

19/74

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

***FARMER & CO LTD v NUCLEONICS ELECTRONICS and
TELECOMMUNICATIONS PTY LTD*****Jacobs P, Reynolds and Bowen JJ A****1 November 1973****CIVIL PROCEEDINGS – CONTRACT – SALE OF GOODS – GOODS DELIVERED – GOODS NOT LEGAL
IN THAT THERE HAD BEEN NO APPROVAL BY THE RELEVANT AUTHORITY – ILLEGALITY – EFFECT
OF – CLAIM FOR DAMAGES UPHeld BY COURT – WHETHER COURT IN ERROR.**

An Order was placed by Farmer & Co in August 1971 for 300 illuminated mirrors, delivery date to be 1 October. One condition of the order was that its acceptance implied a covenant by the supplier that the goods supplied should comply with all statutes, rules and regulations in force in NSW, and if failure to so comply then supplier would be liable in damages, and purchaser might reject goods and withhold or recover purchase price. Delivery was not made by 1 October, and a fresh order was made in practically the same terms. When delivery then made, goods were not stamped and labelled in compliance with the *Electricity Development Act* (NSW). Farmers returned the goods and successfully sued for price paid plus damages. Upon appeal—

HELD: Appeal dismissed.

1. **A merchant who contracts to sell and deliver goods and discovers before the delivery that they are intended for an illegal purpose is not bound merely to cancel the contract; he can sue for damages as for non-acceptance of the goods because he is not to be prejudiced by the illegal act of one party unknown to him.**

2. **There was nothing illegal in the present case in agreeing to sell the 300 mirrors. This was true whether the agreement was looked at as the August order or the late October order. It was performance of the agreement which was carried out illegally. It was delivery pursuant to the order which was the illegal part of the transaction on the part of the vendor. In those circumstances ignorance of the illegality on the part of the purchaser was of primary relevance. The purchaser was entitled to enforce his rights in respect of all matters under the contract until he discovered an illegality.**

3. **There was not the slightest reason why Farmer & Co Ltd should suffer in any way as a result of a failure on the part of the vendor to supply goods which accorded with the order placed by Farmers and in accordance with the law and if a vendor or supplier in those circumstances had agreed to supply them and did not then he was liable for breach of contract. That was the present case.**

4. **Accordingly, the decision below was correct and the appeal was dismissed.**

JACOBS P: ... The defence to this claim for the return of the price and for damages for the amount of the loss of profit was that the sale was an illegal one because there had been no approval by the Electricity Authority and that the effect in the circumstances of that illegality was to prevent Farmer & Co Ltd recovering the price it had paid or any damages for loss of profits.

This submission, it seems to me, is based on a view of the contract and a view of the law relating to illegality which I find very difficult to appreciate. When the order was placed for 300 mirrors on 13th August 1971 the obligation lay upon the vendor company to supply mirrors in compliance with both the express and implied terms of the contract. There was an express term of the contract that the mirrors would comply with the law of New South Wales. This would have been implied in any event because if there is a valid way of performing a contract and an invalid or illegal way of performing it, then it is implied that it will be performed in the legal way and thus that the mirrors ordered would be mirrors that could legally be supplied. Therefore, the contract made in August, or October, with the acceptance by the letter to which I have referred, was a perfectly legal contract between the parties.

It is true that this exchange of documentation was replaced late in October by another

order form of Farmer & Co Ltd and the evidence is silent on any acceptance of that order prior to actual delivery of the goods. This is the basis of the appellants argument before this court. What is submitted is that there was, when this event happened, a cancellation of the earlier agreement for sale and only a sale of specific items which it was illegal to sell. I am of the opinion that this situation does not infect the plaintiff Farmer & Co Ltd in the way which has been sought to be established.

First, if it was a void transaction as a result of the illegality it left in existence the earlier legal transaction and the obligation remained under it. But quite apart from this, it is not a correct analysis, in my view, to say that because there was delivery as a method of acceptance of the written order, therefore the offer to purchase could unilaterally be turned into an illegal sale by an illegal delivery. This, in my opinion, is an impossible proposition of law, and indeed of justice in such a situation. The fact that the illegal nature of the delivery is not established for some time does not, in my view, alter the position. The order, therefore, remains and if it has not been accepted there is the previous agreement to supply which still remains outstanding. But certainly in no way does Farmer & Co Ltd become infected with the illegality unknown to it.

This is well established. It does not apply to cases where the agreement is initially one which under the law neither party could enter into. That is the type of case to which reference has been made before us today (see *Re Mahmoud and Ispahani* [1921] 2 KB 716; [1921] All ER 217) and I think it is also true to say that that was the case in *George v Greater Adelaide Land Development Co Limited* [1929] HCA 40; (1929) 43 CLR 91; 36 ALR 72.

There was nothing illegal in the present case in agreeing to sell the 300 mirrors. This is true whether the agreement is looked at as the August order or the late October order. It was performance of the agreement which was carried out illegally. It was delivery pursuant to the order which was the illegal part of the transaction on the part of the vendor. In these circumstances I do not think that ignorance of the illegality on the part of the purchaser is of no relevance. I think that it is of primary relevance. The purchaser is entitled to enforce his rights in respect of all matters under the contract until he discovers an illegality.

Thus, a merchant who contracts to sell and deliver goods and discovers before the delivery that they are intended for an illegal purpose is not bound merely to cancel the contract; he can sue for damages as for non-acceptance of the goods because he is not to be prejudiced by the illegal act of one party unknown to him. That is precisely the principle to be applied, in my opinion, in the present case. There is not the slightest reason why Farmer & Co Ltd should suffer in any way as a result of a failure on the part of the vendor to supply goods which accord with the order placed by Farmers and in accordance with the law and if a vendor or supplier in those circumstances has agreed to supply them and does not then he is liable for breach of contract. That, in my opinion, is the present case. I consider the decision below correct although my reasoning is somewhat different and in my view the appeal should be dismissed.