05/70

SUPREME COURT OF VICTORIA

GATES v HERON

Pape J

16 March 1970

CIVIL PROCEEDINGS – DETINUE – CLAIM FOR RETURN OF CERTAIN GOODS AND CHATTELS OR THEIR VALUE – COMPANY ABOUT TO GO INTO LIQUIDATION – CERTAIN GOODS AND CHATTELS RETRIEVED – PARTY REFUSED TO ALLOW REMAINING CHATTELS TO BE SURRENDERED – WHETHER COMPLAINANT ENTITLED TO A LEGAL RIGHT TO IMMEDIATE POSSESSION OF THE GOODS – WHETHER THE EVIDENCE DISCLOSED THAT THE RIGHT TO POSSESSION WAS IN THE COMPANY OR THE LIQUIDATOR – FINDING BY MAGISTRATE THAT CHATTELS SHOULD HAVE BEEN SURRENDERED BY THE LIQUIDATOR TO THE COMPLAINANT – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi discharged with costs.
1. It is plain that where a complainant in an action for detinue is out of possession and relies on a right of immediate possession he must recover on the strength of his own title and come prepared to meet a defence of *jus tertii*. Here the defendant's argument raised a right to possession in the company, and the complainant was required to meet it.

2. The evidence in this case established that the contract of hiring constituted by the letters of 29 December and 12 January 1968 had been determined prior to the commencement of the company's liquidation on 10 December 1968.

3. The evidence showed that the company vacated the premises at 110 Nicholson Street, Fitzroy, between 10 and 15 November 1968. At that stage its lease had not expired. Whilst it is clear that the mere vacation of the premises without more did not amount to a surrender of the lease, yet if the landlord by some unequivocal act indicated an acceptance on his part of the company's action, then there was a surrender by operation of law, and the lease was terminated.

4. Here there was evidence of an acceptance by the defendant of the company's giving up possession, for early in December 1968, when Gates went back to the premises to remove the balance of the furniture, the defendant prevented him from so doing. If the lease had been still on foot, even if the company was out of occupation, he had no right to do this, and his action indicated an acceptance of the company's vacation of the premises which operated as a surrender by operation of law of the lease. The company's action in giving up possession was obviously prompted by a decision that it must go into liquidation.

5. Once the company gave up possession of the premises in which it carried on its business, it obviously no longer required the further use of the furniture. It was at least arguable that there was an implied term in this hiring that it should last only so long as the company required to use the furniture. But it was not necessary for the complainant to rely upon any such implied term, for the evidence established beyond question that the contract of hiring was determined before the company went into liquidation, when the company acting through its directors returned the bulk of the furniture to the complainant.

PAPE J: This is the return of an Order Nisi to review the order of the Court of Petty Sessions at Fitzroy, constituted by Mr Murray SM made on 18 July 1969 on a Special Complaint wherein Gillian M Gates was complainant and Len Heron was defendant.

The proceedings were instituted by Special Summons issued on 12 March 1969 wherein the complainant alleged that the defendant had since the month of December 1968 detained from her certain goods and chattels described in the Particulars of Demand, and wherein she claimed the return of the said goods and chattels or payment of $350 their value, together with $250 damages for their detention.

The Complaint was heard on 18 July 1969, and although the certificate of the order and

the affidavit of James Hubert Kelleher, sworn on 13 August 1969, show that the order was made on that date, the record of the Magistrate's reserved decision shows that it was delivered on 19 August 1969. By that decision the Magistrate found that the defendant had wrongfully detained the items referred to in the Particulars of Demand, save and except a louvred door filing wardrobe, and it was ordered that the defendant return to the complainant within 14 days the property listed in the Particulars of Demand with the exception of the said wardrobe, and in default that he pay her the sum of $300, being the value of the said property, with $158.65 costs.

The reason for the exclusion of the wardrobe appears to have been that the Magistrate was satisfied on the evidence that the wardrobe was held by one Burgess under a hire purchase agreement from Myer (Melbourne) Limited.

It has not been easy to ascertain the evidence which was before the Magistrate, because although the defendant's solicitor swore that he was present during the entire hearing (at which Mr Ednie of Counsel appeared for the defendant and Mr Hore-Lacy of Counsel appeared for the complainant) no note appears to have been taken of the evidence. The evidence was put before me in the form of the notes taken by the Magistrate himself, and as might be expected, those notes were scrappy and required a good deal of elucidation involving their complete reading by counsel on this hearing with considerable discussion between counsel as to what took place and what was meant by certain expressions used. By this comment I intend no criticism of the Magistrate – his notes were taken as an aid to his own memory, and not for the benefit of the parties, and he is not required to act as a Bench Clerk and record the evidence precisely as it was given.

These notes show for instance that one Robert M Brown was called as a witness – he is described as a clerk to Kennedy, Smail & Middlemiss and also as a partner in Gates, Burgess & Associates, but all the notes say is that he "produces records", without identifying the records he produced. Later in the notes, it appears that it was sought to recall Mr Brown, but if he was recalled there is no note of his evidence. Documents referred to are not identified by exhibit numbers.

In these circumstances, since the solicitor making the affidavit in support of the Order Nisi was present in Court during the entire hearing it would have been preferable if he had used the Magistrate's notes as an aid to his own recollection, and then set out without "typographical or grammatical slips or omissions" what evidence was given.

Subject to the difficulties created by the manner in which the evidence has been put before the Court, the facts (which were either proved or assumed to exist) appear to be as follows:

On 11 October 1966 a company known as Gates, Burgess & Associates Pty Ltd was incorporated, of which John Alfred Gates (the husband of the complainant) Neville James Fullerton and Dene Meredith Burgess were shareholders and directors. The nature of the business carried on by the company did not clearly appear, but it was a company concerned with the design of buildings. On 20 December 1966 this company entered into a lease with Albert Leonard Heron (the defendant) and Gwendoline Lorna Heron, whereby the company leased premises at 110 Nicholson Street, Fitzroy, together with certain furniture, fixtures and other chattels described in the Schedule, from the lessors for a term of one year commencing on 17 December 1969 at a monthly rental of $208 payable in advance, and covenanted not to use the premises so leased for any purpose other than a drafting service. The lease provided that upon receiving 2 months prior notice before the expiration of the term the lessors would renew the lease for a further period of 12 months.

Although there was no evidence of a renewal, since the company was in possession in November 1968, the Magistrate was entitled to assume that the lease had been duly renewed, and that it would thus expire on 17 December 1968. The lease also contained a guarantee by Dene Meredith Burgess of the due performance by the company of all the covenants therein contained. On 17 June 1967 it was agreed between the company and the complainant that she would lend to the company the sum of $1,700 upon condition that it was repaid within 6 months of that date. This loan is evidenced by a letter dated 17 June 1967 to the company from the complainant and by a letter accepting the complainant's terms dated 27 June 1967, signed by Burgess and Fullarton and bearing the company's seal. These two letters were part of a large bundle of papers, presumably the ''records" which were produced by the witness Brown from the custody of his

employers, Messrs Kennedy, Smail & Middlemiss, the accountants and official liquidators. It does not satisfactorily appear whether all of the documents contained in this folder were admitted in evidence, for the affidavit in support of the order nisi says that the exhibit "is a folder containing true copies of the several exhibits admitted in evidence"; and the notes of evidence do not show what documents were admitted in evidence. However, since the entire folder is exhibited to the affidavit, I assume that its entire contents were so admitted.

This loan became repayable on or before 17 December 1967, and the evidence showed that the complainant duly demanded repayment, but that the company was not in a position to comply with her request. Apparently on 21 December 1967 an offer was made by telephone on behalf of the company that some 28 items of furniture and chattels valued at $1,667 used by the company should be accepted by the complainant in part satisfaction of the loan. On 29 December 1967 a letter was written by the company to the complainant sealed with the company's seal, confirming this telephone conversation, and stating that "we will be requiring further use of all of these goods and therefore would like to offer you $10 per week paid monthly for these same goods". It was pointed out that certain items (including a teak wardrobe) were being bought from Myers and were not fully paid for but that when payment had been made, the company would advise her and they would then automatically belong to her. The goods set out in this letter included the goods the subject matter of these proceedings together with certain other goods which were removed from the premises when the company vacated them.

On 12 January 1968, the complainant replied to this letter accepting the offer so made and confirming that as from that date the balance of the loan was to be regarded as being $33 and that she was the owner of the goods listed, and that she would render monthly accounts for the hire thereof. Thereafter, the complainant sent monthly accounts to Gates, Burgess & Associates Pty Ltd for the agreed rental. None of this rental seems to have been paid, and on 15 September 1968 there was owing a sum of $380. Some time in November 1968 (Burgess said it was between 10 and 15 November 1968) the company vacated the premises at 110 Nicholson Street, Fitzroy. It appears that there was at or about this time a meeting between the defendant and the directors of the company in which the defendant was told that the company was about to go into liquidation.

On 14 November 1968 notice of a meeting of creditors to be held on 10 December 1968 was given to all creditors (including the defendant) pursuant to s260 of the *Companies Act*, and there was evidence that the company in fact went into liquidation, which could only have been done had a resolution for winding up been passed on 10 December 1968 pursuant to the notice. The winding up therefore commenced on 10 December 1968, (ss254, 255 of the *Companies Act*).

According to the evidence of John Alfred Gates, one Stretton of the firm of Kennedy, Smail & Middlemiss was appointed liquidator, although in a letter dated 14 February 1969 from the complainant's solicitor to the defendant's solicitor, it is stated that one Daly of that firm had been appointed liquidator. The evidence regarding the liquidation was very scrappy, but both parties conceded that the company was in fact in liquidation.

It appeared from the evidence of John Alfred Gates and Dene Meredith Burgess that within three weeks of the vacation by the company of the premises at 110 Nicholson Street, Fitzroy all of the furniture which had been transferred to the complainant, other than the items in dispute in these proceedings had been removed by them. Gates said that some of the furniture was taken on behalf of the complainant – that he collected some and went on two other occasions to collect some more – that was three weeks after the premises were vacated, but that the defendant refused to allow him to take the furniture until the debt due to him from the company was paid in full.

Burgess said that when the company surrendered the lease he would not say they left the furniture behind – they removed what they could with the limited transport available, and that he intended to remove the rest when transport was available but was not permitted to do so. The notes of evidence do not specifically state that the furniture so taken was handed by Gates and Burgess to the complainant, but the Magistrate was, in my view, clearly entitled to hold that such was the case for Gates had said that he took some of the furniture on behalf of the complainant and the complainant herself swore that she got some of the goods except those claimed.

The defendant in his evidence said that on 16 December 1968 Gates wanted to take the

goods but he felt that unless he had title he would be jeopardising himself if he gave them to the wrong person, and that he wanted to see Mrs Gates' title which was not forthcoming. This would seem to indicate that the demand was made by Gates on behalf of the complainant.

On 28 January 1969 Messrs Kiddle, Briggs & Willox, the complainant's solicitors, wrote to the defendant, demanding the delivery of the furniture then on the premises at 110 Nicholson Street, Fitzroy. This was answered by the defendant's solicitor on 31 January 1969, when he said that his client had no recollection of having any dealings at all with the complainant. Thereafter there was a telephone conversation between the solicitors, and on 6 February 1969 the complainant's solicitors wrote listing the items claimed and again asking that the complainant have access to the premises to enable her to remove the furniture. In reply, the defendant's solicitor mentioned the existence of the hiring agreement and asked for a complete list of the furniture claimed. On 14 February 1969 the complainant's solicitors wrote that the relevant agreement was held by Mr Daly of the firm of Kennedy, Smail & Middlemiss, who had been appointed liquidator of the company, and stating that at a recent meeting of the creditors it had been acknowledged that the company had no claim upon the chattels claimed and that they were the complainant's property.

On 27 February 1969 the defendant's solicitor wrote in answer to this letter, stating that his client was not present at the creditors meeting and was not a party to the acknowledgement referred to. He also said "It seems moreover that there may be other claimants proceeding on parallel lines to your client and that there has been raised a question of title", and that his client should not be put to the trouble and expense of establishing the complainant's title, but that if the complainant would undertake to pay the costs of such an investigation, he would review the matter. On 28 February 1969 the complainant's solicitors wrote to say that a telephone call to Mr Daly would answer the defendant's queries, and making a further formal demand for the furniture. After receipt of this letter, the defendant went to see Kennedy, Smail & Middlemiss and was given photo copies of the relevant documents. On 5 March 1969 the defendant's solicitor said that he would accept service.

The defendant in his evidence said that apart from certain items which he claimed were fixtures he made no claim to any of the goods, and the only reason he kept them was to protect himself as he did not know who had title.

The Special Summons was then issued on 12 March 1969. At the hearing, the complainant gave evidence herself and called Robert M Brown, a clerk to Kennedy, Smail & Middlemiss, John Alfred Gates and Dene Meredith Burgess. None of these witnesses was asked any questions as to whether the company, Gates, Burgess & Associates Pty Ltd claimed a right of possession of the furniture pursuant to the hiring agreement with the complainant. The only submission put by the defendant's counsel to the Magistrate was that on the evidence it had not been established that the defndant wrongfully detained the complainant's goods, because on the authority of the statement of Fletcher Moulton LJ in *Clayton v Le Roy* [1911] 2 KB 1031 p1051:

> "it is not an unlawful refusal for a man to decline to give up property immediately a demand made, for he is entitled to take adequate time to inquire into the rights of the claimant".

The doubt regarding the complainant's title was said to arise, according to the Magistrate's reasons for judgment, because the defendant had said that he had been told that Gates, Burgess & Associates Pty Ltd was going into liquidation and he had in fact received a notice of a meeting of creditors called for 10 December 1968. It would thus appear that the defendant's case also raised a question as to whether the company still had a right to the possession of the goods which passed to the liquidator, although it does appear that the defendant's counsel specifically argued that point.

The Magistrate reserved his decision and gave his reasons in writing. In those reasons he said,

> "The evidence here indicates that after the premises were vacated in November 1968 Mr Gates returned there and removed some furniture belonging to the complainant and the company files, but Mr Heron refused to allow him to remove the rest of the furniture until the debt due to him from the company was paid in full". Mr Heron agrees that in December Mr Gates wanted to remove the furniture but that he declined to allow this – he says on the basis that "he felt that unless he had

> title he would be jeopardizing himself should he give them to the wrong person". (I presume by this was meant unless he had evidence of title, but I may be wrong about that). He then said, "Mr Heron's evidence indicates that at some time which his evidence does not make clear he went to the office of Kennedy, Smail & Middlemiss and was given copies of the documents, including a copy of the letter of 29 December 1967 from the company to Mrs Gates relating to the sale of office furniture and fittings. I am satisfied that a number of demands were made on behalf of the complainant that the property be delivered to her – Mrs Gates' demand on or about 16 December 1968, the letters from her solicitors to him dated 28 January 1969, 14 February 1969 and 28 February 1969. He knew that Kennedy, Smail & Middlemiss were handling the affairs of the company.
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> I consider that he had more than ample time to inquire as to the title of the claimant prior to the issue of this summons on 12 March 1969. I do not consider that he had the right to act as a self-appointed stake-holder for the rightful claimant and his defence must therefore fail ...I am satisfied that the sale of the office furniture and fittings to the complainant, referred to in the documents tendered in evidence was a genuine sale whereby the property in them with the exception of all goods on hire purchase to Myers passed to her."

Although these reasons for judgment do not in terms say that the company did not have a right to possession by virtue of the hiring agreement, I think that the Magistrate in deciding that the complainant was entitled to immediate possession must be taken to have so determined.

The Order Nisi was made by Master Collie on 5 September 1969 on the single ground that there was no or no sufficient evidence that the complainant was at the time of any demand by the complainant for delivery up of the goods the subject of the complaint entitled to a legal right to immediate possession of the goods arising out of an absolute or special property in the goods.

When opening this case, Mr Ednie, who appeared for the defendant to move this order absolute, told me that the point he proposed to argue was that at the date of the demand the complainant did not on the evidence have a right to immediate possession of the goods, because Gates, Burgess & Associates Pty Ltd had that immediate right to possession by virtue of the hiring agreement made as a result of the letters of 29 December 1967 and 12 January 1968. He conceded that he had not argued this point before the Magistrate. I enquired of him whether it had been contended in the court below that the transaction constituted an unregistered bill of sale under ss54, 55 of the *Instruments Act* 1958 and s100 of the *Companies Act* 1961, and was told that it had not been so argued and that he did not propose to argue that matter in the proceedings. However, at a later stage he told me that he did propose to argue this point.

So far as this point concerning the application of s100 of the *Companies Act* is concerned, it is desirable to deal with it at once. It was a point which was never argued directly or indirectly before the Magistrate, and was one which turned upon a question of fact upon which no evidence was led, and the Magistrate has made no finding upon it. The witnesses who could have given evidence on this matter of fact were called before the Magistrate, but they were asked no questions regarding it. Mr Brown of Kennedy, Smail & Middlemiss was not asked any questions as to whether the liquidator made any claim to the goods on behalf of the creditors or as to whether the relevant documents had been registered or not.

It seems to me that in these circumstances it is not open to a defendant to raise on an order to review an entirely new question which has not been argued and determined in the court below, particularly where, had the point been raised, it was capable of at least being elucidated by evidence. See *Ex parte Reddish; re Walton* (1877) 5 Ch D 882; *Willmott v London Celluloid Company* (1887) 34 Ch D 147 per Cotton LJ at p151; *Ex parte Firth; in re Cowburn* (1882) 19 Ch D 419; *The Tasmania* (1890) 15 AC 23 per Lord Herschell at p225, where His Lordship said:

> "I think a point such as this, not taken at the trial and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by the questions asked of the witnesses which are directed to the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under the circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

See also *Wilson v United Counties Bank Ltd* [1920] LR AC 102; [1918-19] All ER 1035; *Connecticut Fire Insurance Company v Kavanagh* (1892) AC 473; *Warehousing and Forwarding Company of East Africa v Jefferali and Sons Ltd* (1964) AC 1 and *Hudson v Australian Timber Workers Union* [1923] HCA 38; (1923) 32 CLR 413; 30 ALR 13 per Isaacs J at CLR p426, where His Honour said:

> "The ordinary dictates of justice require that neither party shall be prejudiced by the late discovery of the new point. If It is incurable he is not prejudiced, except perhaps as to costs; but if curable by evidence he may be prejudiced and therefore on grounds of natural justice, the party taking it must bear his own misfortune rather than pass it on to the other party. This is a course followed in all appellate jurisdictions where no statutory provision prevents it."

In accordance with these principles, I think it is not open to the defendant to rely upon the argument that the documents of 29 December 1967 and 12 January 1968 required registration under s100 of the *Companies Act*. But independently of this proposition, I think there are on the merits two answers to any argument based on s100 of the *Companies Act*. The first one is that I have grave doubts whether such an argument is within the ground stated in the Order Nisi. It in my view, matter for a separate and distinct ground which raises the question directly. The second is that there was no evidence before the Magistrate that the relevant documents were not in fact registered as required by the section.

I therefore think that effect ought not to be given to Mr Ednie's contention that this transaction was avoided by reason of the provisions of s100(1) and (3) of the *Companies Act* 1961 and ss33 and 54 of the *Instruments Act* 1958. Indeed, beyond stating that he relied upon these sections, Mr Ednie advanced no argument in support of his contention.

This leaves for consideration the main argument advanced by Mr Ednie, namely, that the evidence disclosed that the right to possession of these chattels at the relevant time was in the company or the liquidator, and that therefore there was no evidence that the complainant was entitled to immediate possession.

It is plain that where a complainant in an action for detinue is out of possession and relies on a right of immediate possession he must recover on the strength of his own title and come prepared to meet a defence of *jus tertii*. Here the defendant's argument raises a right to possession in the company, and the complainant is required to meet it. See *Fleming on Torts* 3rd edn, p68; *Salmond on Torts* 15th edn, p143; *Pollock and Maitland on Possession* p91; Holdsworth *History of English Law* vol 7, pp424-429; Fifoot *History and Sources of the Common Law* p112 and *Leake v Loveday & Brooks* [1842] EngR 1063; 134 ER 399; (1842) 4 Man & G 972.

But in my opinion the evidence in this case did establish that the contract of hiring constituted by the letters of 29 December and 12 January 1968 had been determined prior to the commencement of the company's liquidation on 10 December 1968.

The evidence showed that the company vacated the premises at 110 Nicholson Street, Fitzroy, between 10 and 15 November 1968. At that stage its lease had not expired. Whilst it is clear that the mere vacation of the premises without more does not amount to a surrender of the lease, yet if the landlord by some unequivocal act indicates an acceptance on his part of the company's action, then there is a surrender by operation of law, and the lease is terminated. See *Woodfall* 25th edn, p970; *Andrews v Hogan* [1952] HCA 37; (1952) 86 CLR 223 per Fullagar J at p252. Here there was evidence of an acceptance by the defendant of the company's giving up possession, for early in December 1968, when Gates went back to the premises to remove the balance of the furniture, the defendant prevented him from so doing. If the lease had been still on foot, even if the company was out of occupation, he had no right to do this, and his action indicates an acceptance of the company's vacation of the premises which in my view operated as a surrender by operation of law of the lease.

The company's action in giving up possession was obviously prompted by a decision that it must go into liquidation. The terms on which the complainant agreed to hire the furniture to the company were contained in its letter to her of 29 December 1967 in which it was said, "We will be requiring further use of all of these goods and therefore would like to offer you $10 per week paid monthly for these same goods". Once the company gave up possession of the premises in which

it carried on its business, it obviously no longer required the further use of the furniture. It was, I think, at least arguable that there was an implied term in this hiring that it should last only so long as the company required to use the furniture. But it is not necessary for the complainant to rely upon any such implied term, for I think the evidence establishes beyond question that the contract of hiring was determined before the company went into liquidation, when the company acting through its directors returned the bulk of the furniture to the complainant.

The evidence shows that before 10 December 1968 Gates and Burgess collected the bulk of the furniture subject to the hiring and that it was received by the complainant. There is no other reasonable inference open but that she received the furniture from them. Gates' evidence shows that he took the furniture on behalf of the complainant, and the defendant's evidence shows that when on 16 December 1968 Gates demanded the remainder of the furniture, he made it clear that he was demanding it for the complainant, for the defendant in his evidence said, "I wanted to see Mrs Gates' title which was not forthcoming". The only reason why the complainant did not receive the remainder of the furniture was that the defendant refused to release it.

Although he does not advert to this question in his reasons for judgment, doubtless because Mr Ednie did not address any argument to him along these lines, I think Mr Johnstone, who appeared for the complainant to show cause, was correct in saying that it is inherent in his judgment that he considered the matter, for one of the reasons given by the defendant for his doubts about the title of the complainant was that he had received notice of a meeting of creditors, and I find it hard to believe that in finding as he did that the complainant was entitled to immediate possession, the Magistrate had failed to consider whether before the company had gone into liquidation the company was entitled to immediate possession.

For these reasons I do not accept Mr Ednie's argument. The Order Nisi will accordingly be discharged with costs not exceeding $120.

APPEARANCES: For the complainant/respondent Gates: Mr RM Johnstone, counsel. Kiddle, Briggs & Willox, solicitors. For the defendant/applicant Heron: Mr HH Ednie, counsel. James Kelleher, solicitor.
