

39/04; [2004] VSC 475

SUPREME COURT OF VICTORIA

**BARBER v CARRIER AIR CONDITIONING PTY LTD**

Smith J

18, 23 November 2004

**CIVIL PROCEEDINGS – CONTRACT – SALE OF GOODS – PAYMENT REQUIRED BEFORE DELIVERY – GOODS DELIVERED – PAYMENT NOT MADE – CLAIM FOR PAYMENT BY VENDOR – FINDING BY MAGISTRATE THAT PURCHASER CARRIED ONUS OF PROOF AS TO PAYMENT – WHETHER MAGISTRATE IN ERROR.**

1. The law is that speaking generally the defendant to a claim for goods sold and delivered must allege and prove payment by way of discharge as a defence to the action.

*Young v Queensland Trustees Ltd* [1956] HCA 51; (1956) 99 CLR 560; [1956] ALR 939, applied.

2. Where a debtor was being sued after delivery of goods and the issue was whether payment was made for the goods, the burden of proving that the money had been paid rested with the debtor. Accordingly, a magistrate was not in error in finding that the debtor in alleging payment bore the onus of proof on that matter.

**SMITH J:**

**The proceedings**

1. Graham Barber (Barber) has appealed from an order, made on 13 May 2004 by the Magistrates' Court at Melbourne, whereby he was ordered to pay \$14,201 for goods sold and delivered to him by the respondent Carrier Air Conditioning Pty Ltd (Carrier).

2. It was common ground at the hearing that the goods had been delivered. It was also common ground that it was a term of the contract between Barber and Carrier that payment was to be made prior to delivery. Some oral evidence was called as to payment, but little or no documentary evidence was provided. Barber maintained that he had paid the sum of \$14,201 in cash to Carrier.

3. As His Worship stated, the only question was “whether or not payment was made?” The state of the evidence was such, in his view, that it was necessary to determine who carried the onus of proof. He concluded, relying upon *Young v Queensland Trustees Ltd*<sup>[1]</sup> that the onus of proof of payment of the debt rested with Barber. His Worship then stated his conclusion that:

“I have to say, carefully considering as I have attempted to all the evidence and all the possible scenarios, I am left in a state of uncertainty, therefore there must be judgment against the defendant.”

**Analysis of issues raised by the appellant**

4. As noted above it was common ground, that the contract provided for payment prior to delivery. Counsel for the appellant submitted that there was no evidence to suggest that the contract had been varied. Further, the goods were delivered under the contract.

5. Counsel submitted that the case did not fall within the ratio of *Young v Queensland Trustees Ltd*.<sup>[2]</sup> He submitted that that case is authority for the proposition that once the debt is established, it is up to the defendant to plead payment by way of discharge to an action for indebtedness in respect of an executed consideration. Counsel argued that that case concerned the situation of payment for goods made at delivery, or subsequent to delivery. Further, the present case was not a case of an over the counter exchange of goods where it might be said there was a period of notional indebtedness for a short period of time. Counsel for the appellant relied on passages appearing in the judgment<sup>[3]</sup> in which was discussed a difference of view that arose in the 19th Century as to the effect of a “ready money sale”. The Court stated:

“If money was paid over the counter in exchange for goods should the transaction be resolved notionally into indebtedness and contemporaneous payment or should it be treated as one where there was no debt even notionally?”

After referring to some of the authorities their Honours noted:

“There is a relevance in this controversy to the present question. For the basis upon which it proceeded is the tacit assumption that if a debt arose, payment by way of discharge must be pleaded by way of confession and avoidance and that means that the burden of proof would rest on the defendant.”

In the present case, the appellant argued that because the contract required payment prior to delivery there could not be a precedent debt established and that that was necessary before it could be said that the debtor carried the onus of proof of payment.

6. Both parties referred me to a number of authorities which address the issue of burden of proof in different circumstances, but they were not directly in point.<sup>[4]</sup>

7. The issue of burden of proof, in my view, is to be determined by the application of the principles discussed in *Young v Queensland Trustees Ltd*.<sup>[5]</sup> It seems to me that the critical relevant statement of principle is contained in the following passage:<sup>[6]</sup>

“A debt recoverable under an *indebitatus* count was not and is not now conceived of simply as a cause of action for breach of duty or obligation. In other words it is a mistake to regard the liability to pay a debt of a kind formally recoverable in debt or *indebitatus assumpsit* as no more than the result of a breach of contract, a breach which the creditor must affirmatively allege and prove. It is, too, a mistake to suppose the general issue was always a plea doing no more than negating the essential ingredients in the plaintiff's *prima facie* cause of action. For a long period before 1834 it had come to be a plea denying that at the commencement of the suit a cause of action subsisted in the plaintiff, whether because having existed it had ceased to exist, or because it had not come into existence or was incomplete. The law was and is, that speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration.”

8. The situation in the present case is not one where the debtor was being sued prior to delivery. The debtor is being sued after delivery and the issue is whether payment was made for the goods. Carrier has alleged that it performed its part of the contract by delivering the goods and seeks payment for it. Counsel for the appellant properly conceded that if payment had not been made, payment would now be required. The situation is one, however, where Barber is arguing that the debt had ceased to exist, or that it never came into existence. Assuming such analysis is open where the goods have been delivered, it seems to me that the principles stated in the above passage from *Young v Queensland Trustees*<sup>[7]</sup> have the effect that in either event, the burden of proving that the money had been paid rested with the debtor, Barber, the appellant in this case.

9. Counsel for the appellant also submitted that the plaintiff, Carrier, carried the burden of proving a variation of the contract.

10. This was not raised as a separate matter in the appeal, but was, I assume, raised in support of the proposition that the plaintiff carried the onus of proof of non payment. The plaintiff, however, was under no obligation to establish a variation of contract. The evidence led and the case advanced by the plaintiff involved two possible explanations for delivery without payment. One was a variation of contract and the other was simply that a mistake was made in delivering prior to payment. Neither matter was an element of the cause of action that the plaintiff had to prove. They were simply possible explanations for what occurred. The fact remained that whatever may have occurred, if the goods were delivered and were not paid for, there was a debt that had to be met and Barber, in alleging payment, bore the onus of proof on that issue.

## Conclusion

11. For these reasons I am not persuaded that the appellants should succeed in this appeal.

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[1] [1956] HCA 51; (1956) 99 CLR 560; [1956] ALR 939.

[2] Above.

[3] At 565, 566.

[4] *Heydon v Perpetual Executors Trustees & Agency Co (WA) Ltd* [1930] HCA 26; (1930) 45 CLR 111; V, *Coschot v Sakic* (1998) 44 NSWLR 667; *Rondo Building Services Pty Ltd v Casaron Pty Ltd* [2003] QCA 78; [2003] 2 QDR 558, *Cavasinni v Cavasinni* [2001] NSWSC 223, *Rema Industries and Services Pty Ltd v Coad* [1992] FCA 114; (1992) 107 ALR 374; (1992) 7 ACSR 251; (1992) 10 ACLC 530; (1992) 10 ASCR 530, *Leigh-Mardon Pty Ltd v Wawm* (1995) 17 ACSR 741; 13 ACLC 1; *Goodchild v Pledge* [1836] EngR 170; (1836) 1 M & W 363; 150 ER 474; 5 Dowl 89, *Pordage v Cole* [1845] EngR 189; 85 ER 449.

[5] Above.

[6] At 569.

[7] At 569.

**APPEARANCES:** For the appellant Barber: Mr M O'Connor, counsel. Andma Legal Pty Ltd, solicitors. For the respondent Carrier Air Conditioning Pty Ltd: Mr M Dean, counsel. GSM Lawyers.

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