SUPREME COURT OF QUEENSLAND

CITATION:	*Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd* [2018] QSC 117
PARTIES:	**GARMIN AUSTRALASIA PTY LTD** ACN 129 153 448 (plaintiff) **v** **B & K HOLDINGS (QLD) PTY LTD** ACN 092 133 858 (defendant)
FILE NO:	BS12910 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	30 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2018, Further written submissions 14, 21 and 28 March 2018
JUDGE:	Mullins J
ORDER:	**1. Application dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the plaintiff and defendant entered into a dealer agreement for the sale of the plaintiff's goods in Australia – where the goods were invoiced and shipped to the defendant after the termination date of the dealer agreement – where the goods were the subject of a reservation of title clause in favour of the plaintiff – where the defendant failed to pay for the goods – where the plaintiff sues for the price of the goods – whether the written agreement between the parties required the defendant to pay for the goods – where the defendant alleges a right of set-off against the plaintiff in respect of the value of the retained goods – where the plaintiff did not plead the date of the termination of the dealer agreement and the terms of the arrangements between the parties that applied after the termination date – whether the plaintiff is entitled to summary judgment *Sale of Goods Act* 1923 (NSW), s 51

Uniform Civil Procedure Rules 1999 (Qld), r 292

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, considered
Minister for Supply and Development v Service Men's Co-operative Joinery Manufacturers Ltd (1951) 82 CLR 621; [1951] HCA 15, considered
Morphett v Rivergate Marina & Shipyard Pty Ltd [2018] QCA 15, considered
Puma Australia Pty Ltd v Sportsman's Australia Limited (No 2) [1994] 2 Qd R 159, considered

COUNSEL: M S Trim for the plaintiff
M D Martin QC for the defendant

SOLICITORS: Herbert Smith Freehills for the plaintiff
Mills Oakley for the defendant

[1] In June 2012 the plaintiff and the defendant entered into an agreement for the sale of selected Garmin products by the plaintiff to the defendant as a non-exclusive independent dealer for the products in Australia. The plaintiff sues for the payment for products ordered during the period 24 January 2017 to 30 May 2017 as a result of purchase orders for the products submitted by the plaintiff to the defendant. The products were invoiced and shipped to the defendant between 5 June and 18 August 2017, according to the particulars in schedule 1 to the statement of claim. The purchase orders for, and delivery of, the products are admitted by the defendant. The plaintiff's total claim is for $1,134,502.94. The plaintiff's claim is defended, but the plaintiff applies for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) for part of the claim in the amount of $1,014,741.13 or, in the alternative, an order striking out specified paragraphs of the defence on the basis they do not disclose a proper defence to the claim and/or are unclear.

The pleadings

[2] The proceeding commenced by claim and statement of claim filed on 11 December 2017. The pleadings that were current at the time the application was heard were the further amended statement of claim filed on 20 February 2018 and the second further amended defence filed on 2 March 2018. The statement of claim pleads that the parties entered into the dealer agreement that was partly in writing and partly evidenced by conduct. To the extent it was in writing, it comprised the written document entitled "Domestic Dealer Agreement" executed by the parties on or about 18 June 2012 and the document entitled "2017 Garmin Australasia Authorised Dealer Program". To the extent it was evidenced by conduct, the plaintiff particularises in the statement of claim that it "relies upon the course of dealings between the parties in respect of the sale of the Products by the Plaintiff to the Defendant since in or about June 2012".

[3] Relevant terms of the dealer agreement are pleaded in paragraph 4, including that the defendant will make full payment for all products ordered by the defendant from the plaintiff:

> "(i) within 45 days from the date of the Plaintiff's invoice (by operation of the text under 'Payment Terms' on page 4 of the document entitled '2017 Garmin Australasia Authorised Dealer Program'); or
>
> (ii) alternatively that full payment must be made in advance (by operation of clause 3.3 of the 'Domestic Dealer Agreement');"

[4] The defendant's failure to pay for the products identified in schedule 1 to the statement of claim is pleaded as a breach of the obligations under the dealer agreement and the defendant claims the sum of $1,134,502.94 as a debt due and owing by the defendant to the plaintiff.

[5] In the defence, the defendant admits entering into the written dealer agreement on 18 June 2012, but says the parties by a deed dated 23 May 2016 agreed the agreement would terminate on 1 June 2017. (Mr Brkic, the managing director of the defendant, exhibits to his affidavit filed on 2 March 2018 the deed of settlement and release the parties entered into on 23 May 2016 that not only expressly provided the agreement would terminate on 1 June 2017, but also amended terms of the written dealer agreement.) The defendant denies the document entitled "2017 Garmin Australasia Authorised Dealer Program" formed part of the agreement between the parties. The defendant alleges the relevant provision relating to payment of invoices was that contained in clause 3 of the written dealer agreement and that pursuant to clause 3.3 the plaintiff was entitled to extend credit terms to the defendant.

[6] The nub of the pleaded defence to the claim for the purchase price of the products is the defendant's denial that the plaintiff sold the products to the defendant, because the defendant relies on clause 3.6 of the written dealer agreement to assert that title and ownership to products that were delivered to the defendant did not pass to the defendant until it had paid all money due and owing to the plaintiff. The defendant alleges in paragraph 5(f) of the defence that, by operation of clause 3.6 of the agreement, the defendant does not have title to the products, was a bailee of the products at all times and holds them separately from its own goods available for collection by the plaintiff. The defendant alleges that, by letter dated 23 January 2018, it informed the plaintiff that the retained products were available for collection by the plaintiff and that the plaintiff refused to accept the return of the retained products by the defendant to the plaintiff. The defendant then alleges in paragraph 6(c) of the defence that, as a matter of law, the defendant has a right of set-off against the plaintiff in respect of the retained products held by it as bailee in the sum of $1,001,223.50 which it alleges is the value of those retained products.

[7] The defence also raises a claim by the defendant to set off rebates and the value of defective products in the total amount of $119,761.81 against the amount claimed by the plaintiff. The plaintiff concedes the question of the rebates and defective products raises a triable issue, as the plaintiff is seeking judgment only for its claim to the extent of $1,014,741.13 which is the balance of the claim remaining after deducting this set-off amount.

[8] Mr Trim of counsel for the plaintiff submits that it is not necessary to resolve the factual dispute disclosed in the pleadings as to whether or not the "2017 Garmin Australasia

Authorised Dealer Program" document was part of the agreement between the parties, as the plaintiff was entitled to judgment, whether the payment terms were under that document or the payment terms were as admitted by the defendant as those set out in the written dealer agreement. For the purpose of deciding the summary judgment application, it is not necessary to address the issue of whether this identified document was part of the agreement between the parties.

The written dealer agreement

[9] Clause 3 of the dealer agreement regulates the placing of orders and prices of products. Clause 3.3 deals with payment:

> "All payments shall be made in Australian dollars (AUD$). Unless other payment terms are previously agreed in writing by Garmin, Dealer shall make full payment in advance for all Products ordered from Garmin by Dealer. In the event that Garmin shall agree to extend any credit terms to Dealer, any amount owed to Garmin which is not paid when due shall bear interest at the rate of 1% per month or, if less, the highest rate permitted by applicable law. Dealer shall reimburse Garmin for all costs and expenses (including attorneys' fees) incurred by Garmin in collecting any payment owed to Garmin hereunder. Dealer shall not deduct from the amount payable under any invoice issued by Garmin any amount on account of any special discount or cooperative advertising plan. Credit for any applicable discount or cooperative advertising plan shall be handled by Garmin's accounting department."

[10] Clause 3.6 deals with the title to the products:

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

[11] Clause 3.12 deals with offsets:

> "Any credits, allowances or other amounts payable or creditable by Garmin to Dealer shall be subject to offset for any claims or other amounts owed by Dealer to Garmin."

[12] Clause 7.3 sets out the provisions that apply on the termination of the agreement. Paragraphs (h), (i) and (j) of clause 7.3 provide:

> "(h) The expiration or termination of this Agreement shall not release Dealer from the payment of any sums then owing or from any other obligations herein provided to be performed after such expiration or termination.
>
> (i) Garmin shall have no obligation to repurchase or to credit Dealer for any Products in Dealer's stock which are unsold at the date of expiration or termination of this Agreement. Garmin may, at its option, repurchase all or a portion of the Products in Dealer's stock at the then current prices to Dealer or at the prices which Dealer paid to Garmin, whichever are lower, less the cost of repairing or reconditioning such Products. In the event of such repurchase, Dealer shall promptly pack box or crate, in a manner acceptable to Garmin, any Products which Garmin has elected to repurchase. Such repurchase shall not relieve Dealer of its obligation to pay Garmin any balance remaining due after credit is applied for any repurchase of Product. If the Agreement was terminated, the party who gave notice of termination shall pay the packaging and freight charges. If the Agreement expired, Garmin shall pay the packaging and freight charges.
>
> (j) If Garmin should continue to sell its products to Dealer after the termination of this Agreement, such sales shall be subject to the terms and conditions hereof, and such additional sales by Garmin shall not constitute a renewal of this Agreement."

[13] Clause 7.5 of the agreement sets out which clauses shall survive any termination of the agreement and those specified include clauses 3, 7.3 and 7.5. Under clause 8.6(a) of the agreement, the governing law is the law of New South Wales.

Dealings between the parties subsequent to the termination of the dealer agreement

[14] The plaintiff objected to paragraphs 20 to 30 of the affidavit of Mr Brkic on the basis of relevance. To the extent those paragraphs deal with arrangements made between the plaintiff and the defendant in anticipation of the termination of the dealer agreement on 1 June 2017 and then after that termination, I overrule the objection, as those dealings are relevant to the issue whether this is a proper case to grant summary judgment.

[15] Mr Brkic deposes that on 1 May 2017 (which was before the agreed termination date of 1 June 2017) he had a telephone conversation with Mr Howarth, the plaintiff's general manager, in which Mr Brkic said words to the effect that FE Sports (the trading name of the defendant) holds $3.6m worth of the plaintiff's stock and inquired whether the plaintiff was in a position to collect that stock and transfer that sum of money immediately and that Mr Howarth responded to the effect that "Garmin is prepared to purchase the inventory back".

[16] There were email exchanges between Mr Brkic and Mr Howarth on 30 and 31 May 2017, when Mr Howarth on 31 May 2017 confirmed that:

> "… Garmin is prepared to purchase the inventory back. Now this will not be immediate as we will need to first receive 100% of the goods FE Sports claims is in stock at this time. Once those goods are received and we have the opportunity to review the quantities returned as well as the quality (please note that any damaged goods would not be accepted for full credit) we would then provide payment for what has been returned."

[17] Although the dealer agreement terminated on 1 June 2017, it is apparent from the particulars of the transactions in schedule 1 to the statement of claim that the deliveries of the products the subject of this proceeding were made after the termination date. Arguably the indication by the plaintiff of being willing to purchase the inventory back related to the inventory held by the defendant on 31 May 2017. There is then a gap in the material that is relied on by the parties for the purpose of this application, as the next communication that is referred to by Mr Brkic is an email on 18 October 2017, when Mr Brkic asked Mr Howarth whether the defendant could send back about $1m of "older stock".

[18] Mr Howarth responded by email on 20 October 2017:

> "Thank you for your email. As you know, when we confirmed with you that the distribution agreement with B&K Holdings was coming to an end, we specified that Garmin was prepared to repurchase any unsold Garmin stock in your possession at the end of the agreement. We also, as a concession to you, indicated that we were prepared to allow B&K sell through their existing Garmin inventory as well as honour back orders for the purposes of sell through.
>
> In my email to you of 7 September, Garmin reiterated our willingness to consider the purchase of Garmin inventory from you.
>
> Garmin has provided you two options – either sell through your existing inventory or enter into discussions with Garmin regarding the return/repurchase of inventory.
>
> From your recent email, it appears that B&K is seeking to have Garmin repurchase some inventory while allowing B&K to continue to make purchases from Garmin in fulfilling back orders. This is an unreasonable request and not acceptable to Garmin.
>
> For the last time, Garmin indicates that it is willing to consider the repurchase of inventory from B&K. However, we are not prepared to repurchase only some inventory or fulfil back orders where inventory is repurchased.
>
> Please let me know by Tuesday October 24, 2017 if this is how you want to proceed.
>
> If I have not heard from you by Tuesday October 24, 2017, I assume that you wish to sell through your existing inventory. In such circumstances,

and consistent with our usual practice, we will ship your back-ordered products to B&K when your account is no longer in arrears."

[19] It appears that, in the absence of a response from the defendant, the plaintiff made the following demand of the defendant by email on 26 October 2017:

> "Garmin requires B&K to do the following:
>
> 1. Make a minimum payment of $200,000 in respect of outstanding invoices by COB on 31 October 2017 and provide Garmin with a schedule as to when it will make additional payments. [If that payment is made and the schedule of additional payments appears reasonable to us, we can discuss with you the delivery of any outstanding orders made prior to the end of the Distribution Agreement]; OR
>
> 2. Again by COB 31 October 2017, accept our offer to return all existing inventory to Garmin. If your preference is to proceed on this basis, we will require a spreadsheet setting out the specific inventory that you have in stock as well as the invoiced price for that inventory. Of course, to the extent that B&Ks outstanding debt exceeds the value of your inventory, Garmin will expect B&K to pay Garmin for any shortfall following the return of existing inventory.
>
> If we do not receive payment or a clear commitment from you regarding the return of existing inventory, Garmin will need to commence recovery steps as it would do in the normal course."

[20] On 6 December 2017 Mr Howarth advised Mr Brkic that the plaintiff had instructed lawyers to file the court proceeding to recover the total balance outstanding from the defendant, as the parties were unable to resolve the issue, including by the plaintiff repurchasing some of the unsold stock. The email stated:

> "To avoid any misunderstanding, I'm emailing to confirm that any invitations or offers to B&K to repurchase or accept any of the unsold Garmin stock from B&K (which B&K may consider to continue to be open for acceptance) are hereby withdrawn."

The issues raised by the summary judgment application

[21] It is not in issue between the parties that clause 3.6 of the agreement operates as a reservation of title clause in favour of the plaintiff, while the payment for the products by the defendant remains outstanding.

[22] The issues that emerged in the argument on the hearing of the application, as supplemented by the further written submissions made by the parties, are:

(a) what constitutes the contract between the parties that regulates the terms of the sale of the retained products;

(b) whether the reservation that the property in the delivered products remained with the plaintiff precluded the characterisation of the transactions as sale of goods;

(c) was the plaintiff's claim to recover a debt or was it a claim for damages for breach of contract;

(d) whether the plaintiff was obliged to accept the return of the delivered products from the defendant;

(e) whether the defendant was entitled to set off against the plaintiff's claim the value of the products it held as bailee for the plaintiff; and

(f) whether there had been an election by the plaintiff to retake the goods.

The plaintiff's submissions

[23] The plaintiff accepts that the defendant is its bailee in respect of the products for which payment is sought, but relies on the fact that the terms of the written dealer agreement regulate the conditions of the bailment: *Morphett v Rivergate Marina & Shipyard Pty Ltd* [2018] QCA 15 at [21] to [26] per Jackson J (with whom the other members of the court agreed).

[24] In particular, the plaintiff relies on clause 7.3(h) of the agreement which provides that the termination of the agreement did not release the defendant from the payment of any sums owing in respect of products delivered by the plaintiff to the defendant and that clause 7.3(i) expressly recognises that the plaintiff has no obligation to repurchase or credit the defendant for any products which were unsold at the termination of the agreement. The plaintiff also relies on clause 7.3(j) (presumably because the delivery of the products by the defendant to the plaintiff the subject of the proceeding occurred after the termination of the agreement). The defendant is not given any right under the agreement to return the products at any time to the plaintiff. The plaintiff submits that in the context of the agreement between the parties, there is no right of the defendant to redeliver the retained products to the plaintiff, even though the discretion was conferred on the plaintiff to decide whether it elected to repossess and sell them.

[25] The plaintiff relies on *Minister for Supply and Development v Service Men's Co-operative Joinery Manufacturers Ltd* (1951) 82 CLR 621 for the proposition that where a clause in a contract required payment before property in the goods passed, the action to pursue the payment was for debt and not damages. The purchaser of the goods in that case was in possession of them as bailee, but the contract provided for "net cash before delivery" of the goods under the contract. It was held by the majority (at 636 and 642) that, in accordance with the condition of the contract, the seller could sue for the price of the goods, before delivery was made under the contract, even though they were held by the purchaser as bailee pending delivery under the contract.

[26] To the extent that the defendant's submissions are based on *Puma Australia Pty Ltd v Sportsman's Australia Limited (No 2)* [1994] 2 Qd R 159, that case is distinguishable as it concerned a supply of goods subject to a reservation of title clause where the supplier had selected to seek the return of the goods by seeking an order of the court that it was entitled to retake the goods being held by the bailee.

[27] To the extent the defendant submits that a trial is warranted, as there is an issue raised whether the plaintiff may have elected to retake products, the plaintiff argues that no such issue is raised on the pleadings and the evidence that is relied on by the defendant lacks detail.

The defendant's submissions

[28] Mr Martin of Queen's Counsel on behalf of the defendant conceded that some of the arguments advanced on behalf of the defendant were not squarely raised by the defence, but a trial was required to determine what constituted the agreement between the parties and the proper construction of the relevant terms.

[29] The defendant relies on the fact that, even though clause 3.12 of the dealer agreement permits the defendant to set off amounts payable by the plaintiff to the defendant against amounts payable by the defendant to the plaintiff, the clause does not otherwise prevent any other set-offs. On the basis the defendant holds the retained products as bailee for the plaintiff, the defendant seeks to set off the value of those retained products against the invoiced amounts for those same products. The defendant submits that the proper construction of clause 3.6 of the dealer agreement is that the plaintiff is not entitled to maintain its claim in debt for the invoice price of the retained products. The defendant submits the plaintiff should pursue a claim for damages for breach of contract which raises the duty to mitigate and would result in reduction of the invoiced price of the retained products by their current market value, which was the assessment undertaken by the majority in *Puma* at 171 and 180.

[30] The plaintiff cannot rely on the provisions of s 51 of the *Sale of Goods Act* 1923 (NSW) to sue for the price of the retained products as a debt, as the terms of the dealer agreement do not allow it to be characterised as a contract of sale for goods that falls within either s 51(1) or s 51(2).

[31] It is submitted that whether or not an election was made by the plaintiff to retake the products (that was raised by the material in Mr Brkic's affidavit) involves an examination of all the evidence and the background in which the various communications occurred.

What is required for summary judgment?

[32] What must be established by a plaintiff under r 292 of the *UCPR* to obtain judgment is set out in r 292, but not without regard to the consequence of bringing a proceeding summarily to an end: *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [2]-[3], [17] and [43]-[44].

[33] The parties advanced extensive arguments based on the questions of law that emerged during the hearing. The determination of those questions and their application to the facts was impeded by the unsatisfactory state of the pleadings on the part of both parties.

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

[35] It is therefore not appropriate to endeavour to express a final opinion on the issues of law addressed by the parties, when the pertinent matters of fact have not been satisfactorily pleaded or been fully disclosed by both parties. I will observe, however, that the defendant's arguments based on *Puma* overlook the unusual circumstances in which the issues came before the court in that case and, in particular, that the purchaser of the goods the subject of the reservation of title clause had undertaken to the court to keep the proceeds of sale from the goods that were the subject of the retention of title clause in a separate bank account until the trial of the action in which the supplier of the goods had sought a specific order that it was entitled to retake possession of the goods.

[36] As to whether the plaintiff is entitled to sue for the price of the retained products, it depends on the terms of the contract that applied to the delivery of those goods after the termination of the written dealer agreement which has not been fully addressed on the plaintiff's pleading or material (or on the defendant's pleading or material). The terms of that contract are critical to the issue of whether the plaintiff's claim is in debt or for damages. (I will also observe that the fact that a contract for the sale of goods does not fall within the strict terms of s 51 of the *Sale of Goods Act* 1923 (NSW) (which is equivalent to s 50 of the *Sale of Goods Act* 1896 (Qld)) is not conclusive of the question of whether the action is for the price of the goods or for damages, as shown by the decision in *Minister for Supply and Development*.)

[37] Because of the deficiencies in the identification of the terms of contract that were operative after 1 June 2007, I am not satisfied at this stage that there is no need for a trial of the claim. If I had been reluctant to reach that conclusion, I would not exercise the discretion that is otherwise conferred on the court by r 292(2) of the *UCPR* to give judgment for the plaintiff against the defendant to the extent that it is claimed by the

plaintiff in its application. The reason for this is that it is not proper to give judgment on the basis of the terms of a contract pleaded in the statement of claim that is inconsistent with the other material adduced on this application. It is patent that the plaintiff must amend the statement of claim to identify the variation to the dealer agreement or the further agreement between the parties that resulted in the delivery of the retained products after the termination date of the dealer agreement.

[38] Although there was an alternative application by the plaintiff to strike out identified paragraphs of the defendant's defence, it is not appropriate to do so when the plaintiff first has to amend its statement of claim.

Orders

[39] I therefore dismiss the plaintiff's application.

[40] Subject to hearing submissions from the parties, I propose to make these additional directions:

2. Direct that the plaintiff file a second further amended statement of claim on or before 13 June 2018.

3. Direct that the defendant file and serve a third further amended defence on or before 14 days after the service of the second amended further statement of claim.

[41] Although the application has been dismissed, the defendant's defence did not plead all the factual matters that were raised by the supporting affidavit of Mr Brkic. Subject to hearing further submissions of the parties, my inclination is to order that costs be reserved.