

**IN THE HIGH COURT OF NEW ZEALAND  
NELSON REGISTRY**

**CIV 2009-442-375**

BETWEEN

PRO MACHINING LIMITED  
Applicant

AND

BUNNY BUSTER FIREARMS LIMITED  
Respondent

Hearing: 10 November 2009

Counsel: G M Downing for the Applicant  
D Ballantyne for the Respondent

Judgment: 16 November 2009

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**JUDGMENT OF MILLER J**

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[1] Pro Machining Limited moves to set aside a statutory demand issued on 26 August 2009, saying there is a substantial dispute about the debt of \$45,000 said to be owing. The debt is the agreed price of a lathe that Pro Machining agreed to sell under an agreement that Bunny Buster Firearms Limited, as purchaser, has purported to cancel. Bunny Buster says there is no genuine dispute, and that Pro Machining is estopped from denying the debt.

[2] At the hearing I dismissed the application with costs. These are my reasons.

**Background**

[3] Pro Machining makes parts for firearms, among other things. Around January it agreed to supply receivers (the part of a firearm that holds the bolt and mechanism) to Christian Heeg, a firearms manufacturer. He completed a credit application in which he identified himself as a sole trader.

[4] About the same time Mr Heeg decided to make his own rifle moderators (noise suppressors). That led to Greg Anderson, who describes himself and his wife as the owners and operators of Pro Machining, offering on behalf of Pro Machining to sell a 1997 Mazak lathe which would serve the purpose.

[5] On 24 March Mr Heeg incorporated Bunny Buster Firearms Limited to carry on the business of firearms manufacturing. He is its sole director. There is a dispute about whether the lathe was offered to Mr Heeg in his personal capacity only or whether he acted as agent for Bunny Buster Firearms as an undisclosed principal. (There is no evidence that he told Pro Machining about the company.)

[6] The parties agree that an oral agreement was reached between Mr Anderson and Mr Heeg. Mr Heeg's undisputed evidence is that it was in May, after Bunny Buster had established a business finance facility with its bank and he again approached Mr Anderson to inquire whether the lathe was still available.

[7] The agreed price, \$45,000, was paid from the bank account of Bunny Buster Firearms on 2 June 2009.

[8] It is not in dispute that on that date, the machine remained hard-wired to three phase power at Pro Machining's premises, that it still contained software and tooling which Mr Anderson intended to delete before it left Pro Machining's premises, and that it remained subject to a specific charge granted by Pro Machining in favour of Marac Finance. Mr Anderson says, remarkably, that the charge over the lathe "will be removed once these proceedings are resolved".

[9] There is a dispute about delivery. Mr Anderson maintains that it took place constructively on 2 June, and that Mr Heeg had agreed to leave the machine at Pro Machining's premises until room could be made for it at his own premises. Mr Heeg accepts that because the lathe was still hard-wired to the power supply, he agreed that he would pick it up in a couple of weeks when it was ready for delivery. He says that after 9 June 2009 he made regular inquiries of Mr Anderson about delivery.

[10] Mr Anderson says that the machine had last been used on 21 April 2009. About 27 May 2009, Network Tasman, the local electricity lines business, upgraded the electricity supply into Pro Machining's building. Mr Anderson and his wife went overseas on holiday between 31 May and 8 June.

[11] On 12 June Mr Anderson switched the lathe on, intending to remove the programmes and tooling belonging to Pro Machining. The machine's automatic alarm was triggered. It is said that the machine's computer had detected a fault in its power supply unit. Mr Anderson, who is not an electrician, says he is "90% sure" that there is a problem with the power supply unit. That has not been confirmed, nor has the machine been repaired, because Mr Anderson has put the matter in the hands of his insurers, who are investigating the claim. There is no evidence that they are doing so with any urgency. In the meantime, the machine remains at Pro Machining's premises, and is admittedly not in a working condition.

[12] It is clear that Mr Heeg was anxious about the condition of the machine and its delivery, because the parties agree that there was a discussion about refunding the purchase price. Mr Heeg and an electrician who accompanied him to look at the machine, Terence Trembath, say that Mr Anderson kept claiming it would be easy to fix but in late June or July he agreed to repay the money and asked Mr Heeg for the bank account number into which the money would be paid. Mr Anderson denies that, although he admits that there were discussions about it.

[13] By email of 24 July Mr Anderson advised Mr Heeg:

Still have not got the answer back on when the money will be available

As I said the other day I paid the note off and what the holdup is having to reapply for the loan

Will be on their case today to get this done so that we can put this behind us and move forward

[14] By letter of 6 August Bunny Buster Firearms' solicitors confirmed that the contract had been cancelled for "failure and faults of the lathe" and demanded repayment.

[15] Pro Machining remains willing to deliver the lathe. Mr Anderson has offered, should the insurer not meet the claim, to share the repair cost of more than \$7,500. He accepts that Mr Heeg has not been able to use the machine and concedes that that may give rise to some liability in damages as a bailee. He says Pro Machining has offered to mitigate this loss by giving Bunny Buster Firearms access to its own lathes, without charge in the meantime.

[16] Finally, Mr Heeg claims that Mr Anderson has admitted Pro Machining cannot pay and depends on the insurance claim being accepted. Mr Anderson denies making those admissions.

### **The issues**

[17] The application gives rise to several questions: whether Bunny Buster was Mr Keeg's principal; whether the machine was delivered on 2 June, with the consequence that Pro Machining became a bailee; whether Pro Machining was in breach of an implied condition as to title; and whether Pro Machining is estopped from denying liability.

### **Approach**

[18] A statutory demand will be set aside if there is a substantial dispute whether the debt is owing or due: s 290(4)(a) Companies Act 1993. Pro Machining must show a fairly arguable basis upon which it is not liable: *United Homes (1998) Ltd v Workman* [2001] 3 NZLR 447. It is not enough for the applicant to merely assert a dispute, but the Court will not normally resolve disputed questions of fact on affidavit evidence alone, particularly where credibility is in issue.

### **Identity of the purchaser**

[19] It is apparent that Pro Machining has assumed it is enough to point to a dispute about whether Mr Heeg told Mr Anderson that he was purchasing the machine for Bunny Buster Firearms. That is a misconception, for an undisclosed

principal is able to sue on a contract unless the circumstances show that the contract was to be confined to the immediate parties: *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213, *Condon v Parkinson* HC CHCH CIV-2007-409-832 22 September 2008. The question is whether Mr Heeg was in fact acting as the agent of Bunny Buster. If so, a further question may arise whether the circumstances show that the parties intended they alone would be able to enforce it.

[20] I am satisfied that there is no genuine dispute that Mr Heeg was the company's agent in this transaction. It is true that he had initially dealt with Pro Machining in his personal capacity, but he then incorporated the company and the agreement was reached after that date. The machine was being purchased to make noise suppressors, which is part of Bunny Buster's business of firearms manufacture. Mr Heeg was Bunny Buster's director, and Bunny Buster paid for the machine. Further, nothing in the circumstances suggests it was the parties' intention that the contract be confined to Mr Heeg. It follows that Bunny Buster is able to enforce the contract.

## **Delivery**

[21] Pro Machining's claim that the machine was delivered on 2 June, and hence that it was thereafter a bailee only, rests on s 32 of the Sale of Goods Act 1908, which provides relevantly that the place of delivery is the seller's place of business. And in this case the parties agreed that Mr Heeg was to collect the machine after payment.

[22] However, it does not follow that delivery occurred on 2 June, for several reasons. First, delivery is a question of construction, and one of the rules for ascertaining intention in s 20 of the Sale of Goods Act is Rule 2:

### **20 Rules for ascertaining intention**

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 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a

deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof.

In this case, the machine was not in a deliverable state. Pro Machining had to remove the programmes and tooling to get it ready for delivery. It had also to disconnect the machine from the power supply. While the latter is a small job, Mr Anderson makes it clear in his affidavit that he was not going to do it until Pro Machining had been paid. He had also to have the Marac security discharged.

[23] Second, delivery does require a transfer of control, even when it is constructive: see for example *Hammer and Barrow v Coca-Cola* [1962] NZLR 723. There is no evidence that Bunny Buster acquired any degree of control over the machine on 2 June, or at any time. On the contrary, Pro Machining has at all times retained sole control over the machine and the proposed repairs.

[24] For these reasons, it is not arguable that delivery occurred before Mr Anderson switched the machine on to remove the tooling and programmes, or at any time. It follows that the machine was damaged before delivery, and for this reason too it was not in deliverable condition when delivery fell due. Responsibility to place it in that condition remained with the vendor.

### **Breach of implied condition as to title**

[25] In any event, Mr Downing conceded inevitably that if property was to pass on 2 June as Pro Machining contends, Pro Machining was at that date in breach of an obligation to provide title. Under s 14 of the Act there is an implied condition as to title, to the effect that the vendor will have title when property is to pass. It is a condition rather than a warranty, meaning that its breach gives rise to a right to cancel: s 13(2).

[26] It is not in dispute that Bunny Buster gave notice of cancellation on 6 August, at which time the machine remained subject to the Marac charge.

## **Estoppel**

[27] It is not necessary to deal at any length with Mr Ballantyne's alternative argument that Pro Machining is estopped from denying liability to repay. It suffices to say that there is substantial but disputed evidence that a promise was made, but there is no satisfactory evidence of detrimental reliance on such promise, still less that the resulting loss corresponds to the purchase price. The most Mr Ballantyne could point to was Mr Heeg's evidence that Bunny Buster had budgeted for the money to come back and had not made arrangements for additional funding to commence production and sales.

## **Decision**

[28] I am satisfied that there is no genuine dispute about the liability of Pro Machining to repay the purchase price. It is not genuinely arguable that Bunny Buster Firearms is not the principal and so able to enforce the contract, nor that the machine was delivered on 2 June, nor that Pro Machining was and remained in breach of its obligation to provide title when the contract was cancelled. For these reasons Bunny Buster was entitled to cancel. Pro Machining has no arguable answer to Bunny Buster's claim for repayment.

[29] The application to set the notice aside is dismissed. Bunny Buster will have costs on a 2B basis with disbursements as fixed by the Registrar.

Miller J

### **Solicitors:**

McFadden McMeeken Phillips, Nelson for the Applicant  
C & F Legal Limited, Nelson for the Respondent