Casenotes

Catt v Woolworths (SA) Ltd (1994) 63 SASR 145 [1]

The last few years have seen a proliferation of "salad bars" near the delicatessen areas of large supermarkets. Instead of ordering salad from an assistant behind the counter, it is now possible for a customer to choose at leisure the size of tub, the type of salad, and serve themselves with the spoons provided. Having attached the lid, they proceed with the salad to the cash register. Presumably any possible loss to the store due to the uniform pricing of the different types of salad, is more than made up for by savings in salaries and the increase of price in previously cheaper varieties.

What implications does this have for the lawyer? The recent case of *Catt v Woolworths (SA) Ltd*, heard before Nyland J of the Supreme Court of South Australia, revealed issues concerning food hygiene regulations, but more interestingly provided an example of the application of that case beloved of all Contract I students, *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd*.[2]

It will of course be remembered that the *Boots* case found that a self-serve store, in displaying goods that customers may select themselves before proceeding to a checkout, is not making an "offer" as that term is understand in contract law. Rather, the store is giving an "invitation to treat". The customer makes the offer when he arrives at the counter, which is then accepted or rejected by the store-keeper or his agent.[3]

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1 (1994) 63 SASR 145.

2 [1952] 2 QB 795, [1953] 1 QB 401 (Court of Appeal) (*'Boots Pharmacy'*).

3 Cf esp. the judgment of Lord Goddard CJ at first instance, [1952] 2 QB 795 at 802, adopted by the Court of Appeal.

The decision has not been without its critics.[4] B.S. Jackson in particular subjects it to a searching critique in his "Offer and Acceptance in the Supermarket".[5]

How did the principle of *Boots Pharmacy* fare in this case? The facts as set out in the decision of the Magistrate at first instance accord with the usual supermarket experience.

> "It was agreed by the parties the defendant is an incorporated company, that on the day in question the defendant carried on business at Morphett Vale, that on the same day, food, namely salad, was exposed for sale at the defendant's premises in the self serve salad bar, and that Jodie Ann Leslie was employed by the defendant...
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> Jodie Leslie told the court her duties, amongst other duties, [were] to generally supervise the salad bar and in particular place the containers of salad on the bar, refill the containers as required, and if any of the serving spoons had slipped down into the salad, to retrieve those spoons. Clearly therefore, Jodie Ann Leslie comes within the definition of a person who handles food.
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> The evidence is that a customer who wants to purchase a salad or several types of salad, would take an empty container or containers at the salad bar and fill them with whatever her or his requirements were, by the use of serving spoons, and then place a lid on the container or containers. Having done that, the customer would move from the salad bar, collect any other food or items that he or she wanted, approach the checkout counter and checkout operator, and place any items in his or her hands, on the counter with a view to paying for them. If the items have been placed by the customer in a carry basket or simply a basket, he or she removes the items from the basket at the checkout so the operator at the checkout can add up the amount to be paid by the customer. Alternatively, the items are taken out of a basket by the customer or by the seller or both."[6]

A charge was brought of a breach of sub-regulation 11(1) of the *Food Hygiene Regulations* 1990 (SA), which provides that:

> "A person who handles food for sale must not sell by retail food that is ordinarily consumed in the state in which it is sold unless the food is to be delivered to the purchaser completely wrapped or packed."

There were various exceptions in sub-regulation 11(2), none of which covered the present case. The regulations were made pursuant to the *Food*

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4 See the list cited in J N Carter and D J Harland (eds), *Contract Law in Australia*, 2nd ed, Sydney: Butterworths, 1991, para [213] at n 66.

5 (1979) 129 *New Law Journal* 775.

6 (1994) 63 SASR 146–147.

Act 1985 (SA), which in s 3 contains the following definition of the phrase "to sell":

> "'to sell' includes —
> (a) to offer, expose, or have in possession, for sale;
> (b) to deliver for the purpose, or in pursuance, of sale;..."

The question which then arose was, by allowing the customer to serve the salad to themselves, was the employee of Woolworths (the person who "handles food for sale"), "selling" the salad (clearly a food ordinarily consumed in the state in which it is sold) without completely wrapping or packing it? In other words, was the food "sold" when it was put in the plastic tub, before the lid was attached?

While it is not clear from the judgment of the Supreme Court, it seems fairly clear that the Magistrate analysed the legal situation in accordance with the principle in the *Boots* case. He held that the store, in displaying the salad, was making an "invitation to treat". He went on:

> "The *delivery* is complete when the customer transfers the salad to the containers provided by the store, before actually the top is placed on the container, because possession or control of the food item concerned is then with the purchaser."[7]

But as far as the moment of sale is concerned, he continued:

> "I believe a sale takes place when the customer places the items on the counter, either in the basket or from a shopping trolley to allow the checkout operator to ascertain the price and inform the customer of the price. The customer then pays the amount and either the checkout operator or the customer or both puts the items into a receptacle which the customer will carry from the premises."

On the basis that a sale did not take place until the customer had reached the checkout, by which time the tub was sealed, the Magistrate held that no offence had been committed.

An appeal against the Magistrate's decision was taken to the Supreme Court, and was successful. Nyland J did not doubt the correctness of the Magistrate's view that the sale took place at the counter on general common law principles. But she held that in this situation the specific statutory definition of "sale" extended the common law meaning to cover the action of "offering, exposing or having in possession for sale". In other words, what at common law would be an "invitation to treat", in terms of the *Food Act* was a "sale".

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[7] (1994) 63 SASR 147, my emphasis.

Her Honour said:

> "... in interpreting the legislation it is necessary to bear in mind that the clear intention is to ensure that food which is not to be consumed on the premises but which is to be consumed in the state in which it is sold is to be delivered to a customer in an uncontaminated state. That being the case I am satisfied that by defining the phrase "to sell" in the Act it was intended that there be an extension of the normal concept of sale to ensure that the food being acquired by a purchaser is in a pristine condition as soon as it is delivered. Accordingly, the legislation contemplated that, in some circumstances, the sale could take place at a time earlier than the point at which the transaction would more usually be concluded with payment [for] the goods...I am nevertheless satisfied that in this case the sale occurred at the point at which the magistrate correctly found that the delivery had been made to the prospective purchaser i.e. when the customer transferred the salad to the container but before the top was actually placed on the container. The salad was therefore not delivered completely wrapped or packed as required by the Regulations."[8]

Her Honour indicated that perhaps this type of self-serve arrangement was not in the mind of those who had framed the regulations, but that nevertheless an offence had been committed.

It is a well-known phenomenon of the area of what we might call the "law of shopping" that many of the "every-day" offer and acceptance cases arise not from a civil case for breach of contract (because rarely will any damage be sufficient to justify court proceedings), but from criminal prosecutions. Cases like *Fisher v Bell*[9] and *Partridge v Crittenden*[10] illustrate this. *Catt* is another example where the contractual categories of "offer" and "invitation to treat" were applied by the Magistrate in criminal proceedings.

As Jackson points out, the decision in the *Boots Pharmacy* case was by no means the only possible analysis of the "self-serve" situation. He suggests:

> "the principles of offer and acceptance... indicate that the preferred analysis must normally be [that] the offer is the display, the acceptance the presentation of the goods by the customer to the shopkeeper."[11]

We may raise the question whether the *Boots* result itself, as well as the basic reasoning, might not need to be distinguished now that "self-serve" food bars are more common (not only in supermarkets, but also in a number of fast-food restaurants). If a store in such a situation is simply making an invitation to treat, then does a customer have a right to put

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8 *Catt v Woolworths (SA) Ltd*, above n 1, at 149.
9 [1961] 1 QB 394.
10 [1968] 2 All ER 421.
11 B S Jackson, above n 5 at 776.

this food on a plate and walk off without paying for it, when health regulations and commercial common sense would seem to dictate that the store cannot offer the food to another customer?

Since the question as to whether something is an "offer" or merely an "invitation to treat" is in the end an analysis of the intention of the parties concerned, it would seem to be preferable to overturn the *Boots* analysis in the case of "self-serve food" bars. The customer would be held to have accepted the store's offer by taking the food, and be bound to pay. Stores would probably be well advised, however, to display warning notices near the food as to the effect of taking, to avoid unnecessary argument.

In the absence of such a notice, *Catt* suggests that courts, without argument, may continue to apply the *Boots Pharmacy* "invitation to treat" principle until the issue is specifically presented before a higher court. The all-pervasiveness of legislation, however, may mean that, as in the *Catt* case, a decision will often turn on the provisions of a particular statute.[12]

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[12] This principle is illustrated in the appeal from the decision of Nyland J to the Supreme Court (In Banco) at (1994) 63 SASR 150 [King CJ, Bollen and Debelle JJ]. Her Honour's decision was reversed on a point of interpretation relating reg. 11(1) to other provisions concerning food hygiene. The Chief Justice (with whom the other Justices agreed) held that to apply the extended definition of "sell" to reg. 11(1) would "produce absurd consequences" (at 153). The word "sell" ought to be given the meaning of "selling in the ordinary sense". On the question with which this note is concerned, King CJ commented in passing that: "The sale, according to the ordinary meaning of that concept, occurred at the checkout point" (at 152).