IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2011-404-001590
[2012] NZHC 982

UNDER	the District Courts Act 1947
BETWEEN	MJN MCNAUGHTON LIMITED Appellant
AND	RICHARD JAMES THODE Respondent

Hearing: 10 May 2012
(On the Papers)

Counsel: S J Ropati for the Appellant
G P Blanchard for the Respondent

Judgment: 10 May 2012

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 10 May 2012 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: G P Blanchard P O Box 1235 Shortland Street Auckland 1140 for the Respondent

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Facts

[1] The appellant, MJN McNaughton Limited (McNaughton), is a manufacturer of timber joinery. The respondent, Richard James Thode, was a director of Nikau Living Ltd (Nikau), a building company currently in liquidation. In March 2008, McNaughton delivered timber joinery, which it had manufactured, to a building site of a residential building that was being constructed by Nikau. McNaughton was not paid for this joinery.

[2] As Nikau then went into liquidation, McNaughton brought proceedings in the District Court against Mr Thode claiming that it was entitled to recover the cost of joinery from him, as he was a guarantor under the terms of supply between McNaughton and Nikau. McNaughton was unsuccessful and appealed to this Court.

[3] In the District Court, Mr Thode had successfully denied that there was a contract between McNaughton and Nikau to supply the joinery that was delivered in March 2008.

[4] On 21 October 2011, I delivered an interim judgment in which I found at [26] that there was a contract to supply the joinery which McNaughton had delivered to Nikau's building site. At [31] of the interim judgment, I found as follows:

> The joinery was delivered some time in March 2008, but Nikau did not pay for the joinery. It was stored on site in a garage and none of it was used in the building project. The appellant discussed with Mr Lamb, who was buying the Victoria Avenue property, the possibility of him purchasing the joinery, but the price he was prepared to pay was not acceptable to the appellant. The sale of the property was to settle in May 2008, but shortly before the settlement date, the appellant removed the joinery from the site. It remains with the appellant.

[5] At [32]-[35] of the interim judgment, I identified what I described as outstanding issues that had not been addressed, either in the District Court or by the parties in the appeal to this Court. I saw those issues as pivotal to the outcome of the appeal. I provided the parties with the opportunity to address those issues. They were also given the opportunity of inviting me to refer the case back to the District Court for rehearing. The parties chose to continue with the appeal and to

address the outstanding issues by way of written submissions. Having considered their submissions, I am now in a position to deliver a final judgment. This has been done on the papers. This judgment should be read together with the interim judgment which sets out the factual context in which the dispute between the parties arose.

Application of the Sale of Goods Act 1908

[6] At [32] of the interim judgment, I found that the first outstanding issue the parties needed to deal with was whether the contract for the supply of the joinery was governed by the Sale of Goods Act 1908 (the SOG Act). The parties now concede that it does; thus, they impliedly accept that the joinery constitutes "goods" for the purpose of that Act.

[7] They also concede that the guarantee given by Mr Thode only covers liability for the contract price and not liability for damages for non-acceptance.

[8] The next question is how to characterise the nature of the breach by Nikau and the liability that arises therefrom. Here, it is important to determine whether property has passed under the SOG Act.

Passing of property

[9] Section 19 of the SOG Act states that property in specific or ascertained goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred, having regard to the terms of the contract, the conduct of the parties and the circumstances of the case. Where the parties have not shown a specific intention, the default rules in s 20 apply.

[10] Usually, if there is an express retention of title clause, that would show an intent for property not to pass until payment were made. Here, the terms of trade under which the joinery was supplied do not contain an express retention of title clause. But they did give McNaughton a security interest over the joinery.

[11] The question, therefore, is whether something less than a retention of title clause could still be interpreted to show the same intent; in particular, whether retaining a security interest over the goods is considered to be reserving a right to the goods so as to manifest an intention against the passing of property on delivery.

[12] In *Segard Masurel (NZ) Ltd v Nicol* (2008) 10 NZCLC 264,386 (HC), the agreement did not expressly provide that title would not pass until payment is made. The relevant contractual clause contemplated that payment might be made after delivery date, and the seller did not insist on concurrent payment. Cooper J held at [26] that:

> When the appellant did not insist on payment on the date of delivery of the wool, it effectively demonstrated an intention to grant credit if the goods were delivered, without requiring payment.

On this basis, Cooper J rejected the argument that the parties intended that property in the wool would not be transferred to the buyer until payment was made. As this meant the parties did not show an intention under s 19, Cooper J went on to consider the s 20 default rules.

[13] Cooper J's conclusion is also supported by the fact that under the Personal Property Securities Act 1999 (the PPS Act), retention of title is not the determinative factor. The fact that a secured party holds or does not hold title is not critical in terms of the PPS Act's operation: see *JS Brooksbank & Co (Australasia) Ltd v EXFTX Ltd (in rec & liq)* [2009] NZCA 122 at [46]. So, the fact that there is a clause granting credit is neutral for the purposes of showing intention for title to pass.

[14] Here, under Clause 5.1 of the terms of trade, McNaughton has set a condition that until the goods and services have been paid for in full, Nikau was restricted in its ability to part with possession, sell or otherwise dispose of any of the goods. Clause 5.2 provided that McNaughton has a right under the PPS Act to seize the goods if payment is not made by the due date. Those provisions are to be read in the background of the terms of trade being signed in relation to an agreement granting credit to the buyer. All relevant factors point to a situation similar to that in

Segard Masurel, where the intention seems more like one of granting credit than of retaining title, which leads me to conclude that the parties did not clearly manifest an intention under s 19 of the Act of when property is to pass. Thus, the default rules in s 20 must be considered.

Default rule on passing of property

[15] Section 20 of the SOG Act sets out different default rules for different types of goods. As the joinery had not been produced at the time of the contract, it would be considered a "future good", which means a good "to be manufactured ... by the seller after the making of the contract of the sale" (s 2(1)). So, the s 20 default rule that is relevant is Rule 5, which provides that:

> Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: ...
>
> Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

[16] When considering whether the default rule should apply, the presumption that property does not pass where the seller has reserved the right of disposal under s 21 is also relevant:

> (1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled.

(2) In such case, notwithstanding the delivery of the goods to the buyer, ... the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

[17] Therefore, for property to pass under Rule 5, these requirements must be met:

(a) There must be goods of the contractual description in a deliverable state;

(b) There must be unconditional appropriation to the contract by one of the parties;

(c) The other party must assent to the appropriated goods being those subject to the contract, whether the assent is express or implied; and

(d) The parties did not reserve the right of disposal of goods.

Application of Rule 5

Goods in a deliverable state

[18] One issue is whether the joinery was "in a deliverable state" when delivered to the seller. In s 2(4), this is defined as goods "in such a state that the buyer would under the contract be bound to take delivery of them". This refers to goods that are assembled, as opposed to goods that still need to be severed from something else, or still needed to be dismantled.

[19] Here, although the joinery was merely components in a building project, it was the responsibility of Nikau, once it had received the joinery, to incorporate it into the project. So, as far as McNaughton is concerned, its obligation was complete on delivery. The joinery was in a deliverable state after it had been manufactured.

Unconditional appropriation

[20] This requirement is more appropriate for unascertained goods than for future goods that have been specifically designed for a contract. The general principle,

according to *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240 at 255, is that unconditional appropriation requires an intention "to attach the contract irrevocably to those goods, so that those goods and no others are subject to the sale".

[21] Because the joinery was custom-made to Nikau's specifications, as soon as it was produced, I consider that it would have been appropriated to the contract; McNaughton would not have been entitled to attach any other goods to the contract because they would not meet the specifications. I consider, therefore, that this requirement was met.

Express/implied assent

[22] It seems clear that this requirement was also met. The factual circumstances and findings on the existence of a contract that were made in the interim judgment are set out at [22]-[26] of that judgment. The only way to give business efficacy to this contract is to expect that once joinery meeting the contractual specifications was manufactured, it would be appropriated to the contract. So, even though there was no express assent, Nikau's agreement with McNaughton that this specific joinery should be produced can also be understood to include an implied assent that the joinery, once manufactured, would be appropriated to the contract.

Reservation of right of disposal

[23] Whether McNaughton has reserved a right of disposal is a similar exercise in contractual interpretation as analysing the parties' intentions under s 19. Reading clause 5 of the contract as a whole, although McNaughton has placed restrictions on how the property might be used once it has been delivered, there is nothing necessarily suggesting that McNaughton still maintains the right to dispose of the goods in its own way; unlike, for example, a bill of lading made to the order of the seller. Indeed, the clause seems more consistent with an interpretation that McNaughton is anxious that the goods remain with Nikau, such that it is able to enforce its security interest if Nikau defaults.

[24] Therefore, while McNaughton has no doubt reserved some rights in the property, I consider that the clause does not amount to reserving a "right of disposal" under s 21.

Conclusion: property has passed

[25] In sum, because the parties have not clearly manifested their intention as to when property should pass, I find that the default rule for future goods in s 20 of the SOG Act applies, and s 21 regarding the right of disposal does not apply. This means that property passed when the goods were unconditionally appropriated to the contract with express/implied consent. I consider that this occurred here when the manufacturing process was completed and the joinery was ready to be delivered.

Remedy

[26] According to s 29 of the SOG Act, the buyer has a duty to accept and pay for the goods in accordance with the terms of the contract of sale. Failure to do either is a breach of that duty and could give rise to remedies available in ss 50-51 of the Act.

Contract price

[27] Since I have found that the property passed under the contract once the joinery was manufactured and ready for delivery, it follows that McNaughton is entitled to sue for the contract price. This is the appropriate remedy under s 50(1):

> Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

[28] As stated in *Gault on Commercial Law* at 3A.7(6):

> Where the seller is suing for the price, practical advantages arise. It is not obliged to prove anything other than what the price is, that it has become payable and that it has not been paid. It does not need to establish any loss, let alone that it was foreseeable or that it has done anything to mitigate its loss.

[29] So once McNaughton proves that the price has actually not been paid, and that non-payment was wrongful according to the terms of the contract, whether it has mitigated its losses or not is irrelevant.

[30] In terms of wrongfulness, where, for example, credit was granted such that the payment obligation did not have to be rendered at a specific time, or the buyer had demonstrated a willingness to pay, then refusal to pay would not be wrongful. But once the period of credit has expired and there is a failure to pay, such neglect would then become wrongful.

[31] But even where there is wrongful neglect or refusal to pay, the seller must remain in the position to perform his side of the contract, as to do so is to maintain that the contract is still alive: see *Chatfield v Jones* [1990] 3 NZLR 285 (CA), where because the sellers had sold the goods to someone else, they were treated as having cancelled the contract.

Analysis

[32] In the terms of trade, clause 3 provides that payment for deliveries of goods within New Zealand should be made on or before delivery, or, with McNaughton's prior approval, on or before the 20th of the month following the month of invoicing. Clearly, this payment obligation was not performed in accordance with the contract, so wrongfulness has been established.

[33] Although McNaughton seized the joinery, it still remains in storage and has not been on-sold. That means that if Mr Thode pays the contract price, McNaughton would still be in the position to return the joinery, in this case to Mr Thode, since he has paid for it and Nikau no longer exists.

[34] In summary, then, the requirements for an action for the contract price have been met. As Mr Thode has conceded that the guarantee would cover payment of the contract price, it follows that Mr Thode is liable for the full payment of the joinery.

Effect of repossession

[35] The above conclusion is complicated by the fact that McNaughton has repossessed the joinery, but not resold it. The legal basis for doing so must be ascertained to consider whether it affects if Nikau has to pay the contract price, which in turn impacts on Mr Thode's liability under the guarantee.

[36] Under the SOG Act, where the buyer has wrongfully failed to pay, the unpaid seller has a lien on the goods, or a right of stopping the goods in transit after he has parted with the possession of them, or a right of resale (s 41). However, a lien ends when the buyer obtains possession of the goods (s 44(1)(b)), and transit ends when the buyer obtains delivery (s 46(2)). None of these provisions specifically allow the seller to repossess goods once they have been delivered and keep them until the buyer has paid.

[37] McNaughton's right to repossess the goods must, as the contract states, be derived from the PPS Act. Section 109 provides that a secured party may take possession of and sell the collateral when:

(a) The debtor is in default under the security agreement; or

(b) The collateral is at risk.

[38] As the agreement provided that Nikau would pay either on delivery or before the 20th of the following month (which one applies is not material here) and failed to do so, it was in default under the security agreement and McNaughton was entitled to take possession.

[39] Normally when a creditor has taken possession of the collateral, it has two options: either to sell it (s 109); or to retain it and apply it in satisfaction of the debt (s 120). Both of these require further action to be taken, including giving notice to all interested parties of its intention to do so (s 114 and s 120(2) respectively). Failing these procedures, neither option has been adopted.

[40] So, the legal position is that McNaughton seized possession of its security interest to which Nikau has legal title. It has not done anything under the PPS Act to satisfy the debt in any way. So, the debt is still owing, despite repossession. There is nothing in the PPS Act that has the effect of detracting from the analysis of McNaughton's right to sue for the contract price under s 50(1) of the SOG Act.

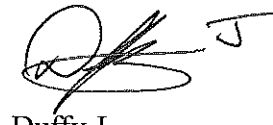
[41] Once the contract price has been paid, Mr Thode may redeem the collateral from McNaughton under s 132 of the PPS Act. This avoids the situation where McNaughton would get the contract price and still retain possession of the goods.

Result

[42] McNaughton has succeeded in its appeal. It is entitled under the terms of the guarantee to recover the contract price for the joinery of $30,177.01 from Mr Thode.

[43] The terms of trade provide for payment of interest on outstanding credit. McNaughton may be entitled to claim pre-judgment interest under those contractual terms. Whether McNaughton is entitled to claim contractual interest post-judgment instead of interest under the Judicature Act 1908 is another question yet to be determined.

[44] Should the parties be unable to resolve any questions regarding payment of interest (before and after judgment) or costs, they have leave to file memoranda on those issues.



Duffy J