

41/04; [2004] VSC 478

**SUPREME COURT OF VICTORIA**

**MYER STORES LIMITED v JOVANOVIC**

**Balmford J**

**3, 24 November 2004**

**CIVIL PROCEEDINGS – BAILMENT OR SALE OF PHOTOGRAPHS – CLAIM FOR DAMAGES FOR CONVERSION – FINDING BY MAGISTRATE THAT TRANSACTION WAS A BAILMENT AND NOT A SALE – WHETHER MAGISTRATE IN ERROR – PHOTOGRAPHS NOT RETURNED TO OWNER – ASSESSMENT BY MAGISTRATE OF DAMAGES PER PHOTOGRAPH – PHOTOGRAPHS TO BE DONATED TO MUSEUM OR GALLERY – QUESTION OF REAL VALUE OF PHOTOGRAPHS – WHETHER MAGISTRATE IN ERROR.**

1. Where there was evidence that photographs were supplied for display purposes and when no longer required one set to be donated to a public gallery or museum and the other sets to be subject to consultation with the photographer, a magistrate was not in error in finding that the nature of the transaction was a bailment and not a sale. Accordingly, the owner of the photographs which were not returned or dealt with as agreed suffered a loss.

2. Where goods have been converted, the rule is that the owner of the goods is entitled to no more than the real damage sustained. In the present case, the appropriate measure of damages was the value of the prestige to be attached to having the photographs in museums or galleries. As there was no evidence before the court on this matter, the magistrate was in error in determining that the quantum of loss should be assessed by reference to the value of each photograph.

**BALMFORD J:**

**Introduction**

1. These two appeals arise out of the same events and on 24 May 2004 Master Wheeler ordered that they be fixed for hearing on the same day and before the same Judge. Both appeals are brought under section 109 of the *Magistrates' Court Act* 1989, which provides that a party to a civil proceeding in the Magistrates' Court may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding.

2. The final order of the Magistrates' Court which is the subject of proceeding No. 5519 of 2004 ("the first appeal") is the order made on 19 March (incorrectly stated in the Master's Order as 19 May) 2004 by the Magistrates' Court at Melbourne whereby the appellant ("Myer") was ordered to pay the respondent ("Ms Jovanovic") \$40,000 damages for the conversion of certain photographs created by Ms Jovanovic.

3. On 24 May 2004 Master Wheeler ordered that the questions of law shown to be raised by the first appeal are:

(a) having regard to all of the evidence did the Magistrate err in finding that the respondent had suffered any compensable loss in tort or contract?

(b) if no, did the Magistrate err in assessing the quantum of loss and in particular did the Magistrate err in holding that it should be assessed by reference to the value of each photograph?

(c) did the Magistrate err in holding there was a conversion of the photographs in circumstances where the respondent was never to have the photographs returned to her?

4. The final order of the Magistrates' Court which is the subject of proceeding No. 6188 of 2004 ("the second appeal") is the order made on 4 May 2004 by the Magistrates' Court at Melbourne whereby the appellant was ordered to pay the respondent \$6,754.50 by way of interest and \$11,511.40 by way of costs.

5. On 26 May 2004 Master Wheeler ordered that the question of law shown to be raised by the second appeal is:

If [the first appeal] is successful, should [the order the subject of the second appeal] be set aside?

6. Counsel were in agreement that the result of the second appeal depended directly on the result of the first appeal and no other issues arose in that connection.

7. *[After dealing with a matter not relevant to this Report, Her Honour continued] ...*

**Question (a): The terms of the agreement**

8. The respondent is a photographer, who described herself as established in the area of photography as art. On 29 June 1995 her agent, Ms Frajman, of M33 Photoagency, wrote a letter (Exhibit E before the Magistrate) to Mr Kelly of Myer in the following terms:<sup>[1]</sup>

Dear Mr Kelly,

This, as we understand it, is the agreement between Tania Jovanovic, M33 Photographer and Myer/Grace Bros with regard to the use of Ms Jovanovic's "Cuban" series of photographs:-

- Tania Jovanovic has supplied 3 identical portfolios of Black and White sepia toned prints to be used by Myer/Grace Bros for display/exhibition purposes throughout their Australian network of stores.
- All copyright pertaining to the photographs remains with Tania Jovanovic.
- Photographs are supplied for the purposes of exhibition only - they are not to be reproduced, sold, or disposed of in any other way, without the written permission of the photographer or her agent, M33 Photoagency.

-Reasonable reproduction for purposes of publicising the 'exhibition', is permitted.

- When the photographs are no longer required for display they will be disposed of as follows:

-one set to be donated to a public gallery or museum.

-Remaining two sets - outcome to be decided in consultation with the photographer.

Please let me know if you have any queries with regard to the above.

Yours sincerely,

Helen Frajman, Director

M33 Photoagency

9. It is not in issue that each portfolio consisted of 44 photographs, making 132 photographs in all, and that \$12,000 was paid by Myer to Ms Jovanovic on three invoices each relating to 44 photographs at \$4000.

10. Nor is it in issue that only 40 of the photographs can now be found by Myer, and that Myer conceded in its affidavit of documents that in about 2000 the remaining photographs were disposed of to its employees.<sup>[2]</sup> Before the Magistrate it was conceded that none of the photographs had been donated to a public gallery or museum.<sup>[3]</sup> On 29 July 2002 a letter demanding the return of the photographs within fourteen days was sent by the solicitors for Ms Jovanovic to Myer. None of the photographs have been returned.

11. In the proceeding before the Magistrate Ms Jovanovic sought damages for breach of the agreement between herself and Myer, the return of the photographs and damages for detainee and/or conversion for those not returned to her. Myer claims that the agreement was an agreement for the sale of the photographs to Myer for the price of \$12,000.

12. The Magistrate found the contract to be a bailment<sup>[4]</sup> and not a sale, and described the terms of the contract as follows:<sup>[5]</sup>

The whole of the evidence disclosed (and I find) that the contract was made in the terms pleaded by the plaintiff in clause 3 and 4 of her amended statement of claim dated 21 March 2003 with some additions and some implied terms.

That was in effect a finding that the contract was in accordance with exhibit E, with the addition of terms that Ms Jovanovic would supply the photographs to Myer within a week, that payment of the \$12,000 would be made to Clique Photography, and that the photographs would be framed by Myer in such a way as to ensure the long term preservation of and suitability of the photographs for acceptance by public galleries or museums. Those additional terms derive from the evidence of Ms Jovanovic.<sup>[6]</sup> It was put to her in cross-examination that the transaction was a sale and she denied this.<sup>[7]</sup>

13. The Magistrate had the opportunity of hearing the oral evidence of Ms Jovanovic and Mr

Kelly. In his written judgment<sup>[8]</sup> he commented as follows on that evidence and set out his reasons for his findings as to the nature of the contract.

It is noted Mr Kelly in his evidence could not recall ever having read [Exhibit E]. More specifically and not unsurprisingly he recalled very little at all. In the main his evidence was based upon what he usually did if a particular event took place . . .

Generally speaking, on the issue on what were the terms of the agreement the evidence of Ms Jovanovic was clear, truthful, candid and credible. Ms Jovanovic made concessions readily where appropriate. In my opinion she had a clear recollection of her dealings with Mr Kelly.

Mr Kelly on the other hand had little actual recollection of many of the important matters at all. This did not surprise me given the long lapse of time involved since the making of the contract. His evidence was in essence based on the manner upon which he usually carried out transactions such as this. His assertion that this agreement could only be one by way of an immediate sale helps make the defendant's case in my view less likely than the case of Ms Jovanovic. The plaintiff's case was based on a clear recollection of events. The evidence of Mr Kelly is not preferred.

There are a number of additional reasons that the plaintiff's version is preferred. [Exhibit E] supports the plaintiff's case that the transaction was not an outright sale because of its wording which refers to "display/exhibition purposes", the retention of copyright, the restrictions on "reproduction, sale or disposal" and the ultimate use to be made of the photographs.

The invoices also support the plaintiff by the reference to "photographic prints for exhibition".

At the time of the first meeting Mr Kelly was extremely busy carrying out a huge project make it less likely [sic] that he would have remembered or indeed have bothered to consider such a small transaction (in his terms). The details such as [absence of?] proper documentation and the shortage of time add even further to the plaintiff's version of events being more probable in my opinion . . .

Mr Kelly denied in his testimony ever saying to Ms Jovanovic's solicitor that he could not remember whether the arrangement was a sale or loan. Her solicitor swore that was what Mr Kelly had said to him.<sup>[9]</sup> The evidence of the solicitor of this admission is in my opinion preferable to that of Mr Kelly.

14. The photographs were used by Myer for exhibition and Ms Jovanovic's evidence was that she saw them exhibited in Myer stores several times a year until 1999, after which she was too busy to visit.<sup>[10]</sup>

15. Mr Barrett, for Myer, referred to a number of matters which he submitted were consistent with the transaction having been a sale of the photographs from Ms Jovanovic to Myer. However, this proceeding is an appeal on a point of law, not an appeal by way of rehearing. It is not for this Court to decide on the evidence whether or not the transaction was a sale. The task of this Court, as set out in the extract from *Spurling* cited at [7] above, is to "confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come".

16. I am satisfied that there was evidence upon which the Magistrate, as a reasonable man, might come to the conclusion set out in [12] above as to the nature of the transaction, namely that it was a bailment and not a sale, and thus that ownership of the photographs remained with Ms Jovanovic. In addition to the evidence cited above, there is material in the evidence of Ms Jovanovic to which the Magistrate did not refer directly in his judgment and which supports that conclusion. I note her statements that "my concern was about getting the pictures back at the end of it. That was the thing I was the most concerned about";<sup>[11]</sup> and "I was going to get the benefit of getting them back and doing something with them, and I don't have that any more."<sup>[12]</sup> When asked about the difference between her deal with the National Gallery earlier in 1995 and her deal with Myer, her explanation was that the Gallery had approached her to purchase certain images for a certain price, but Myer had approached her to produce certain images for exhibition: "It was always an exhibition of the work that they wanted to produce."<sup>[13]</sup>

17. As the owner of the photographs, which have neither been returned to her, nor dealt with in accordance with her wishes as expressed in the agreement, Ms Jovanovic has suffered a loss. The answer to question (a) in the Master's order turns on whether that loss is compensable.

**Conversion**

18. The Magistrate found<sup>[14]</sup> that Ms Jovanovic had bailed the 132 photographs for an indefinite period, i.e. until Myer had finished with them. That was a finding open to him on the evidence before him. It was also open to him to find that the agreement relating to the disposition of the photographs when they were no longer required for display was an expression of the wishes of Ms Jovanovic, with the agreement of Myer, as to what was to be done with her property when that time arrived. In evidence she expressed enthusiasm about the prospects of donating the photographs to galleries, both overseas and regional.<sup>[15]</sup> She also expressed enthusiasm at the prospect of Myer being involved in that process.<sup>[16]</sup>

19. As Windeyer J said in *Hobbs v Petersham Transport Co Pty Ltd*:<sup>[17]</sup>

A bailment comes into existence upon a delivery of goods of one person, the bailor, into the possession of another person, the bailee, upon a promise, express or implied, that they will be re-delivered to the bailor or dealt with in a stipulated way.

In this case the relevant promise was that the photographs would be used for display and when they were no longer required for display they would be dealt with in the manner set out in the last asterisked point in Exhibit E.

20. The Magistrate found<sup>[18]</sup> that:

... the disposal of 99 of the photographs<sup>[19]</sup> to employees of Myers clearly represents a serious breach of the contract amounting to a conversion of the whole of the photographs. ... It is a serious breach because it made it impossible for any part of the original agreement to be carried out at the time Myer's use of the photographs had finished.

... the retention by Myer of the 33 photographs<sup>[20]</sup> it has located is wrongful even if no demand had been made. They have also been wrongly retained once the demand for return was made and not complied with within the time limit of the demand. In the circumstances of this case it is my view that the failure to comply with the terms of the agreement, coupled with the failure to return any of the photographs to Ms Jovanovic amounts to an unequivocal assertion of ownership of all the photographs and is conversion. Certainly on any view 99 have been converted.

21. The Magistrate relied on the decision of the High Court in *Penfolds Wines Pty Ltd v Elliott*<sup>[21]</sup>. That decision was explained in the following terms by Lowe J in *Milk Bottles Recovery Ltd v Camillo*:<sup>[22]</sup>

In *Plasycod Collieries Co Ltd v Partridge, Jones & Co Ltd* [1912] 2 KB 345 at 351, Hamilton J says that: It is well-established law that where chattels have been placed in the hands of a bailee for a limited purpose, and he deals with them in a manner wholly inconsistent with the terms of the bailment, and consistent only with his intention to treat them as his own, the right to possession revests in the owner, who can sue the bailee in trover.

In *Penfolds Wines Pty Ltd v Elliott* [1946] HCA 46; (1946) 74 CLR 204; [1946] ALR 517, Latham CJ at CLR pp 214 and 217-8, Dixon J at CLR p227, McTiernan J at CLR p233 and Williams J at pp 241-2 recognise that this is the law and the other Judge does not dissent from this proposition.

22. It was clearly open to the Magistrate to find that the actions of Myer in disposing of 99 photographs to its employees and in failing to return the remaining photographs to Ms Jovanovic were inconsistent with the terms of the bailment and consistent only with the intention of Myer to treat all of the photographs as its own, and that accordingly Ms Jovanovic had suffered a compensable loss. The answer to question (a) is accordingly No.

**Question (c)**

23. It is convenient to deal next with question (c). This question assumes that when the agreement between the parties was entered into, "the respondent was never to have the photographs returned to her". The effect of *Penfolds Wines* arises after Myer's breach of the terms of the bailment. However, leaving that matter to one side, in my view there must be implied into the agreement from the outset a specific provision as to what was to happen to the photographs if Myer should fail to carry out its obligations under the last asterisked point in Exhibit E.

24. The judgment of Mason J (with whom Stephen J agreed) in *Codelfa Construction Pty Limited v State Rail Authority of NSW*<sup>[23]</sup>, adopting the passage from *BP Refinery (Westernport) Pty. Ltd. v Hastings Shire Council*<sup>[24]</sup> where the Privy Council summarised as follows the conditions necessary to ground the implication of a term into a contract:

- (1) [The term] must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that 'it goes without saying';
- (4) it must be capable of clear expression;
- (5) it must not contradict any express term of the contract.

25. The agreement between the parties contains no provision as to what was to happen to the photographs should Myer not wish to deal with them in the manner agreed, or should it fail to do so. An implied term that, in that situation, they should be returned to their owner, Ms Jovanovic, seems to me to meet all the requirements set out in *Codelfa*. I would refer in particular to the passages from the evidence of Ms Jovanovic cited at [16] above and to the requirement in Exhibit E that the photographs are not to be sold or disposed of without the permission of Ms Jovanovic or her agent.

26. If such a condition is to be implied, it follows that Ms Jovanovic was entitled to possession of the photographs at the time the conversion took place, that is to say in 2000 when 92 photographs were disposed of to employees of Myer, and since 2002 when there has been no response to the request for the return of the remaining forty.

27. No such implied condition was pleaded. However, I note the inclusion in the particulars of loss and damage of a claim for loss of the use, enjoyment and possession of the photographs.

28. I note the evidence of Ms Jovanovic that she did not expect the photographs to be returned to her.<sup>[25]</sup> However, it is clear from the context that that statement was premised on the expectation that Myer would comply with the agreement.

29. I find that question (c) is based on a false premise, and accordingly it is not necessary to answer it.

### Question (b)

30. The Magistrate referred to the judgment of Menzies J in *Butler v Egg and Egg Pulp Marketing Board*<sup>[26]</sup> where His Honour said:

There is no hard and fast rule that the value of the goods at the time of the conversion is always the measure of damages to be assessed for the conversion ... . The true rule is ... that the plaintiff is entitled to no more than the real damage he has sustained.

He found that the real damage sustained by Ms Jovanovic by reason of the conversion "is not in my view nominal and is the present market value of all the photographs."

31. After consideration of the extensive evidence on this point, he assessed the market value of the photographs at \$600 each and on that basis assessed damages for conversion at \$79,200. As that amount exceeded the jurisdiction of the court and the plaintiff abandoned the excess over and above the jurisdiction, he gave judgment in the sum of \$40,000. The assessed value of \$600 per photograph is not challenged in this appeal.

32. Mr Barrett, for the appellant, submitted that Ms Jovanovic was not entitled to damages on the "real damage" basis, because an assessment on that basis would have the effect of putting her in a better position than she would have been in had the contract been performed.<sup>[27]</sup>

33. The problem with this submission is the impossibility of knowing what position Ms Jovanovic would have been in had the contract been performed. The first set of photographs



would have been donated to a public gallery or museum, and it is agreed that the only significant benefit which Ms Jovanovic would have received from that set would have been the prestige to be gained from having her photographs in such an institution. There is no evidence from which to attach a value to that prestige.

34. There is no way of knowing what would have happened to the second and third sets of photographs, had Myer carried out its part of the contract. Its only obligation in that regard was to engage in consultation with Ms Jovanovic as envisaged by Exhibit E. In the events which happened, Myer clearly lost interest in all of the photographs after they were no longer required for display. That being so, there is a clear possibility that, had the consultation envisaged by Exhibit E occurred, Myer would simply have returned the second and third sets of photographs to Ms Jovanovic as owner, to deal with them as she desired.

35. However, the evidence is that Ms Jovanovic, in that situation, would have proceeded to donate the photographs to some gallery or museum. I note her statement cited in [16] above "I was going to get the benefit of getting them back and doing something with them", and the enthusiasm which she expressed about the prospects of donating the photographs to museums or galleries.

36. On that basis, I find that it was not open to the Magistrate to find, as he did, that there should be an award of damages measured by the real value of the photographs. The appropriate measure of damages is the value of the prestige to be attached to having the photographs in museums or galleries, a matter on which there is no evidence before the Court. The answer to question (b) is accordingly Yes.

37. I invite submissions from counsel as to the form of the orders to be made as a result of these findings and also in respect of the second appeal.

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[1] The letter was addressed to Mr Kelly at Myer/Grace Bros, but nothing turns on this.

[2] The Magistrate at p5 of his judgment states that only 33 have been found, but it appears from the transcript at pp26-27 that a further seven were located just before the commencement of the hearing before him, and the hearing proceeded on the basis that forty was the correct figure.

[3] Transcript p3.

[4] Judgment p8.

[5] Judgment p4.

[6] Transcript pp8, 9 and 67-8.

[7] Transcript p60.

[8] At pp3-4.

[9] This evidence appears at transcript p188-189.

[10] Transcript p23.

[11] Transcript p9.

[12] Transcript p86.

[13] Transcript p91.

[14] Judgment p8.

[15] Transcript pp18, 62, 87.

[16] Transcript p58.

[17] [1971] HCA 26; (1971) 124 CLR 220 at 238; [1971] ALR 675; 45 ALJR 356.

[18] Judgment p8.

[19] actually 92, see [2] above.

[20] actually 40, see [2] above.

[21] [1946] HCA 46; (1946) 74 CLR 204; [1946] ALR 517.

[22] [1948] VicLawRp 58; [1948] VLR 344 at 346.

[23] [1982] HCA 24; 149 CLR 337 at 347; (1982) 41 ALR 367; (1982) 56 ALJR 459.

[24] [1977] HCA 40; (1977) 180 CLR 266; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20 at 26; 32 ALT 41.

[25] Transcript p57.

[26] [1966] HCA 38; (1966) 114 CLR 185 at 192; [1966] ALR 1025; 40 ALJR 114.

[27] See *Commonwealth v Amann Aviation* [1991] HCA 54; (1991) 174 CLR 64 at 82; (1991) 104 ALR 1; (1991) 66 ALJR 123; [1992] Aust Contract Reports 90-007 per Mason CJ and Dawson J.

**APPEARANCES:** For the appellant Myer Stores Limited: Mr MP Barrett, counsel. Middletons Lawyers. For the respondent Jovanovic: Mr E Heerey, counsel. Foster Hart, solicitors.