IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 309/83

BETWEEN ROLAND DOYLE

First Appellant

A N D ARMY SURPLUS DISPOSALS LIMITED

Second Appellant

A N D BENJAMIN DOYLE

Respondent

Hearing: 2 February 1984

Counsel: K F Gould for Appellants
A W Grove for Respondent

Judgment: 6 March '84

JUDGMENT OF THORP J

This is an appeal against the decision of His Honour, Judge Nicholson, in the District Court at Auckland, delivered on 3 March 1983, allowing a claim brought by the respondent, Mr Benjamin Doyle, against the first appellant, his brother Mr Roland Doyle, and the second appellant, a company run by his brother called Army Surplus Disposals Limited. The Statement of Claim read:

> " 1. ON orabout the 10th day of July 1981 753 knives were delivered by mistake by the supplier thereof, The Farmers Trading Company, to the First and Second Defendants.
>
> 2. THE said goods were intended to be delivered to the Plaintiff and are his property.
>
> 3. THE value of the said knives is the sum of $1,882.50. Despite demand made of the Defendants on the 20th day of July 1981 they have failed to deliver up possession of the said knives to the Plaintiff.

WHEREFORE the Plaintiff claims:

(a) Possession of 753 knives purchased from The Farmers Trading Company or in case possession cannot be had, judgment for the sum of $1,882.50 being their value.
(b) By way of damages for the detention thereof the sum of $500. "

The case was put in the District Court, and in this Court, as being an action in detinue. For the reasons which are set out later in the judgment, I do not consider that the plaintiff has made out such a case.

The modern view that pleadings should be liberally interpreted and that the real issue raised by the pleadings should not fail by reason of the mode of pleadings, clearly deserves particular emphasis and consideration in the District Court. I have considered whether the pleadings in the present case would provide the basis for determining the dispute which is at the centre of this matter on some other basis than detinue, but as best I can judge the matter this is not feasible, principally because of the failure to join The Farmers Trading Company ("Farmers") as a party in the proceedings.

The respondent's action must therefore stand or fall as one in detinue.

It is convenient at this point to set out the facts, which can be briefly stated. The contentious area was a relatively minor part of the whole, and His Honour's findings on the conflicts were not challenged by the appellants.

Mr Benjamin Doyle and his brother, Mr Roland Doyle, operate similar businesses in the same block in Hobson Street, Auckland, a short distance from the premises of the Farmers Trading Company. There is little love lost between them. Their parents are described in the judgment as "estranged", and while Mr Roland Doyle is assisted in his business by his mother, Mr Benjamin Doyle is assisted by his father.

On 10 July 1981 Mr Benjamin Doyle negotiated with the Farmers to buy a particular type of fishing knife. He and a Mr Wayne Jones, an employee of Farmers, finally agreed that Mr Benjamin Doyle should buy the whole of FTC's stock of such knives at 45¢ per knife. Mr Jones did not know how many knives his company held in stock, so it was not possible to fix the total price there and then.

The evidence of Mr Benjamin Doyle on this point reads:

> " ... Mr Jones and I went into his office on the third floor. I proceeded in writing out a cheque and Wayne realised that he did not count the knives that he had stacked up and had in the warehouse out the back so I stopped writing the cheque. Mr Jones said 'If you give me a bit longer, I'll get the boys to count the ones out the back and they can deliver them over to your place and you can fill in the right amount on the cheque and give the cheque to the boys'. "

What happened next was that, after the knives had been collected and counted, two of Farmers' delivery boys, having been instructed to deliver them to Mr Benjamin Doyle's premises, took them instead to the appellant's premises with an invoice which stated "753 only Fish Knives", and "Amount 338.85". In the middle section of the invoice form appears the statement, after a printed notation "CUST. No. A/c.", "10/07/81 2 CASH TCT 338.85", indicating that the transaction was classified by the vendor as a cash sale.

Mr Roland Doyle stated in evidence that when the boys arrived with the invoice they asked for "Mr Doyle" and were shown to him. They said they had the invoice from Farmers and asked for payment of the agreed price. He said he asked who had ordered the knives and thought that they said "Mrs Doyle". He stated that he then assumed that his mother had ordered the knives, gave the boys a cheque for $338.85, and proceeded to take action to resell the knives. Indeed, he claims that he had sold 600 of them prior to the arrival at his premises of his brother and a representative of Farmers, after they discovered the error made by the delivery boys.

The learned Trial Judge did not accept Mr Roland Doyle's evidence that he had no idea that the goods were intended for his brother's business, nor his evidence about the immediate resale of the great bulk of the knives received.

"The possibility of confusion must always be there", said His Honour, "and I do not think for one moment there would be any misunderstanding on the part of the first defendant as to who had ordered these articles in these circumstances". That finding, of course, excludes the first appellant from the class of a purchaser for consideration in good faith and without notice.

There were some unresolved conflicts about what was said between the brothers and the representative of the Farmers in Mr Roland Doyle's shop, but clearly the latter did not agree to hand over the knives, and a formal letter of demand sent by Mr Benjamin Doyle's solicitors on 20 July 1981 did not induce him to change his mind.

On the issue of ownership of the knives the learned Judge said at pp 3 and 4 of his judgment:

> " Looking at the evidence as a whole it appears quite clear to me that there is no dispute between the Farmers Trading Company and the plaintiff as to where the property in the goods lay. They are at one that the plaintiff was the owner of the goods and entitled to possession of them. The arrangements for payment had been made which were satisfactory to both parties and I do not think it is open to the defendants in the light of the evidence I have heard to suggest that there was no complete contract between the parties nor can they successfully allege that the property in the goods had not passed to the plaintiff."

In this Court the stated ground of appeal was that the evidence did not justify the finding that the knives were the property of the respondent at the time the appellants were required to deliver them up to him, and the argument centred on the question of the time at which the plaintiff acquired property in the knives he had agreed to purchase from the Farmers.

I was far from satisfied that question was decisive. In any event it seemed to me that the evidence did not provide the basis for a positive finding that the parties had intended the property to pass at the time of the agreement, and there were time constraints affecting the advisability of adjourning the argument part heard. After discussion with counsel it was agreed that the matter should proceed to a conclusion by means of the preparation and filing of memoranda of argument in writing.

Those memoranda have now been filed and considered.

The respondent's submissions raise the question of the significance of the right of possession to the knives as distinct from the right of property in those goods. That question was raised in the District Court in the course of brief argument on an application for non-suit made at the end of the plaintiff's case. His Honour then held that as the Statement of Claim relied on an allegation that the plaintiff had property in the knives at the time of the demand, it would be unfair to let the plaintiff switch horses in mid-stream. It does not seem to have been considered then, nor at any other time during the hearing, that the plaintiff might be obliged to establish rights not only of property but also to the immediate possession of the knives. Rather, it would appear that the relative simplicity of the facts, in combination with the obviously superior merits of the plaintiff's claim on the facts as His Honour found them, obscured from all involved the desirability of commencing by determining the essential elements of claims in detinue.

Such claims were abolished in Britain by the Torts (Interference with Goods) Act 1977, in response to continuing complaints about the artificiality and illogicality of the common law rules as to detinue and trover. One of the most cogent criticisms of those rules was written for the Law Quarterly Review in 1903 by Sir John Salmond, who then said:

> " Thus if we open a book on the law of torts, howsoever modern and rationalized, we can still hear the echoes of the old controversies concerning the contents and boundaries of

> trespass and detinue and trover and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches. "

The subject, he said -

> " is a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading. "

It is ironic to note that notwithstanding the origin of that criticism, the citizens of England have for some time had the benefit of a modern code, while those in the Antipodes must still endeavour to find their way through the complexities of the common law.

That task now involves locating older editions of the standard texts and commentaries, as Davis on Torts, the only New Zealand text, deals but briefly with the topic, and Clerk & Lindsell on Torts (15th ed) is the only standard modern text which attempts to consider the law in Britain before 1977.

The most convenient summary of the law is in 38 Halsbury's Laws of England (3rd ed) under the title "Trover and Detinue". At para 1297, the section "Who May Sue" commences: "In order to maintain an action of trover or detinue, a person must have the right of possession and a right of property in the goods at the time of the conversion or detinue;". It was common in most of the texts for the remedies of detinue and trover to be considered together in this fashion, although historically they are distinct remedies, the writ in detinue being the earlier. While the cases cited in Halsbury to support the proposition set out above establish plainly enough that the proprietary interest in chattels needed to support an action in trover may be limited, there is no clear preponderance in the authorities as to the nature of the interest in chattels necessary to support an action in detinue. Most authorities favour the view that a plaintiff must have "the property" in the chattels

at the time he sues; see Rosenthal v Alderton & Sons Ltd [1946] KB 374, 377:

> " It is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed: (see, e.g., Viner's Abridgment, vol.8, p. 23; Holdsworth, History of English Law, vol.7, pp. 438, 439.) It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict. "

The authority of that statement is not aided however by a perusal of Viner's Abridgment, which at page 26 notes the availability of "detinue de biens" under which a bailee could sue in detinue, "though he be not the owner".

Nor does Holdsworth, A History of English Law provide the solid support which Viner withheld. The early history of detinue is discussed in Volume III of the History. It notes that the initial emphasis on property was under threat in the thirteenth century and states that "though the contractual aspect of debt and detinue was gaining prominence, from the reign of Edward III onwards, it never entirely prevailed over the older ideas."

The author's examination of the later development of detinue is principally contained in Volume VII at pages 437-440. At page 438 it is stated that by the seventeenth century the proprietary nature of the action had become clearer. On the following page is the statement relied on in Rosenthal, that the action was essentially a proprietary action. However that statement is but the first clause in the sentence: "The action was essentially a proprietary action; but it was also a personal action; and both the lawyers and the Legislature had gradually come to think that personal actions must be founded on either contract or tort."

Indeed, Sir William Holdsworth joined Sir John Salmond in recognising the obscurity of the basis of detinue. "To the end", he says, "the lawyers never quite made up their minds as to the nature of detinue."

Perhaps the most helpful commentary is the nineteenth century practitioners' guide and mentor, Bullen and Leake's "Precedents of Pleadings", which in the third edition at page 312 states:

> " To support this action, the plaintiff must have the right to the immediate possession of the goods at the time of commencing the action, arising out of an absolute or a special property; ..."

The cases cited in Bullen and Leake, while not all capable of complete reconcilation, show that an estate as mortgagee or as tenant for life or as bailee, could provide the necessary proprietary qualification.

What does not appear in any of the commentaries noted or in any of the authorities cited to me or since discovered, is that the contractual right of a purchaser of chattels, before the passing of property in those chattels to him in terms of his contract, can qualify as a sufficient proprietary right to support a claim in detinue.

In any event, neither the early nor the more recent authorities provide any reason to doubt the correctness of Halsbury's contention that a plaintiff in detinue must have the right to immediate possession of the goods detained. Thus, a purchaser of goods in whom title was vested has been held unable to claim in detinue purchased goods which remained in the vendor's physical possession and subject to his right to a lien for unpaid purchase moneys; see, Lord v Price (1873) LR 9 EX 54, cited in Clerk & Lindsell at page 1042 in support of the proposition: "So a purchaser of goods in whom the title is vested cannot sue for conversion until he pays or tenders the price and thus becomes entitled to possession."

In my view on the facts found by the District Court, the plaintiff fell short of establishing a right to a claim in detinue in two respects:

(i) Whatever the nature of the proprietary right which must be established by a plaintiff in detinue, all this plaintiff had at the

time he made his demand was a right in contract against The Farmers Trading Company Limited, not a right of property in the knives; and (ii) If I am wrong as to the time property in the knives passed from the Farmers under its contract with the plaintiff, the sale was clearly one for "cash on delivery", and the principle of Lord v Price must apply, the plaintiff not having a right to possession of the knives pending payment of the price to the vendor.

The second proposition is the simpler, and in itself sufficient to be determine the proceedings against the plaintiff/respondent. However, in view of the extent of the oral and written argument directed to the first point, I set out below the principal reasons which would lead me to find against the plaintiff/respondent on that ground also.

The first is that, having now had the opportunity to consider the principal authorities on this topic, I believe that the better construction of the evidence is, as Mr Gould contended, that the evidence on this point by Messrs Benjamin Doyle and Jones, and the general character of the transaction, sufficiently indicate that the parties did not intend property to pass until the vendor's delivery boys had received a cheque in exchange for physical delivery of the knives.

The evidence on which Mr Gould principally relied was:

(a) The evidence of Mr Benjamin Doyle at page 4:

" Q Is it not normal in your type of business that all transactions are cash deals?

A Not necessarily.

Q Are you saying that you get ownership of goods before you pay for them?

A Do you mean on credit.

Q No in a transaction like this?
A Sorry can you put that to me again.

Q In a transaction such as this one you do not get ownership or possession of the knives until you have given the owner a cheque do you?

A This is usually the case, yes. "

and

(b) The evidence of Mr Jones at page 7:

"Q The type of transaction such as this one, is it normal procedure for Farmers Trading Company to require payment and then the items are passed over?

A Normal, yes.

Q It is a straight out cash transaction?

A Yes. "

During the argument I asked Mr Grove whether there was any other evidence which pointed towards the parties having intended that property would pass when they made their agreement. He suggested that the invoice which had been sent with the knives assisted his client. My perusal of that exhibit does not persuade me that it in any way assists the respondent: to me it rather suggests that the transaction was regarded by Farmers as a special transaction in which it was prepared to take a substantial reduction in the normal price for its stock provided the whole was quit for an immediate cash payment.

It is certainly possible to construe the evidence in the way the Court of Exchequer construed the agreement in Lord v Price by holding that it was only the right to possession which was deferred. But while that construction was necessary in Lord's case because the conditions of sale specifically declared that the goods were to be at the purchaser's risk from the time of the making of the contract, no such condition was introduced in this case. The more natural interpretation of the evidence seems to me to be that Farmers were content to quit the whole of their stock for immediate cash settlement, and that although some deferment of payment became necessary in order that the stock could be located and counted, that was not intended to alter the basis of the contract, namely an exchange of goods for cash.

If, however, that construction is not correct, the furthest I consider the evidence can go is to leave the question of

the time at which property is to pass undetermined by express evidence, and therefore to be determined by application of the Rules under s 20 of the Sale of Goods Act 1908. With the greatest respect to the opposite opinion declared by His Honour the learned trial Judge, and giving due allowance to the fact that he had the advantage of hearing the witnesses, I cannot reconcile the recorded statements on this point by Messrs Benjamin Doyle and Jones with an intention on their part that property was to pass on the making of the oral agreement to sell.

The question then is which of the Rules governs this set of facts. Mr Grove supported the application of Rule 1. I prefer Mr Gould's submission that the matter is determined by Rule 3 which reads:

> " Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof. "

In support of his submission Mr Gould relied upon the commentary in Benjamin's Sale of Goods (2nd ed). Paragraph 319 notes that the Rule:

> " is construed to cover the situation where specific goods are bought which are unascertained in extent or quality and the price cannot be computed until the extent or quality of the goods is ascertained. The rule codifies the common law before the passing of the 1893 Act, but with the additional requirement that the buyer should have notice."

Paragraph 321 considers more directly the matters here at issue, and can usefully be set out in full:

> " The rule applies where the seller is bound to weigh, measure or test the goods, and also where he is bound to do 'some other act or thing' with reference to the goods for the purpose of ascertaining the price. The mere adding up of separate items previously measured is not sufficient to suspend the passing of the property

> for 'it is too trifling an incident to say that the measure is not complete.' But presumably counting the quantity of the goods could be a sufficient act, provided the extent of the goods was unascertained and counting was not merely a mental act to determine the price of the goods the extent of which was already ascertained. "

Neither counsel nor I have been able to find any case which is directly in point, but in my view the cases do support the statements of principle in para 321 of Benjamin's, and in a manner which would make it appropriate to apply Rule 3 in the present case.

The case from which the quotation in the second sentence of para 321 comes is Tansley v Turner (1835) 2 Bing (NC) 151. In that case there was an agreement for the sale and purchase of a number of felled trees at an agreed price per cubic foot. Each tree had at the time of such agreement been measured and marked to indicate its allocation to the sale, but no step had been taken to calculate the total price prior to the vendor being adjudicated bankrupt. At page 154 Tindal CJ, with whose judgment on this point the other members of the Court of Common Pleas, Park, Gaselee and Vaughan JJ all agreed, said:

> " Under the circumstances of this case, I think there was a complete delivery to the purchaser. The trees, which were on the land of Buckley, were sold at so much a cubic foot; the purchaser to have the power of entering to remove them when he pleased.
>
> I agree that if any thing had remained to be done by the seller, the property had not passed. But when I find that all that remained was to ascertain the total number of cubical feet, and that the number for each tree had been ascertained, the mere adding up the whole is too trifling an incident to authorise us to say the measurement was not complete. "

Two early Canadian cases, each finally decided in the Privy Council, illustrate the same principle.

In Logan v Le Mesurier (1847) 6 Moo PC 116, a raft of timber comprising "1,391 pieces measuring 50,000 feet or less" was

sold at $9^1/_2$d per foot, "measured off". It was held that the property in the timber remained with the vendor until it had been measured.

In Gilmour v Supple (1858) 11 Moo PC 551 a raft of timber "about 71,000 feet" was sold at $7^3/_4$d per foot. Before the parties completed the note which recorded the sale, the vendor had obtained measurements of each log by an official surveyor and handed his estimates, which gave the total volume as 71,443 feet, to the purchaser. It was held that, there being nothing in the circumstances from which it could be inferred that the vendor was to make any further measurement in order to ascertain the price, the property had passed at the time of signature of the agreement. The Judicial Committee noted and distinguished the earlier decision in Simmons v Swift (1826) 5 B & C 857, in which the agreement reached was for the sale and purchase of a specified stack of bark at a specified price per ton. There the Court of Kings Bench had held that property did not pass until the stock had been measured, this "involving of necessity the concurrence of the vendor".

In more recent times Simmons v Swift has been noted with approval, as in National Coal Board v Gamble [1959] 1 QB 11 (see judgment of Devlin J at page 21). In that instance the question was whether the property in a truck load of coal, sold at so much per unit of weight, passed before the vendor's employee had weighed the load and handed a weight note to the purchaser's driver. The decision of the Court was that the property did not pass until the measuring had been completed and the result notified to the purchaser's driver.

Those cases, and others in which they have been applied, establish that unless there is evidence from which a contrary intention can be inferred -

1. If some measurement must be undertaken by or with the concurrence of the vendor before the price can be ascertained, property does not pass until that action has been taken: but
2. That if measurements have been taken from which the price can be calculated, the fact that such calculation remains to be done will not defer the passing of property.

Although the original explanation for the distinction was that such a calculation was "too trifling an incident" to justify deferring the vesting of property, in terms of Rule 3 as it now stands that result necessarily follows from the fact that the "act or thing" required by Rule 3 must be an act or thing to be done by the vendor.

I can see no reason in principle for distinguishing between contracts for sale at an agreed sum per unit of weight or volume, in which ascertainment of the price requires determination of the number of such units, and contracts of sale of separate items at an agreed sum per item where the number of such items is not known, in which ascertainment of the price requires determination of the number of such items.

As already stated there seemed to be no case directly in point. Those which come closest to the issue appear to be -

1. R v Tideswell [1905] 2 KB 273 in which the point with which we are concerned was not at issue but arose in exchanges between the Court and counsel about an analogy raised by counsel in argument. At page 277 Alverstone LCJ said:

> " Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock ...",

and expressed the view that in such a case the agreement would suffice to pass property in the whole flock. However, Channell J's description of the analogy which had been put to the Court is in slightly different terms, namely that of an agreement for the sale of "all the sheep in a field ... not knowing for certain how many sheep there are ...". It may be that the Court considered the identity of the sheep was sufficiently established by their being visible within the boundaries of the field.

2. Mitchinson v Otaihape Farmers' Meat and Produce Co Ltd [1920] GLR 45. In that case an agreed number of sheep had been selected by the intending purchasers, marked with a distinguishing mark and set

aside in a separate pen. Prices were agreed for three different classes of sheep but they were not drafted into the different classes until delivery was taken by the purchasers. Part only had been so delivered by nightfall, and overnight the rest were lost as a result of fire. Edwards J held that the conduct of the purchasers' agent in directing where the sheep should be placed, first in the pen then for overnight pasturing, was "notice of exercise of dominion over them which is consistent only with the passing of property".

The passage which followed was accordingly obiter, as far as the present question is concerned. This passage dealt with an argument that it was not possible to ascertain the purchase price of the sheep destroyed with mathematical precision. "This", said Edwards J, "cannot affect the plaintiff's right to recover the value of their sheep. ... Such a trifling difficulty must be met in a practical way." The practical solution he reached was to give judgment for a sum based upon the number of sheep destroyed at an average of the prices which had been fixed for the different classes, which ranged from 31/6d to 35/- per head.

3. The last decision of some relevance is that of McGregor J in Farm Products Co-Operative (Tararua) Ltd v Bellkirk Poultry Farm Ltd [1965] NZLR 1012, which considered an agreement to buy the assets of a poultry farm and business at a price to be determined by valuation. The contract was subject to certain consents being obtained which had not been obtained at the date when the vendor was adjudicated bankrupt. At page 1015 McGregor J said:

> " If the contract had been an unconditional one I would have been prepared to hold that the parties intended the property to pass on completion of the valuation fixing the price, and notice thereof to the buyer. " (emphasis added)

The clear inference is that, although the identity of the assets being sold was known, the concurrence of the vendor in arranging the valuation and the statutory requirement of notice would have involved the application of Rule 3.

I accept Mr Grove's submission, that Tideswell's case gives some support to the respondent. In my view Mitchinson's case is in the end of little if any significance, and the support which the Farm Products decision gives to the appellants does no more than offset the opposite opinion in Tideswell.

More importantly, in my view, those decisions do not in total disclose any sufficient reason for departing from the general principles laid down in Benjamin's Sale of Goods, which appear simple, logical and easy to apply.

When applied to the present case they must mean that since the counting necessary in order to determine the price, an act which the seller alone could do, had not been carried out nor the result notified to the respondent at the time when he demanded possession of the goods, the property in the knives had not passed.

It follows that whichever of the two bases for fixing the passing of property in the goods is applied, neither supports the proposition that the plaintiff had the necessary ownership in the knives to support a claim in detinue.

For all the foregoing reasons the appeal must be allowed, and the judgment of the District Court vacated.

In many respects this is an unsatisfactory result. The principal grounds on which the appellants have succeeded were not put by them to the District Court, and their case is one entirely without merits.

The result would be even less attractive were it not for the circumstances:

1. That hopefully the case may encourage those who maintain an interest in law reform to reconsider the introduction of a code to replace the artificiality and technicality of the common law rules as to detinue;
2. That although the respondent fails in these proceedings, and although this Court cannot adjudicate on any other proceedings,

there is no reason for believing that The Farmers Trading Company Limited, which frankly admitted its contractual obligation to the respondent during the course of the District Court hearing, should take any different position at this time; and

3. The Court has at least a discretion in the matter of costs, which I have no doubt can in the circumstances of this appeal properly be exercised by declining to make any order.

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Solicitors

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Anthony Grove & Darlow, Auckland for Respondent