Offsetting claim under s 459H

[18] The expression "offsetting claim" is defined in s 459H(5) of the *Corporations Act* as meaning,

> "a genuine claim that the company has against the respondent by way of counterclaim, setoff or cross-demand (even if it does not arise

> out of the same transaction or circumstances as a debt to which the demand relates)".

A "genuine claim", it has been said,

> "must not have been manufactured or got up simply for the purpose of defeating the demand made against the company. It must have an existence that is objectively demonstrable independently of the exigencies of the demand that evoked it."[2]

It is enough if any amount claimed is claimed in good faith.[3]

Genuine offsetting claim for the contract price?

[19] I am inclined to think that no concluded contract did come into existence. There was a lack of any agreement as to how and when payment would be made; the suggestion of amortisation in the facsimile of 23 May and the response of 19 July which again speaks of amortisation as a possibility, "over the future production, the details which are yet to be agreed", smack of "agreement to agree". The parties' subsequent conduct - their debate over whether the acknowledgment of debt and guarantee represented the terms of their agreement and their discussion of the machine being returned to the applicant's possession - speaks against the concluding of the contract by the exchange of the facsimile and letter.

[20] But assuming that the applicant has at least an argument that there was a concluded contract in the two letters it relies on, that contract clearly contemplated payment at a time other than upon delivery of the machine. There was a consensus that amortisation over future production was an available means of payment. Given that, s 30 had no application: the payment mechanism contemplated was one which was not contemporaneous with delivery but would extend over some period into the future. Nor, given the consensus to that extent, is there any evidence of any refusal to pay for the goods according to the terms of the contract.

[21] It does not seem, then, that the applicant can meet the requirements of s 50(1) so as to maintain an action for price. Other matters which reinforce that conclusion include the evidence suggesting that property was not intended to pass on delivery of the machine. It is not, I think, necessary to resort to the rules in s 21. Section 20 of the *Sale of Goods Act* provides that property in goods passes to the buyer at the time the parties intend such a transfer, and, in ascertaining that intention,

> "regard is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

There is nothing specific in the terms of the contract, but the conduct of the parties certainly suggests that property was not to pass until payment was made. The acknowledgement of debt sent by the applicant made that clear; the respondent (through Mr Meyer) did not dispute that as their mutual intention, but rather confined its disagreement to the absence of any reference to the work to be provided. Similarly, the parties' letters at the end of 2005 and the beginning of 2006 are consistent with that mutual intention: Mr Meyer in his letter of 14 November 2005 suggested movement of the machine either back to the applicant's

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2 *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519 per McPherson JA at para 18.

3 *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd & Anor (No 2)* (1994) 122 ALR 717.

premises or to the premises of the party to whom it was sold, while Mr Bellucci's letter of 27 January 2006 and facsimile of 15 February 2006 also spoke of removing the machine from the respondent's possession. It is also, I think, of some significance that no invoice was sent for the price of the machine until February 2006, after service of the notice of demand. The obvious conclusion is that the parties did not intend that the property in the machine would be transferred until payment of the purchase price in full, and it had not, accordingly, passed.

Genuine offsetting claim for damages?

[22] There remains the question of whether the applicant can, as it has submitted, rely instead on a claim for damages for non-acceptance. This was not a claim specifically raised in the affidavit of Mr Bellucci supporting the application to set aside the statutory demand. The only conceivable reference to it is contained in the last substantive subparagraph of the affidavit, which is in these terms:

> "The applicant will commence proceedings against the respondent for the balance between the money owed in the sum of $165,000.00 and the amount claimed by the respondent in the sum of $139,077.69 and *for other breaches*."(italics added)

Nothing in Mr Bellucci's supporting affidavit provides any evidence of non-acceptance of the goods, much less of the damages which might be claimed. One could hardly say that the material facts to support such a claim had been identified in that affidavit.

[23] But if one takes a liberal approach and accepts the claim as raised by Mr Bellucci's supporting affidavit, it is still not possible, taking that affidavit with the subsequent material, to say that there is an offsetting claim which would exceed the amount demanded by the respondent. It is true that it is not incumbent on the applicant to establish the amount of its claim with any precision, provided there is

> "a plausible and coherent basis for asserting a claim to a sum which, despite elements of uncertainty, can be seem to be, in any event, greater than the amount of the debt the subject of the statutory demand."[4]

[24] The difficulty here is that the applicant has claimed no amount in its material. Rather it seeks as an afterthought to rely on Mr Meyer's throw-away line about the machine having only scrap value, which can hardly be regarded as a serious basis for valuation. There may well exist a market for the machine - Mr Bellucci alluded in his correspondence to other prospective buyers - but one can only speculate as to what the machine would fetch on that market. In order for the damages to exceed $138,000 (the respondent's claim of $140,000 less the statutory minimum to support the demand) the market value of the machine would have to be less than $27,000. But this can only be a matter of speculation; there is simply no evidence on the point. Without such evidence I cannot be satisfied that the applicant has an offsetting claim which exceeds the respondent's claim[5].

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4 *Elm Financial Services Pty Ltd v Macdougal* [2004] NSWC 560 at para 19.

5 *Macleay Nominees v Belle Property East* [2001] NSWC 743; *Royal Premier Pty Ltd v Taleski* [2001] WASCA 48

[25] Accordingly, the application is dismissed. Subject to contrary submission, I will order that the applicant pay the respondent's costs of and incidental to the application.