
COOK AND ANOTHER

v.

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED, AND HANSON

REASONS FOR JUDGMENT

Oral

Judgment delivered at ~~Melbourne~~ **PERTH**

on **Friday 10th September 1971**

COOK AND ANOTHER

v.

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED, AND HANSON

ORDER

Appeal dismissed with costs.

COOK AND ANOTHER

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THE COMMERCIAL BANKING COMPANY
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JUDGMENT
(ORAL)

BARWICK C.J.

COOK AND ANOTHER

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The facts of this matter, including the written agreement between the appellants and Wool Exporters Pty. Ltd. fully appear in the reasons for judgment of the learned Chief Justice of Western Australia: I have no need to repeat them.

The question is whether the property in the 116 bales and 6 bags of wool was still in the appellants on 13th December, the date when the second respondent, who was the receiver for the debenture holder, took possession of that wool. The agreement was an agreement to sell the whole of the wool on the flock of sheep in the possession of the appellants at that time: it was thus an agreement for the sale and purchase of specific goods which were not then in a deliverable state.

Whilst the property in those goods will pass at the time the parties intended that it should pass. Section 18 Rule 2 of the Sale of Goods Act 1895 of the State of Western Australia would ensure that in default of a contrary intention the property in the wool did not pass until the wool was in a

deliverable state: but the rule would do no more than that. There was quite clearly no intention that the property in the wool should pass while it was still on the sheep's back.

The contract contained no express terms as to the passing of the property. There were special conditions as to the ascertainment of the total price payable and as to the time of its payment. These had been inserted at the instance of the appellant.

There seems little in the conduct of the parties on which to found anything as to their common intention with respect to the passing of the property. I would not myself infer anything from the evidence as to the insurance of the wool from the time it was baled although clearly it would be possible to conclude from that evidence that the wool was considered by the parties to be at the buyer's risk from the time it was placed on the railway trucks at Kendenup.

The wool, having been placed there on the trucks, was delivered by the railways to the buyer or to carriers for carriage to the buyer's wool store. Although there does not seem to have been direct evidence of that fact it may fairly be inferred that when placed on the railway trucks the wool was consigned to the buyer, but in any case as was evidently contemplated by the parties the rail freight was paid by the buyer for its own account.

To my mind the most significant provision of the contract in considering when the property in the wool was intended to pass is that which called for delivery of the wool in good order and condition on trucks at Kendenup. When so delivered the seller had performed the contract so far as it placed any obligation on him. The goods were at that time placed in the possession and

control of the buyer and, as I think, in his capacity as buyer and not in any sense as agent of the seller.

True it is that the total price to be paid for the wool could not then be known but in my opinion that situation is not inconsistent with the passing of the property to the buyer on delivery. It is also true that the appellant had a right under the contract to be present at the weighing of the wool: but to my mind so far from this right being inconsistent with the passing of the property at an earlier time its existence tends towards the view that the property was intended to pass before the weighing. The condition as to the owner's presence at the weighing seems to me to be founded on an unexpressed assumption that but for that condition the buyer would have had the right to weigh the wool where when and how it might see fit. The condition limits that right but only to the extent of requiring the seller's presence. The seller's right to be present is derived, it seems to me, not from ownership of the wool but from the presence in the contract of the special condition.

The arrangement between the parties clearly was not for cash against delivery but provided in express terms for cash on the ascertainment of weights. The stipulation for the presence of the seller at the weighing was not in my opinion to protect the seller's continuing ownership of the wool but rather to protect him in the ascertainment of the total price payable.

I do not think that any real assistance in the resolution of the critical question in this case is to be derived from the decided cases to which reference has been made in the course of argument. The question is as to the intention of these parties. No application of any rule can itself supply the answer.

After listening to all that has been said I can find nothing in the contract, the circumstances of the case or the conduct of the parties which leads me to doubt that the common intention of the parties was that the property should pass to the buyer on delivery of the wool on railway trucks at Kendenup.

I conclude therefore that the property in the wool passed to the buyer on that delivery: I agree with the reasons in this respect of the learned Chief Justice. Thus the property in the wool was not in the appellant on 13th December. Consequently the second defendant's dealings with the wool on that date were not wrongful as against the appellant. I therefore agree with the order of the Supreme Court dismissing the action. It follows that in my opinion this appeal must be dismissed.

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JUDGMENT

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McTIERNAN J.

COOK AND ANOTHER

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I agree with all that has been said by the Chief Justice. I think it is clear that the decisive condition of the contract is expressed in the words "delivered on trucks at Kendenup", and that when that condition was fulfilled the property had passed from the vendor of the wool.

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JUDGMENT
(ORAL)

MENZIES J.

COOK AND ANOTHER

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I agree.

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JUDGMENT
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WALSH J.

COOK AND ANOTHER

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I agree with the reasons given by
the Chief Justice.

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(ORAL)

GIBBS J.

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I agree.