SUPREME COURT OF QUEENSLAND

CITATION:	*Reynolds & Reynolds v Aluma-Lite Products Pty Ltd* [2009] QSC 379
PARTIES:	**ROSS MACKENZIE MAX REYNOLDS and MARGO LOGAN REYNOLDS** (plaintiffs) **v** **ALUMA-LITE PRODUCTS PTY LTD** (defendant)
FILE NO/S:	7589 of 1997
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 29, 30 October 2008, 19 March 2009
JUDGE:	Martin J
ORDER:	
CATCHWORDS:	MORTGAGES – SALE UNDER POWER – MODE OF EXERCISE OF POWER – RIGHTS AND LIABILITIES OF PARTIES – Where plaintiffs defaulted under mortgage agreement – Where plaintiffs resisted defendant's right to possession – Where plaintiffs forced to forfeit possession – Where plaintiffs left rubbish on property – Where plaintiffs obstructed access to property for one month after forfeiture - Where defendant exercised power of sale over property – Where the plaintiffs allege the defendant breached its duties under s85 of the *Property Law Act 1975* (Qld) to obtain market price – Whether the defendant properly described the property in advertisements for sale - Whether the defendant wrongly denied inspections to prospective purchasers - Whether the defendant adequately advertised the property for sale – Whether the defendant and its agent properly maintained the property at and before auction – Whether the defendant otherwise failed to take reasonable care when selling the property – Whether the defendant breached its duties under s 85 of the *Property Law Act 1975* (Qld). BAILMENT - DETINUE Where plaintiffs in default of

mortgage – Where plaintiffs forced to forfeit possession of real property – When plaintiffs abandoned machinery on road reserve - Where machinery obstructed access to property - Where defendant caused machinery to be moved – Where plaintiffs allege they made demands for return of machinery – Where demands allegedly refused – Where machinery subject to a Bill of Sale to third party - Where plaintiffs in default of Bill of Sale - Where plaintiffs seek damages in detinue and bailment – Whether plaintiffs had an immediate right to possession of machinery – Whether the plaintiffs made valid demands for the return of the machinery – Whether the plaintiffs suffered loss – Whether the plaintiffs are entitled to damages.

BAILMENT – DETINUE - Where plaintiffs abandoned grain and stock on property when they forfeited possession – Where plaintiffs allegedly made demands for return of grain and stock – Where crop lien and stock mortgage existed in favour of defendants - Where plaintiffs seeks damages in detinue and bailment for grain and stock – Whether the grain was subject to the crop lien – Whether the stock was subject to the stock mortgage.

MORTGAGES – BILL OF SALE – DUTY TO ACCOUNT – Where crop lien and stock mortgage executed between plaintiffs and defendant as security for a real estate mortgage – Where plaintiffs defaulted under mortgage agreement – Where defendant exercised power of sale over stock and crops – Where plaintiffs alleges defendant failed to properly account for proceeds of sale – Whether defendant failed to properly account for proceeds of sale.

Property Law Act 1975 (Qld), s 85
Apple Fields Ltd v Damesh Holdings Ltd (2004) 1 NZLR 721
CAGA Ltd v Nixon (1983) 152 CLR 491
Council of the City of Sydney v West (1965) 114 CLR 481
Falk v Haugh (1935) 53 CLR 163
French v Smith [2005] VSCA 114
Gaba Formwork Contractors v Turner Corp (1991) 32 NSWLR 175
General and Finance Facilities Ltd v Cook's Cars (Romford) Ltd [1963] 2 All ER 314
Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd [1970] 2 NSWR 156
Henry Berry & Co Pty Ltd v Rushton [1937 St. R. Qd 109
Higton Enterprises Pty Ltd v BFC Finance Ltd [1997] 1 Qd R 168
Malec v Hutton (1990) 169 CLR 638
McKeon v Maloney (1988) 1Qd R 628
Midland Silicones Ltd v Scruttons Ltd [1959] 2 QB 171
Nixon v Commercial & General Acceptance [1980] Qd R 153

Pendlebury v CML Assurance Society Ltd (1912) 13 CLR 676
Rapid Roofing Pty Ltd v Natalise Pty Ltd [2007] 2 Qd R 335
Sablebrook Pty Ltd v Credit Union Australia Limited [2008] QSC 242
Strand Electric & Engineering Co v Brisford Entertainment [1952] 2 QB 246
Southland Hospital Board v Perkins Estate [1986] 1 NZLR 373
Stockl v Rigura Pty Ltd (2004) ANZ Conv R 265
WD & HO Wills (Aust) Ltd v State Rail Authority of New South Wales (1998) 43 NSWLR 338

COUNSEL: K C Fleming QC with P Mylne for the plaintiffs
B O'Donnell QC with K Boulton for the defendant

SOLICITORS: Shand Taylor for the plaintiffs
Ellison Moschella & Co for the defendant

Introduction

[1] In 1977 the plaintiffs (Ross and Margo Reynolds) bought a property called Condamine Ponds on the Condamine River, south-east of Warwick. In 1979 and 1981 they purchased the nearby properties of "Kingsley" and "Milton" respectively. The three properties, as an entity, were usually referred to as "Condamine Ponds". The Reynolds ran cattle and grew crops on the property.

[2] From about 1990 until 1996, the properties experienced serious drought conditions. This contributed to the accumulation of a debt owed by the plaintiffs to Westpac and the Commonwealth Development Bank which, by 1994, was in the order of $1.5 million. Part of this debt was incurred because of expenditure associated with obtaining the necessary approvals for conducting feed lots on two of the properties.

[3] The Reynolds became aware that the approvals they had for feed lotting would not allow for a sufficient number of cattle to make the project worthwhile and that, to obtain an increase in numbers, the expenditure of more money was required. Their financiers would not provide any extended facility and so they sought to refinance, pay out the two banks and have enough to extend their feedlot approval.

[4] In late 1993, the Reynolds were introduced to a solicitor, Paul Crowley, who told them he could assist in refinancing the property. In February 1994, after some inconclusive negotiations involving other parties, the defendant ("Aluma-Lite") agreed to lend the plaintiffs $1.6 million. This loan was secured by:

(a) A mortgage over the properties, and
(b) A bill of sale over certain farm equipment.

[5] It was a term of the original mortgage that the sum secured was to be repaid in February 1995. The plaintiffs did not comply with that term nor with a term requiring the payment of interest.

[6] In December 1995 the plaintiffs, in order to provide further security for the loan, entered into a stock mortgage with Aluma-Lite.

[7] In March 1996 the Reynolds and Aluma-Lite entered into a deed of extension which required, among other things, that the plaintiffs grant a crop lien to Aluma-Lite.

[8] There is a dispute on the pleadings about whether, after the deed of extension, the plaintiffs fell into default under the mortgage. It is not necessary to determine that because:

(a) On 14 March 1996 in Action 1822 of 1995 the defendant obtained an order that it was entitled to possession of the property and a judgment against the plaintiffs for $1,750,000; and

(b) On 5 October 1996 the defendant entered into possession of the properties.

[9] Pursuant to its rights under the securities, Aluma-Lite sold the properties, some of the stock and grain, and some machinery. The sales realised amounts below the amount owed by the plaintiffs to Aluma-Lite.

The issues

[10] The main dispute arises out of the contentions by the Reynolds that Aluma-Lite failed to take reasonable care when selling the properties and, thus, obtained less than market value for them.

[11] The other major issues are related to the sale of other property – grain, equipment, cattle, horses and other chattels – by Aluma-Lite which the Reynolds say it was not entitled to sell.

The quality of evidence

[12] Most of the relevant events occurred more than 12 years before the hearing of the trial. In assessing the credit (where necessary) of witnesses, I have taken into account the inevitable decay in recollections that such a length of time can engender. Some witnesses, not surprisingly, had little clear recollection of what was said or by whom at the relevant time and others were sufficiently uncertain to render their evidence of little assistance.

[13] It was obvious, though, that the events of the mid to late 1990s spawned a substantial degree of ill will and rancour between Mr Reynolds and John Williams, a director of Aluma-Lite at some of the relevant times and the person most involved on behalf of the defendants. This bitterness was obvious in the way in which both Mr Reynolds and Mr Williams responded to some questions in cross-examination and in the way in which Mr Reynolds, in particular, took opportunities to embellish his recounting of events in order to present them in what he must have thought was the most favourable light for the plaintiffs.

[14] On matters going to the issues on the pleadings, Mr Reynolds was a witness who was reluctant to make any concessions in evidence, no matter how reasonable or appropriate they might have been. On some occasions he deliberately gave answers which were not responsive and were framed in a way which, he apparently thought, would assist his cause.

[15] On issues such as the climatic and economic circumstances and the condition of the properties in 1996/97, I do not accept Mr Reynolds. On those matters I prefer the evidence of other witnesses, especially Mr Kirkwood.

[16] The main part of the plaintiffs' case was that the properties were sold at an undervalue and Mr Reynolds appeared determined to give answers which would show that there were no reasons for a low price being received. For example, Mr Fleming QC opened that there "had been bad times over a period of about 10 years leading up to 1996 as a result of drought conditions." In an early part of his cross-examination Mr Reynolds said:

> "Mr Reynolds, at the time that the auction was held in March 1997, the area in which Condamine Ponds was situated had been in drought pretty much the past five years, hadn't it?-- No, that's not correct. We had big floods in '96.
>
> Yes. So you disagree there had been a drought over the bulk of the previous five years?-- Without checking my records, I don't think that was completely correct, sorry, no.
>
> But it was substantially correct, wasn't it?-- There were dry years in that time certainly."

[17] He also gave evidence which was contrary to his own experience. He was asked:

> "And the commodity prices were depressed-----?-- No.
>
> -----by the time of the auction?-- No.
>
> Beef prices were low?-- For feedlot cattle they (sic) were still good prices.
>
> Would you agree with me that prices for beef were low-----?--No.
>
> -----by the time of the auction? You disagree with that? Are you quite sure Mr Reynolds?-- Well, the cattle that we sold, I'm not certain on the day of the auction what the prices were, but in July and September the previous year we certainly got reasonably good prices.
>
> Prices were low for grain, grain sales, that's right, isn't it, in the lead up to the auction in March 1997?-- No.
>
> And the rural market generally was depressed?-- No.
>
> And for properties like yours there was very little interest in the market generally?-- No."

That was inconsistent with what he said later:

> "Did you and your wife about that time, early 1996, list the property for sale with real estate agents?-- Yes.
>
> Who did you list it with?-- Elders Real Estate and Ray White Brisbane.
>
> Sorry, Elders Real Estate in Warwick?-- No, sorry, Primac Real Estate in Warwick and Ray White Real Estate in Brisbane.

Did it remained listed for sale until you left the property in October?-- Yes.

During that time did you receive any offers?-- No.

Not a single offer?-- No."

[18] There were other examples where his evidence conflicted with witnesses such as Mr Kirkwood and Mr Nilon. Mr Nilon, a valuer, took notes of what he was told by Mr Reynolds and I accept that he is accurate in his recollection. Mr Kirkwood, who eventually bought Condamine Ponds, part of Kingsley and part of Milton, also gave evidence of the condition of the properties. He impressed me as someone who was reliable, knowledgeable and impartial. His evidence was consistent with other verifiable facts. Where Mr Reynolds' evidence conflicts with either that of Mr Nilon or Mr Kirkwood, I prefer their evidence. In general, unless Mr Reynolds' evidence is confirmed by some other, reliable evidence, I have not relied on what he said.

The sale of the Condamine Ponds properties

[19] In their pleadings the plaintiffs assert that the defendant:

(a) Breached s 96 of the *Property Law Act*
(b) Breached s 84 of the *Property Law Act*
(c) Breached s 85 of the *Property Law Act* by failing to take reasonable care to ensure the property was sold at market value in that its agents:
    (i) Advertisements wrongly described the property
    (ii) Denied access to prospective purchasers
    (iii) "Talked down" the properties to prospective purchasers
    (iv) Failed to advertise the properties properly
    (v) Failed to offer the properties in separate lots after the property failed to reach the reserve on auction day
    (vi) Failed to offer the property to persons who had made offers higher than the anticipated sale price at auction
    (vii) Told prospective buyers the property was sold when it was still on the market
(d) Failed to take reasonable care to ensure the property was sold at market value by:
    (i) Damaging the property prior to auction, and
    (ii) Failing to maintain the properties.

[20] The plaintiffs claim that the real market value of the properties at the time of sale was $4,100,000 and that the difference between that amount and the price obtained was $2,805,887.13.

The other securities

[21] The plaintiffs claim that the defendant has failed to properly account for the sale of the items the subject of the bill of sale or for the sale of stock under the stock mortgage.

Detinue and bailment

[22] The plaintiffs claim that:

(a) they made a demand for the return of certain property from the defendant,
(b) the defendant refused to return the property, and as a result
(c) they suffered losses.

The real property case – the sale of Condamine Ponds

The blockade

[23] I will deal with the issues here using the same headings as the plaintiffs have used in their pleading; but, before I do that, it is appropriate to mention a matter which influenced a number of the issues regarding the sale. During the trial it was referred to as "the blockade".

[24] On 5 October the plaintiffs were given three days by the Bailiff to leave the property. Mr and Mrs Reynolds enlisted the help of their children and some other people including a Mr Wallace and a Mr Wilson to whom reference will be made later. Most of the personal belongings of the plaintiffs were removed but not all the machinery.

[25] The individual property called Condamine Ponds is very nearly bisected by a road licence which runs off Wickhams Road. That road licence is not part of the property the subject of any of the mortgages but is owned by the plaintiffs. The road licence was the most commonly used means of gaining entrance to Condamine Ponds and, in particular, to the homestead.

[26] When the plaintiffs departed from the property they left a substantial number of machines and associated equipment on the road licence. The machinery was, according to the Reynolds, subject to a bill of sale to Mr Wilson. Mr Reynolds said that it was left there so that he could come back and "pick up the stuff that we didn't have time to move away from the property". He also agreed that it was left there so that it would not be in Aluma-Lite's possession when the Bailiff handed the property over to it.

[27] The machinery left on the road reserve included: two bulldozers, two tractors, a harvester, an auger, a grain auger, and three trailers. Mr Reynolds denied that the position in which the machinery had been left would have prevented anyone travelling in a vehicle from Wickhams Road getting to the main homestead or any of the sheds. He was then asked:

> "You travel from the public road in that line bordered by the parallel lines of trees down to the main homestead and the sheds surrounding it?-- Yes.
>
> Now, the Massey International harvester and the two John Deere tractors had been placed across that road licence, stretch of the road licence from the public road to where you get to the homestead?-- No, the Massey harvester was placed on the road up towards the gate, yes. The two tractors were placed down near the shed.
>
> In the shed?-- Down near the shed.
>
> Not on the road licence?-- Down near the shed on the road.

> In a position they were blocking a vehicle getting through?-- You could have still get a vehicle through past one of the tractors.
>
> I am suggesting that you could not. You placed them there deliberately to prevent Aluma-Lite getting any vehicles onto the property?-- Using - no, using our roadway.
>
> In the meantime you commenced an application in the Supreme Court trying to seek an order giving you back possession of the property?-- Yes.
>
> This positioning the two tractors and the harvester was in order to keep the mortgagee out?-- Keep them off our land, yes."

[28] The photographs that were tendered showing the machinery on the road licence demonstrate that their positions would have made vehicular access to the homestead very difficult, if not impossible, to achieve.

[29] The "blockade" was not cleared until the end of October when some of the items were moved onto the property occupied by Aluma-Lite. It constituted a significant impediment to the marketing of the properties by the defendant.

Breach of s 96 of the Property Law Act

[30] On the second day of the trial Mr Fleming QC withdrew reliance on this claim.

Breach of s 84 of the Property Law Act

[31] This was not pursued.

Breach of s 85 of the Property Law Act and the common law duty of mortgagees with respect to the sale of mortgaged property

[32] At the relevant time, s 85 of the *Property Law Act* provided:

> 85.(1) It is the duty of a mortgagee, in the exercise after the commencement of this Act of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
> (2) Within 28 days from completion of the sale, the mortgagee shall give to the mortgagor notice in Form 8 of Schedule 2.
> (3) The title of the purchaser is not impeachable on the ground that the mortgagee has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.
> (4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) shall be guilty of an offence.
> Maximum penalty—2 penalty units.
> (5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee from the duty imposed by this section.
> (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.

> (7) This section applies to mortgages whether made before or after the commencement of this Act but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this Act."

[33] The claims by the plaintiffs are in two parts: first, against the defendant's agents and, secondly, against the defendant itself.

[34] It will assist in the analysis of the evidence relating to the acts of the agent if I set out, briefly, the principles which have emerged from the authorities:

(a) "The duty of a mortgagee exercising a power of sale in Queensland is clear; it is to take reasonable care to ensure that the property is sold at market value. It may be accepted that in the present case the appellant took reasonable care to choose competent agents, and then left the conduct of the sale in their hands. In my opinion this does not mean that the appellant thereby discharged its duty under section 85(1). **The duty of the mortgagee is not merely to take care to ensure that the sale is carried out by competent agents. It is to take reasonable care to ensure that the property is sold at the market value. The duty to take reasonable care is one that the mortgagee is bound to perform, and it cannot escape liability by a breach of that duty by delegation to another.** … A reasonable man, selling his own property by auction, and wishing to obtain the market value, would not allow the auctioneers a free hand to advertise in whatever manner they thought fit; he would make reasonable endeavours to ensure that the advertising proposed was adequate. It is not unduly burdensome to require a mortgagee to exercise similar care."[1] (emphasis added)

(b) "The power is exercised primarily on behalf of and for the benefit of the mortgagee by his agent in whose selection the mortgagor has no say. **The agent acts in accordance with the instructions of the mortgagee and has no independent discretion to exercise except insofar as the mortgagee may choose to leave arrangements for the sale in the hands of the agent. It is not unfair or unreasonable in this situation that the mortgagee should have the responsibility for the taking of reasonable care to ensure that the market value is obtained, including the responsibility for adequate advertising of the sale**. He should satisfy himself that the property has been advertised in accordance with his instructions – that, after all, is what a prudent vendor would do in the circumstances."[2] (emphasis added)

(c) "What does the duty oblige the mortgagee to do? **The duty, to be performed in the exercise of a power of sale, extends to the steps to be taken to attract potential buyers for the property, the negotiations for sale, and the settling of the terms of sale.** Ordinarily a vendor of property engages others whose professional or business skills equip them to perform these tasks and who, by taking

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1 *CAGA Ltd v Nixon* (1983) 152 CLR 491 at 496 per Gibbs CJ

2 ibid at p 503 per Mason J

the appropriate steps, ensure a sale of the property at market value."[3] (emphasis added)

(d) Where a mortgagee sale is to be by auction, advertisement would seem to be obligatory.[4]

(e) The advertisement should contain material details concerning the property and should clearly identify its location and the agent to contact in relation to the sale.[5]

(f) Where the property is situated outside the capital city, advertisement in local and state-wide newspapers will usually be appropriate.[6] It may also be prudent to advertise the property more than once on a state-wide basis.[7]

(g) The advertising should be conducted a reasonable period before the auction or sale (as the case may be).[8]

(h) An error or omission in pre-sale advertising will not, by itself, establish that the property was sold for a price less than the price obtainable if no such error or omission had occurred.[9]

(i) In some circumstances, it may be necessary for it to be established by expert evidence that the error or omission in the pre-sale advertising was likely to depress the price obtained on an auction.[10]

(j) It is usually prudent for a mortgagee to obtain a written valuation of the property before sale, and to be wary of selling the property at a price substantially below that valuation. That said, failure to obtain a valuation will not automatically constitute a breach of s.85.[11]

(k) In assessing whether market value is achieved, a Court may take into account genuine offers to buy. [12]

(l) Where the Court can be satisfied that the property has been properly advertised and that the sale (whether by auction, tender or private treaty) has been properly conducted, then the Court is entitled to take what is actually elicited from the market in response to that sale process as the best evidence of market value at the time. In particular, the Court is entitled to prefer that market response over opinions of registered valuers as to market value. [13]

(m) Whatever deficiencies there might have been in the sale process, if the property is actually sold at its market value, then s.85 gives no remedy. [14]

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3 ibid at p 524 per Brennan J

4 *Pendlebury v CML Assurance Society Ltd* (1912) 13 CLR 676 at 683*; CAGA Ltd v Nixon; Higton Enterprises Pty Ltd v BFC Finance Ltd* [1997] 1 Qd.R. 168.

5 *Pendlebury* at 683 – 685, *Nixon v Commercial & General Acceptance* [1980] Qd.R. 153 at 154 – 156

6 *McKeon v Maloney* (1988) 1Qd.R. 628 at 634

7 *Pendlebury* at 683 – 685; *ANZ Banking Group Ltd v Bangadilly Pastoral Co. Pty Ltd* (1978) 139 CLR 195 at 229; *Emerald Securities v Tee Zed* (1981) 28 SASR 214

8 *McKeon v Maloney* at 634; *Nixon* at 156

9 *Tyler v Custom Credit* [2001] QSC 495 at [128]

10 *Stone v Farrow Mortgage Services* at 467

11 *Stockl v Rigura Pty Ltd* (2004) ANZ Conv. R 265 at 272

12 *Stockl* at 270; *Benzlaw v Medi-Aid Centre Foundation* [2007] QSC 233 at [126] – [128]

13 *Stockl* at 269 – 270 and *Stone v Farrow Mortgage Services* (2000) ANZ Conv. R. 463 per Hodgson CJ in Eq. at [3]: "A price actually obtained after proper steps have been taken is strong evidence of the true value of the property."

14 *Apple Fields Ltd v Damesh Holdings Ltd* (2004) 1 NZLR 721 but see *Benzlaw v Medi-Aid* at [142]. If it is shown that the duty has been breached, then the measure of damages is the difference between

[35] In *Stockl v Rigura Pty Ltd*, Palmer J said:[15]

> "It will be seen, therefore, that the first question is always: has the mortgagee taken proper steps to advertise and sell the property? If the clear answer to that question is "yes", the court may regard the resultant sale as the best evidence of the current market value of the property so that no regard need be paid to other valuation evidence. However, if the answer to the first question is doubtful, valuation evidence as to current market value may assist to resolve the doubt."

[36] That approach – of first considering whether proper steps to advertise and sell the property were taken – is particularly apt in this case.

[37] But the cases also establish that a court must consider all of the conduct of the mortgagee's actions to ascertain whether the section has been breached.[16]

[38] With that in mind, I turn to the claims made by the plaintiffs of fault or shortcomings on the part of the defendant or its agents.

(A)The advertisements wrongly describe the property

[39] The defendants complained that the advertisements placed in Queensland Country Life, Warwick Daily News and the Elders property magazine at the end of January and February 1997 wrongly described the property in three particulars:

(a) "Main residence has been partly updated, two additional houses in fair order that need repair", when in fact the main residence was tastefully renovated and refurbished and the two additional houses were in good order.
(b) The fences on the property were described as "needing repair" when in fact all of the fences were relatively new and none were in need of repair.
(c) Failed to properly describe the property by omitting farm assets such as sheds, yards, silos, dairies and the double frontage to the Condamine River, feedlot approvals, water allocations and water storages.

[40] I refer first to the description of the main residence, the two additional houses and the fences. Mr Reynolds' evidence was that these structures were in good order and that the main house had been renovated and refurbished. I prefer the evidence of Mr Kirkwood. He was independent, he was careful and he was anxious to ensure that any property he purchased was suitable for his needs. He inspected the property four times before the auction and his recollection is one I accept. His evidence with respect to the condition of the houses and the state of repair of the fences was not challenged in cross-examination. It was consistent with the description in the advertisements.

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the sale price and the true value; such that if there is no difference then there is no remedy: *Stone v Farrow Mortgage Services* at 466.

15 At [34]

16 *Sablebrook Pty Ltd v Credit Union Australia Limited* [2008] QSC 242

[41] Similarly, Mr Nilon inspected the property on 17 February 1997. He recorded what he observed and his report supports the description of the property given in the advertisement.

[42] There was, in the first part of the series of advertisements, an error in the description of the water licences. That was corrected in later advertisements and no expert and no other witness gave evidence that that error did have or could have had an effect on the sale of the property.

[43] The bulk of the acceptable evidence is that the properties were fairly described and I find that there was not the error or misdescription as alleged by the plaintiffs. Something was made of the absence of reference to some aspects of the property such as the existence of sheds, yards, silos and so on, but there was no evidence to suggest that that would have or could have made any difference.

(B) Denial of inspection to prospective purchasers

[44] It is alleged by the plaintiffs that Mr Robert Koremans, the defendant's real estate agent, denied permission to inspect the property to two sets of "purchasers". The first was a Mr Steve Economidis. It is alleged that the second was Mr Joe Brewer and his wife.

[45] As to Mr Economidis, he was a client of another real estate agent, a Mr McMahon. On the first occasion that Mr McMahon and Mr Economidis attended the property, they met Mr Koremans at the gate and were told that there would not be an inspection on that day. This occurred on 17 November 1996. There was still some machinery on the road licence and Mr Koremans offered to take Mr Economidis on a full inspection when the blockade had been removed and when it was closer to going to auction. Mr Koremans said that the property was not suitable for an inspection at the time that Mr Economidis visited in November and that he offered a full inspection after the blockade had been completely removed.

[46] It was put by the defendant that it was significant that Mr Economidis was not called as a witness and no explanation for his absence was given. I agree. I think it is open to me to infer, and I do infer, that his evidence would not have assisted the plaintiff's case. There was no evidence that Mr Economidis was a genuine buyer or that he had the capacity to buy or that a full inspection of the property might have moved him to purchase the property. There is no evidence to suggest that any failure or refusal to provide a full inspection of the property in November to Mr Economidis led to the sale of the property being completed at an undervalue.

[47] It was also alleged, but there were no submissions made on this point, that an inspection had been denied to Mr and Mrs Brewer. In fact, Mr and Mrs Brewer were not interested in the property but they had told Mr Koremans that their son, Brian Brewer, might be. Mr Koremans contacted Brian Brewer and offered an inspection but the invitation was never taken up. Mrs Brewer was unable to give evidence due to illness, but neither Mr Joe Brewer nor Mr Brian Brewer were called as witnesses and no explanation for their absence was given. I find that there was not a refusal of an inspection with respect to either of the persons referred to by the plaintiffs; rather offers were made for full inspections but were not taken up.

(C) Mr Koremans disclosed prices he would expect the property to achieve at auction and "talked down" the property.

[48] The plaintiffs allege that Mr Koremans "talked down" the properties to four people. Of those four, three were called to give evidence.

[49] There was some evidence about a conversation between Mr Koremans and a Mr Keleher. Mr Koremans could not recall having that conversation but there was an account of it given by another witness who was listening in on the conversation. His account was confined to one side of the exchange. The absence of Mr Keleher was not explained by the plaintiffs. In circumstances where allegations of this nature are made, the absence of an explanation for the absence of the witness leads me to infer that his evidence would not have assisted the plaintiffs' case.

[50] As I have already mentioned, Mrs Brewer was not called and a written statement of her evidence was tendered. She was not, therefore, cross-examined. I do not place weight on her written statement.

[51] Mr Dunsworth and a Ms Bartley were called. Mr Dunsworth was a real estate agent and Mr Koremans knew that. Mr Koremans told Mr Dunsworth that the property might sell for $1.2 million to $1.4 million but that, at auction, it might only obtain $1 million. He told Ms Bartley that it might sell for $1.2 to $1.5 million.

[52] Neither of those witnesses took any further steps after having spoken to Mr Koremans with respect to the property. They did not make an offer for the property. They did not seek to inspect the property before the auction. They did not bid at the auction. They did not say that they passed on to anyone else the information given to them by Mr Koremans.

[53] The two witnesses also said that Mr Koremans described the property in negative terms. So far as Mr Dunsworth is concerned, Mr Koremans said that he was speaking more frankly than he might to an ordinary enquirer because he knew that Mr Dunsworth was a real estate agent and that he might be seeking to sell in conjunction with him. At any rate, what Mr Dunsworth recalled being said by Mr Koremans was reasonably close to what I have found to be the true state of the property as described by Mr Kirkwood.

[54] Ms Bartley's recollection of the conversation was not particularly good. Her recounting of what she was told was reasonably consistent with what Mr Kirkwood said was the situation of the property.

[55] I find that Mr Koremans did, when speaking to Mr Dunsworth, refer to the property in terms that might not ordinarily be expected when dealing with a prospective purchaser but that his approach is explicable given that Mr Dunsworth was a fellow real estate agent. Each of the persons who did give evidence about speaking to Mr Koremans were either friends of or acquaintances of the Reynolds and Ms Bartley spoke to Mr Koremans after having spoken to the Reynolds.

[56] There was no evidence that any of the persons called under this allegation were truly interested in purchasing the property for themselves or for anyone else. There was no evidence that any of them had the capacity to buy the property or that they would have paid more but for Mr Koremans' statement. I find that this alleged breach was of no consequence.

(D) Failure to advertise the properties properly

[57] The plaintiffs alleged that the defendant through its agents failed to advertise or advertise adequately the property for sale in that it was not advertised in a national publication such as the "Australian Financial Review" nor was it advertised in a general state-wide publication such as the "Courier-Mail". This allegation excited quite a bit of evidence from various persons and the concentration of that evidence was on the non-publication of an advertisement in the "Australian Financial Review".

[58] The plaintiffs relied heavily on the evidence of John Bourke, a real estate manager from Buderim. He had some 40 years experience in the marketing of rural properties and he was asked by the Reynolds in 1996 to do a marketing proposal for the property. He did not see the property itself but he did prepare a programme for possible advertising. At that time, he was working for Dalgety's, a large and respected firm, which frequently deals with rural properties. He recommended advertising in "Queensland Country Life", "The Land", "The Rural Weekly", and the "Australian Financial Review". His reasoning for advertising in the last named publication was that it covered a business market where you might have "businessmen" wanting to invest in rural property and that the "Australian Financial Review" would reach such persons in Sydney and Melbourne, as well as in Brisbane.

[59] Mr Bourke had recommended that there be 11 advertisements placed. Only one of those was to be in the "Australian Financial Review". His predominant expectation was that a buyer would be found through the rural publications. He accepted that agents held a range of views about what was and was not appropriate for the advertising of rural properties and he was of the view that a vendor should not eliminate a city buyer. He did though accept the proposition that it was a reasonable view that a vendor could put all the advertising funds into specific advertising to the rural sector.

[60] The view which Mr Bourke accepted as being one which could be reasonably held was the view which was held by each of the three firms whose opinions were sought by the defendants as to the proper marketing of the property. Of those three agents – Elders (Warwick), Primac (Warwick) and Westfarmers (Brisbane) – none recommended placing an advertisement in either the "Australian" or the "Courier-Mail". Westfarmers suggested that one advertisement should be placed in the "Australian Financial Review". All of the persons who were consulted by either the plaintiffs or the defendant were of the view that the emphasis in advertising should be in the rural publications, "Queensland Country Life" and "The Land".

[61] The property was advertised with five advertisements in the "Queensland Country Life", three in the "The Land", three in the Warwick Daily News, in the "Elders Rural" magazine (a publication distributed by Elders throughout Australia), and by radio advertising on 4WK (a local radio station), five or six times a day over a three week period prior to the auction.

[62] During the marketing campaign for the property, Mr Williams did seek advice from Mr Koremans as to whether an advertisement should be placed in the "Australian Financial Review". Mr Koremans' evidence was that there was no point in placing such an advertisement for a number of reasons, including that the properties were of a size that they could only be run efficiently by a farmer who would own and operate it him or herself. It was unlikely to be attractive to a business person seeking

an investment. In evidence Mr Koremans said that an investor would want to see financial statements for the property and that none could be provided.

[63] No expert witness was called to support the view that a failure to place one advertisement in the "Australian Financial Review" would have contributed to selling the property at an undervalue. A mortgagee does not have to be a model of perfection when selling a property, it need only exercise reasonable care. I find that, with respect to this allegation, reasonable care was exercised.

(E) Failure to offer the properties in separate lots after the property failed to reach the reserve on auction day

[64] This was not the subject of submissions by the plaintiffs. However, submissions were made that there was a failure to determine a value of each of the blocks before sale. That was not an allegation pleaded and I will not consider it.

(F) Failure to offer the property before or after the auction to Mrs Killaway

[65] This allegation was to the effect that the defendant failed to offer the property to a Mrs Fran Killaway who had, prior to the auction, offered $1.8 million for the property. Mrs Killaway was not called and no explanation for her absence was given. Correspondence which was tendered showed that, rather than offering $1.8 million, Mrs Killaway had made an offer of $1.5 two days before the auction. The defendant did not accept that offer and, when the property did not sell on the day of auction, sent Mrs Killaway a contract for sale in the amount of $1.5 million. That contract was not signed nor was any deposit paid. Subsequently she made an offer of $1.35 million, but that was below the Heron Todd White valuation and the mortgagee rejected it. No evidence was called to demonstrate that Mrs Killaway had the capacity to buy the property for herself or for any other person for $1.5 million or for any other amount.

(G) The agents told prospective buyers that the property was sold when in fact it was still for sale.

[66] Three particulars were pleaded of this failure. First, that Mr Koremans had told a Mr Wallader that the property was sold in early April 1997. No evidence was called on that. Secondly, that a Mrs O'Neill, an employee of Elders Warwick, told John Brady that the property was sold. No evidence was called on that. Thirdly, that on 14 and 16 April 1997 there was a "sold" sign on the advertisement for the property in the window of Elders Warwick.

[67] As to the last particular, there was evidence from Mr Reynolds and from Mr Wallace.

[68] Mr Koremans gave evidence of the practice employed in his office at the time with respect to the placing of "sold" signs in the office window. It was that such a sign was not deployed until a contract had been signed. The only contemporary comment about such a sign was in a letter from the plaintiffs' solicitors asserting that such a sign had been placed across the advertisement for Condamine Ponds by 16 May 1997. A contract of sale of part of the property to Nestlebrae Pty Ltd had been signed on 9 May 1997.

[69] I accept what Mr Koremans said about the practice and that it was employed with respect to this property. I find that both Mr Reynolds and Mr Wallace were mistaken.

The plaintiffs made two allegations against the defendant with respect to the property: first, that they damaged the property prior to auction and secondly, that the defendant failed to maintain the properties.

[70] In their submissions, the plaintiffs combined these two points into one submission that the property was presented poorly. In aid of that submission, two folders of photographs were relied upon. One set was taken before October 1996 and one after October 1996. In their pleading, the plaintiffs particularise the damage which was said to have been done to the property prior to auction and particulars of the failure to maintain the farm in a condition so as to maximise the selling price were also given.

[71] In the defendant's written submissions in reply, the defendant argues that it is not open to the plaintiffs to make a general case that "the property was presented poorly" and that the plaintiffs are limited to the specific matters raised in the statement of claim. Two of the matters raised in the written submissions of the plaintiffs (a failure to slash grass anywhere around the entrance and the presence of scattered iron beams around the Kingsley property) were not particulars pleaded against the defendants.

[72] I should deal now with a matter which arose after all the written submissions had been provided. At the conclusion of the trial I made directions for the filing and service of written submissions with a view to oral submissions being made to supplement and support those written submissions. The failure of the defendant to comply with that direction meant that the written submissions were not provided until a substantial period after the date in the directions. When the defendant provided a written submission in reply, it clearly dealt with matters which were factual rather than questions of law only and the plaintiffs took objection to that. For reasons which have and will continue to be obvious, I have not needed to consider the reply submissions of the defendant on questions of fact. Some of them were matters which were obvious, in any case, and to which I would have made reference, but I have not needed to consider those parts of the defendant's submissions in reply which go beyond what is ordinarily allowed in such a document.

[73] There was considerable evidence called by both sides as to the condition of the property before and after the mortgagee took possession. There was evidence, which I accept, that the mortgagee in possession had not treated the property as well as one might expect the owner of the property to have treated it. There was evidence with respect to actions, or failure to take actions, which resulted in the garden area around the main homestead not looking as attractive as it had in the past, and there was evidence that areas close to the homestead were in disarray. I accept that there had been actions taken which resulted in the house and garden looking generally unkempt, but I also accept that when the Reynolds left the property they left, in various places, a huge amount of rubbish which had to be removed and which the mortgagee in possession did set about removing. That, inevitably, had some effect on the appearance of the property.

[74] There is, though, a more important point to be made with respect to the litany of complaints made by the plaintiffs and to which I have referred above. There was no evidence with respect to any of these matters that either singly or together they resulted in the property being sold for less than would otherwise have been its market value. In the absence of any evidence, I am not willing to draw an inference that the condition of the property and the actions referred to above led to a sale at an undervalue and I am certainly not in a position (even if I had formed that view) to assign any value to the matters pleaded by the plaintiffs.

The value of the properties

[75] Two valuers were called to give evidence. William Johnson was called by the plaintiff and David Nilon by the defendant. Each of them prepared valuations and both of them provided a report to the court in which they identified the matters upon which they agreed or disagreed. On the issue of the relevance of their respective valuations they said this:

> "… the valuations conducted by Mr Johnson and Mr Nilon were completed on 3 July 1996 (Mr Johnson) and 17 February 1997 (Mr Nilon) and separate report on part of 'Kingsley' on 20 August 1997. The properties were valued as a single entity by both valuers as per their respective instructions. The property was subsequently sold as three (3) separate parcels as follows:
>
> | | | | |
> |---|---|---|---|
> | (i) | 476.7 hectares | 09/05/97 | $1,000,000 |
> | (ii) | 286.717 hectares | 02/06/97 | $200,000 |
> | (iii) | 163.797 hectares | 15/01/99 | $206,000 |
>
> Mr Nilon's valuation is considered within a reasonable time frame of the subsequent sale of (i) and (ii). Mr Johnson's is considered outside of the industry accepted standard timeframe of three (3) months.
>
> With regard to the sale of (iii), both valuations are considered well outside of the industry accepted timeframe. The subsequent revaluation by Mr Nilon of part of "Kingsley" on 20 August 1997 is also considered outside the industry accepted timeframe.
>
> As evidenced in both valuers' reports, there was considered limited market movement and evidence at the time with regard to sale of properties (i) and (ii). Both valuers are unable to comment on the sale of property (iii), as the relevant date of valuations are considered too distant."

[76] The above extract identifies two major problems with the valuations:

(a) They are, for the most part, outside the industry accepted timeframe for reliable valuations, and
(b) The land was eventually sold in different configurations to those which existed at the time of the valuations.

[77] A retrospective valuation was conducted by Mr Johnson in 2008.

[78] There was a considerable amount of evidence and submissions with respect to the approach taken by the two valuers, particularly with respect to the capacity of the properties, the water resources of the properties, and the potential value of the feed lot licences.

[79] As I have set out about above, the market value of a property must be determined at the time of sale, not at the time of the auction. Thus, the three properties need to be assessed as at May and June 1997 and January 1999. I have found that the allegations by the plaintiffs with respect to breaches of the mortgagee's duties have not been made out. In circumstances where there are few directly comparable sales, the opinion of a valuer, and this was acknowledged by both valuers, is rendered less reliable than it would otherwise be. I intend to apply the reasoning of Palmer J in *Stockl.*[17] I regard the resulting sales of the properties as the best evidence of the market value of those properties at that time. I find that the properties were not sold at an undervalue.

[80] Should I be mistaken in that view, then I would prefer the evidence of Mr Nilon to that of Mr Johnson. Mr Nilon's valuation of $1,450,000 is closer in time to the sale of two of the three properties than is Mr Johnson's exercise. The retrospective valuation performed by Mr Johnson in 2008 was based on his inspection of the property in July 1996 and I accept the submission of the defendants that, as such, it is therefore no more reliable than his July 1996 valuation.

[81] Mr Johnson values the properties at $2,435,000 which is more than $1,000,000 above the total sales prices. That overestimate suggests to me that Mr Johnson's valuation is not accurate. I am fortified in that view by the experience of Mr Kirkwood in 1998 and 1999 when he attempted to sell the property (formerly part of Condamine Ponds) which had been bought in the name of Nestlebrae.

[82] I also find that Mr Nilon's valuation examined in greater detail the various considerations which might affect a price, such as other relevant sales, the condition of the rural industry at the time and so on. Mr Nilon's valuation was based more on his own investigations whereas Mr Johnson relied heavily on what he was told by Mr Reynolds. The total value arrived at by Mr Nilon ($1,450,000) is only $44,000 more than the sum received for the properties and supports the conclusion that the sale price was the market value.

The feedlots

[83] In their submissions, the plaintiffs seek damages in the sum of $1,190,000 in respect of the value given to the "feedlot" by the valuer Mr Johnson. The feedlot proposal had not received final approval but, the plaintiffs submit, there was a good chance that the local authority would grant approval. Mr Johnson valued the feedlot licence approval at $1,589,500. The plaintiffs say that they should receive 75 per cent of that figure.

[84] Apart from alleging that Mr Koremans told Mr Dunworth that "the feedlot licences were worthless", there is no reference in the statement of claim to the feedlot licences nor is there any separate claim that they had a value beyond the value of the property itself. In Mr Johnson's report he had said: "Advertising for final approval would be necessary, however, it would appear that this will be a formality". That assertion was struck out. The plaintiffs called Kenneth Ridenour, a consultant from Amarillo, Texas in the United States of America. He attended an Australian feedlot conference at the Gold Coast in 1994 and visited the Condamine Ponds property at that time. He also visited again in 1995. He had some experience in feedlot licence approvals in Australia in the late 1980s and early 1990s in New South Wales. It was

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[17] See [35] above.

not until his re-examination that he said that he thought that the feedlot operation at Condamine Ponds was in an ideal location and that he more than likely would have invested in it had it proceeded.

[85] The plaintiffs also proposed to call a Mr Simon Lott to give expert evidence on the value of feedlots. An application for leave to present that evidence was made on the fifth day of the trial. In the light of the directions which had been given some time previously, and the fact that, had the defendant known of the intention to call Mr Lott, it would have sought similar expert evidence, I decided not to allow Mr Lott to give that evidence. As a result, the plaintiffs relied upon the evidence of Mr Johnson with respect to the feedlots' value. In his report, Mr Johnson said:

> "My research indicates that whilst there are a number of feedlots in the south-east Queensland and Darling Downs areas, generally the lots have been owner or joint operated and the larger established [lots] have not been sold. It is therefore difficult to establish the added value of the licence alone, however, suggested figures have been from $85 per head upwards, however, there is no recent evidence."

[86] That evidence was objected to on the basis that Mr Johnson had not been able to identify any sales for which he could attribute values to the feedlot licences and simply suggested figures of $85 a head on the basis of what someone else told him. In examination Mr Johnson identified five people to whom he had spoken as the sources of the "suggested figures" he referred to in his report. None of those people, though, were called. There was no basis proved for the figures relied upon by Mr Johnson in his assessment of the value of the feedlot licences. In simply adopting a figure which was not otherwise proved by admissible evidence to be accurate or to itself be opinion of an expert nature, there is no admissible evidence of the value of the feedlot licences. The evidence from Mr Johnson was that he was provided with a range of figures but, even then, he was not able to say upon what factors those figures differed. Mr Nilon said in his report:

> "In this instance the existing use as a mixed farming property is considered to be consistent with the highest and best use for this property at this time. As detailed above, the property currently has approvals for a 3,000 and 5,000 head feedlot, one located on the eastern side of the river and the other on the western side of the river. The economic liability of establishing a split feedlot under the current economic trading conditions is considered to be unfeasible. As an application for a 15,698 standard cattle unit feedlot has not been lodged with Warwick Shire Council, details of proposed conditions are unable to be assessed and we consider at this stage the preliminary DPI approval has no added value to the property."

[87] In the absence of any admissible evidence from the plaintiff with respect to the value, if any, of the feedlots and in the presence of Mr Nilon's opinion, I am of the view that the plaintiff has not established that the feedlot licences which existed and the possibility of a further feedlot licence added any further value to the property.

The claim in detinue and bailment

[88] When the defendant entered into possession there were chattels left on Condamine Ponds (some grain, cattle and horses) which were not the subject of the defendant's securities. There was also machinery and associated items which had been left on either the road reserve or the mortgaged land. The plaintiffs claim that they were the owners of all those items or were entitled to immediate possession of them. They further claim that adequate demands for the return of those items were made, but they were not so returned, and that, as a result they have suffered damage.

[89] The plaintiffs, in their written submissions, seek damages for the loss of use of certain machinery for the two year period from the date of the mortgagee going into possession until September 1998. The basis upon which those damages are calculated is that the plaintiffs could have hired out the five particular pieces of machinery: a D4 bulldozer, a D7 bulldozer, a Massey-Ferguson 760 harvester, a John Deere 4630 tractor and a John Deere 2010 tractor. That claim is based upon a loss of a chance of hiring out the equipment in accordance with the principles in *Malec v Hutton.*[18]

[90] There are two matters which must be acknowledged at this point. First, the plaintiffs had in March 1996 granted a bill of sale to R W L Wilson Pty Ltd over a large number of chattels including those specific machines listed above. Secondly, there was a deal of oral and documentary evidence relating to the allegation that the defendant damaged the machines. While the plaintiffs have referred to that allegation and the evidence relevant to it in their submissions, they have not sought to quantify any loss suffered by them as a result of that action and I will confine these reasons to that property for which they claim damages.

[91] By the Wilson bill of sale the plaintiffs effectively used all of their otherwise unsecured property as security for a loan from Wilson. The only other similar items of any worth were the subject of another bill of sale to the defendant.

[92] The claim by the plaintiffs in both detinue and in bailment is inconsistent with many of their actions and, later, inaction. In the time leading up to the mortgagee taking possession, there was nothing done by the defendant which would have prevented the plaintiffs from removing all machinery, including the five machines referred to above, from Condamine Ponds. It had been the plaintiffs' refusal to accept that the defendant had the right to take possession of the land that led to them having insufficient time to remove the machines. I have referred above to the blockade which was created by the plaintiffs. Each of the five items of equipment the subject of the claim for damages was left on the road reserve and formed part of that blockade. After the machines had been there for about a month, the defendant caused them to be moved from the road reserve onto one of the properties. That was done without the permission of the plaintiffs but the defendant justified it on the basis that the road reserve needed to be cleared in order that access could be obtained and that the properties could be sold. The machines stayed on the property for a couple of years and were moved in that time as parts of the property were sold. They eventually ended up on the Kingsley property.

The claim for possession

[93] Detinue is provable when a person who has been in possession of goods detains them after a proper demand has been made for their return by the person who has an

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[18] (1990) 169 CLR 638

immediate right to possession. The defendants dispute two issues. First, it says that the plaintiffs did not have an immediate right to possession and, secondly, that no proper demand was made.

[94] The defendant points to the Wilson bill of sale to support its claim that the plaintiffs did not have an immediate right to possession. The plaintiffs argued that they had a better right to possession than the defendant and that the defendant is not entitled to plead *jus tertii*.

[95] I turn first to the question of entitlement to immediate possession. The defendant relies on clause 3 of the Wilson bill of sale which, like an old system mortgage, transferred the property and the goods to Wilson. Clause 5 of the bill of sale then required the plaintiffs to repay to Wilson the secured money as provided for in the agreement. The agreement required that the loan be repaid on 29 June 1996, that is, it was a loan for three months. The plaintiffs did not make repayment and, says the defendant, that is a default as provided for in clause 10 of the bill of sale which results, under clause 11.2, in Wilson's being entitled to possession of the property. It should also be noted that clause 10.4 provided that Wilson had an immediate right of possession of the property prior to the occurrence of an event of default. Thus, says the defendant, on and from the default occurring on 29 June 1996 the plaintiff lost their right to possession of the machinery and, in its stead, they only had an equity of redemption.

[96] It is an essential element of the cause of action for damages in detinue that it can only be made by a person with a right to immediate possession. The forms of judgment available in an action for detinue as explained by Diplock LJ in *General and Finance Facilities Ltd v Cook's Cars (Romford) Ltd*[19] reflect the fact that this cause of action is essentially an action for recovery of goods. A plaintiff can seek damages for detention and where the chattel is not of any special value or interest or cannot be shown to be of any special value to the plaintiff then damages will be awarded where that affords appropriate compensation. In this case, of course, return is not sought because the plaintiff obtained possession of the machines in September 1998.

[97] The plaintiffs found themselves in the position that, having left the machines on the road reserve, they had given up actual possession of the machines and, being in default under the Wilson bill of sale, did not have a right to immediate possession but only the right to pay all amounts outstanding in order to regain that right.

[98] It is argued by the plaintiffs that the defendant cannot point to Wilson as having the right to immediate possession and no one else. In other words, the defendant cannot plead *jus tertii*. That principle, though, does not apply in this factual situation. Although Wilson did have a right to possession superior to the plaintiffs, that is because the plaintiffs did not have a right to immediate possession at all. This is not a case where a grantor of a bill of sale was not in default.

[99] The principle that a party cannot rely on a third party having a superior right to chattels appears only to apply in cases where the party seeking to do so is in possession of the chattels as a result of a wrongful act.[20]

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19 [1963] 2 All ER 314 at 317

20 *Henry Berry & Co Pty Ltd v Rushton* [1937] St. R. Qd 109

[100] That being so, it is open to the defendant to resist this claim on the basis that the plaintiffs did not have the right to immediate possession; rather it was R W L Wilson Pty Ltd.

[101] Although it may have been slightly difficult for the plaintiffs to recover the five pieces of machinery from the road reserve, it was still open for them to do so. There was evidence that the plaintiffs did enter upon the road reserve from time to time in October 1996 and remove other items of machinery and associated goods.

[102] The five particular items of machinery ceased to be in the possession of the plaintiffs when they abandoned them on the road reserve at the beginning of October 1996. When the defendant did move those machines from the road reserve onto the mortgaged property any right that may have existed was that of R W L Wilson Pty Ltd and not the plaintiffs. That finding brings to an end the claim both in detinue and bailment but I will proceed to consider, briefly, the other aspects of the elements of a claim in detinue.

[103] In order for a claim in detinue to be successful there must be a demand made for the return of chattels. There are many authorities that consider what constitutes a proper demand and it is acknowledged by the plaintiffs that some of the demands which were made by them may have been "technically deficient because there was not a request for specific plant and equipment". But the plaintiffs go on to argue that the attitude evinced by the defendant was that no demand, no matter how detailed and otherwise valid, would have been responded to properly. There was evidence that the defendant had, through an employee, disabled the machinery so that it was not able to be removed once it had been taken from the road reserve. This was, in my view, an example of the substantial personal animosity which existed between the plaintiffs and Mr John Williams on behalf of the defendant. That, of course, had its origins in the failure by the plaintiffs to comply with their obligations under the various loan agreements, the plaintiffs' actions taken to forestall the inevitable, and the plaintiffs' actions in creating the blockade.

[104] The initial movement of the machinery from the road reserve to a paddock on Condamine Ponds came about when the bailiff seized the harvester and two of the tractors and moved them. There was considerable evidence about oral requests and written requests made by or on behalf of the plaintiffs to both the defendant and to R W L Wilson Pty Ltd. Much of it was, in my view, little more than fencing on the part of the plaintiffs and a continuation of the running battle which had commenced with the creation of the blockade.

[105] I turn now to the case mounted to support the claim for damages. Mr Reynolds gave evidence that he wanted the machinery in order to hire it out for work in the surrounding area so as to earn some income. I do not accept that. His actions belie what he said in the witness box. The machines returned into the physical possession of the plaintiffs in September 1998. They were then removed to another property to which the plaintiffs had access. They remained there until 2001 when Mr Reynolds examined them very briefly. It was not until 2003 that he compiled a list of what he said had been removed from or was missing from the machinery. I find it difficult to accept that the work which Mr Reynolds said was available between October 1996 and September 1998 ceased to be available and thus could not be the subject of work for the machines.

[106] What the plaintiffs seek is to have the defendant pay for the profits which the plaintiffs they say they lost because of the detention of the goods. The plaintiffs say that they would have made those profits by hiring out the equipment for earthmoving or for harvesting work. In order, though, for them to succeed in that claim, the plaintiffs must establish two things:

(a) That the machinery which was denied them was machinery which had normally been hired out by them for profit in the course of their business; and
(b) That Aluma-Lite must have used the equipment for its own purposes during the two year period it was not in the plaintiff's possession.[21]

[107] Neither of those criteria were satisfied by the plaintiffs' evidence.

[108] There are other, more compelling, reasons for concluding that the plaintiffs have not established any damages. In order for a plaintiff to recover in respect of a loss of profits claim in the circumstances of this case, it would have been necessary for the Reynolds to have put Aluma-Lite on notice of the facts which would result in the Reynolds losing the profits claimed. In other words, the plaintiffs would have had to have informed Aluma-Lite of their intention to use the machinery to make a profit and that they would suffer a loss if not allowed to obtain possession.[22] Of course, in this case, the defendant would be taken to have understood that the machinery had been used in the operation of the grazing and farming engaged in on Condamine Ponds but not (as was not the case anyhow) that the machinery was used for profit making ventures.[23]

[109] Secondly, the plaintiffs could not have used the machinery as they did not have a farm on which to use it.

[110] Another matter of difficulty for the plaintiffs is that to engage upon a venture of hiring out machines would have required at least some expenditure on their part. At the relevant time, the plaintiffs were completely incapable of obtaining any finance and were in debt to the defendant for $1,750,000. The capacity of the plaintiffs to engage in any such work would, in my view, have to be regarded as non-existent.

Bailment

[111] Where a bailment is alleged to exist the court must look at the particular circumstances of each case to see whether the essential elements are made out.[24] In *Halsbury's Laws of Australia*, the essential elements of a bailment are said to be:

(a) The delivery of the exclusive right of possession by the bailor;[25]
(b) The voluntary assumption of possession by the bailee;[26]
(c) An assumption of the responsibility by the bailee to keep the goods safe;[27] and
(d) The obligation to return the thing which has been bailed.[28]

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21 *Strand Electric & Engineering Co v Brisford Entertainment* [1952] 2 QB 246; *Gaba Formwork Contractors v Turner Corp* (1991) 32 NSWLR 175
22 *Rapid Roofing Pty Ltd v Natalise Pty Ltd* [2007] 2 Qd R. 335
23 *ibid* at [70] to [74].
24 *Council of the City of Sydney v West* (1965) 114 CLR 481.
25 *Midland Silicones Ltd v Scruttons Ltd* [1959] 2 QB 171 at 189
26 *WD & HO Wills (Aust) Ltd v State Rail Authority of New South Wales* (1998) 43 NSWLR 338 at 353
27 *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 2 NSWR 156;

[112] The plaintiffs plead:

(a) That they were the owners of the machinery; and

(b) That they were entitled to immediate possession of that property.

[113] As I have discussed above, the plaintiffs were not, because of the Wilson bill of sale, the owners of the chattels. Further, after the default by the plaintiffs they were not entitled to immediate possession of that property.

[114] I accept the submission from the defendant that if, by leaving the machinery on the road reserve, a bailment arose, then it would have arisen as between R W L Wilson Pty Ltd and the defendant. The plaintiffs have not made out a case for bailment.

Stock and grain

[115] The plaintiffs plead that they have suffered loss and damage in both detinue and bailment with respect to: grain which was contained in silos on the property at the date of possession by the defendant, 124 head of cattle and three horses. The plaintiffs plead that there was 260 tonnes of grain (sorghum, maize and wheat) which had a value of $53,500 and that the cattle and horses had values of $44,888 and $3,500 respectively. Requests for return of the grain and the livestock are pleaded as having been made orally on five occasions between 7 October 1996 and 4 July 1997 and by letter on 22 April 1997.

[116] Both with respect to the grain and the livestock there were considerable problems with obtaining accurate records. This was a function of a number of events, not the least of which was the time which had elapsed since the events in question.

[117] The grain the subject of dispute was contained in five silos on the property. One of the silos contained wheat which had rotted and was of no value. No claim is made with respect to it. The other silos contained sorghum, maize and barley. The eventual claim for grain made in the plaintiffs' written submission amounts to some $21,500. Considering the amount claimed, the time taken for this matter to be debated during the trial was extraordinary. Further, it was not surprising, given that these events took place about twelve years before the trial that witnesses' recollections were not particularly strong and that documents had been either destroyed or were missing.

[118] The defendant asserts that the grain in the silos at the date of possession was subject to a crop lien in favour of itself and therefore cannot be the subject of a claim in detinue or otherwise. The crop lien which was executed on 3 May 1996 came into existence as a result of the deed of extension referred to above and an order made by Moynihan SJA in action 1822 of 1995 on 3 May 1996. In the deed of extension there is a provision (clause 2) as follows:

> "The mortgagors shall execute a crop lien to be prepared by the mortgagors' solicitor and submitted to the mortgagees' solicitors for approval over all grain recently harvested on the subject property presently situated in a vehicle on the property and on the crop growing and not harvested on the property."

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[28] *Southland Hospital Board v Perkins Estate* [1986] 1 NZLR 373 at 375-6.

[119] No crop lien in those terms was executed by the parties. When action 1822 of 1995 came before Moynihan SJA on 3 May 1996, the plaintiffs gave an undertaking which contained, among other things, the following undertaking:

> "… to execute and deliver … a facsimile executed copy of the crop lien in favour of the plaintiff pursuant to clause 2 of the deed of extension executed on 29 March 1996. …"

[120] The crop lien which was actually executed was not as extensive as envisaged in the deed of extension. It purported to grant security over crops described as:

> "the grain crop which at the date of this document is growing on the farm property."

[121] Aluma-Lite submits that the deed of extension combined with the undertaking given to the court creates an equitable lien in favour of the defendant over all grain crops growing on the property as at 1 March 1996 or, alternatively, 29 March 1996. It follows, says the defendant, that the court should find that the grain in the silos at the date of possession was the result of the harvesting of crops growing on the property as at either 1 March or 29 March 1996.

[122] Whether there is or should be an equitable lien in favour of the defendant is unnecessary to decide. The defendant called evidence to establish that it sold the grain in the silos, apart from the 10 tonnes of wheat which had rotted.

[123] Peter Henry, a grain trader, gave evidence that in 1996 and 1997, he bought grain from the Condamine Ponds property. He recalled buying grain from the defendant while it was the mortgagee in possession. Not surprisingly, his original records of the purchase and then sale of that grain were destroyed some time ago, at least seven years after they were brought into existence. However, he was asked to give a statement to police in October 2002 and in providing that statement he had access to his business records for the relevant period. He said that those records were complete so far as the collection of grain from Condamine Ponds on the instructions of the defendant was concerned.

[124] I accept the evidence that all the grain that was in the silos when Aluma-Lite went into possession was sold to Peter Henry. That conclusion is supported by the evidence of John Williams and of Mr Cook who was Aluma-Lite's agent on the property for at least part of the time after the plaintiffs moved out.

[125] Other evidence was given by witnesses such as Mr Reynolds and Mr Koremans, but they could only give estimates as to the amount of grain available to be sold; whereas Mr Henry's evidence was based on documents created for the purpose of the sale and transmission of the grain from the property. All the grain which was sold to Mr Henry was sold, at the latest, by 25 January 1997. There are some instances in which Mr Cook recorded grain leaving the property and for which there is no record by Mr Henry for the same day. In each instance, though, there is a record for a day shortly after which, I find, sufficiently accounts for the early removal.

[126] I am satisfied that the evidence from Mr Henry was the most accurate evidence available and that the defendant, so far as it was required to, has shown that it

accounted to the plaintiffs for the sale of the grain by way of reducing the amount otherwise payable by the plaintiffs to the defendant.

[127] I turn now to the question of stock.

[128] The defendant had a stock mortgage, as did Mr Wilson. Other cattle, which were owned by Mr Wallace, were agisted on the property. On or about 10 October 1996 Mr Wilson caused 206 head of cattle (being those to which his security applied) to be removed from the property and a further 65 head (being those belonging to Mr Wallace) were removed. The plaintiffs' case is that, following the removal of those cattle, there remained 124 head of cattle and three horses on the property that were not subject to the defendant's stock mortgage. The defendant's case is that all the stock then remaining on the property was the subject of the stock mortgage granted to the defendant and dated 22 July 1996. The claim for wrongful detention of stock could only refer to stock not subject to the defendant's mortgage.

[129] Clause 2 of the stock mortgage provides that the property secured was:

> "… all those livestock on the property of the grantee known as Condamine Ponds … to the number of 350 head of livestock and continuing at 350 head of livestock.
> … and also … all other livestock of every kind which at any time during the continuance of this security may be acquired by or of or to which the grantor shall become possessed or entitled and/or which now are or shall hereafter during the continuance of this security be in upon or about the lands of the grantor … and whether in addition to or in substitution for the livestock described in the second schedule and the natural increase as well of all such other livestock of the grantor hereafter acquired as of the livestock particularised …"

[130] This security extends to: all livestock and, thus, covers horses as well as sheep; and to the natural increase of that livestock.

[131] The plaintiffs could not explain how the stock which was left on the property after the removal by Mr Wallace and Mr Wilson was not subject to the stock mortgage. Evidence was called from a number of people about when stock was removed and sold but none of that is of any moment for, in my view, the stock that did remain on the property was stock which was subject to the mortgage and thus for which the plaintiff had no capacity to maintain a claim in detinue or bailment.

Claim for an account

[132] In their prayer for relief the plaintiffs seek an "account of what is due as between the plaintiffs and the defendant in respect of money received by the defendant arising from the sale of property set out in paragraph 21". That property is the grain and stock to which I have already referred. In response to that the defendant prepared an account which became Exhibit 82. The plaintiffs' answer to that is contained in paragraph 7.71 of their written submissions.

[133] There are two observations which need to be made. First, I accept that Exhibit 82 correctly lists the income received by the defendant for the items sold by it pursuant to its security, whereas the plaintiffs' version lists values which were not received and which do not reflect my findings. Secondly, the calculation in the plaintiffs'

written submission proceeds on the erroneous basis of crediting receipts against capital instead of interest.

[134] In *Falk v Haugh* Rich, Dixon, Evatt and McTiernan JJ said:[29]

> "It has long been a rule that when payments are received generally on account of a debt, which is in part interest and in part principal, they are treated as applicable to interest in priority to principal ... The rule affords only a presumption in the absence of any actual or express appropriation by the debtor or the creditor."

[135] More recently, in *French v Smith* that rule was followed: "the amounts paid should be applied in accordance with the well-recognised principle that a sum paid in partial reduction of a debt is appropriated first against interest accrued on that debt and any balance is treated as reducing the capital amount."[30]

[136] The account proposed by the plaintiffs is flawed in those two fundamental ways. I accept that the process used in creating Exhibit 82 (as described in evidence by Mr Williams) was appropriate and that amounts recorded are accurate.

[137] Both parties agree that it is appropriate to order an account but that the exercise can be accepted as having been undertaken by the taking of the evidence in this trial. I am satisfied that there is a dispute between the parties as to the amount owing, that any declaration relates to the amount of the judgment debt which was outstanding at the date of trial, and that there is utility in making a declaration.

Counterclaim

[138] The defendant seeks a declaration as to the amount in which the plaintiffs are indebted to the defendant. That relief was premised on the possibility of a finding that the plaintiffs were entitled to damages to some extent. I have found they are not. There is no purpose to be served, in the light of the account referred to above, in making a separate declaration.

ORDERS

[139] The claim and counterclaim are dismissed. I will hear the parties on the appropriate orders: to reflect the decision as to an account, and as to costs.

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29 (1935) 53 CLR 163 at 173

30 [2005] VSCA 114 at [35]