CITATION:	*Sean Clancy v Simon Peters* [2022] NTLC 018
PARTIES:	Sean CLANCY
	v
	Simon PETERS
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	21930513
DELIVERED ON:	21 September 2022
DELIVERED AT:	Darwin
HEARING DATE(s):	9 & 10 November 2020
DECISION OF:	Greg Macdonald

CATCHWORDS:

Civil Law – Sale of Goods – Contracts – Mercantile Agents - Bona fide purchaser – In the ordinary course of business – Good faith – Whether purchaser obtained good title – Motor vehicle – *Factors (Mercantile Agents) Act 1923* (NSW), s 5

Factors (Mercantile Agents) Act 1923 (NSW)
Evidence (National Uniform Legislation) Act 2011 (NT)
Financial Transaction Reports Act 1988 (Cth)
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705
Mercedes-Benz Financial Services Australia Pty Limited v State of NSW & Anor [2011] NSWSC 1458
Associated Midland Corporation v Sanderson [1983] 3 NSWLR 395
Project Blue Sky Inc. v Australian Broadcasting Authority [1998] 194 CLR 355
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34
Magnussen v Flanagan [1981] 2 NSWLR 926

REPRESENTATION:

Counsel:

	Plaintiff:	Mr H Baddeley
	Defendant:	Mr P Morgan

Solicitors:

	Plaintiff:	DWF (Australia) & Roussos Legal
	Defendant:	Piper Ellis & Associates

Decision category classification:	B
Decision ID number:	018
Number of paragraphs:	34

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Claim No. 21930513

BETWEEN:

Sean CLANCY

Plaintiff

AND:

Simon PETERS

Defendant

REASONS FOR DECISION

(Delivered 21 September 2022)

Judge Macdonald

Background

1. On 27 April 2017 Mr Simon Christopher Peters (the Defendant) purchased a Ford Falcon XY GT (the Vehicle) for $150,000 from Clayton Bespoke Pty Ltd (the Agent) at Woolloomooloo in Sydney (the Sale). Until 27 April 2019 the Vehicle was owned by Mr Sean Clancy (the Plaintiff), who had engaged the Agent to sell the Vehicle on consignment.

2. The Plaintiff's original instructions to the Agent's principal dealer, Mr Bevan Clayton, in September 2015 were to list the Vehicle for sale for $300,000. The actual engagement, including delivery of the Vehicle to the Agent's possession, occurred in October 2015, some 18 months prior to the transaction the subject of the proceedings.

3. As matters transpired, the Plaintiff ultimately instructed the Agent to sell the Vehicle for $180,000 but received no monies from any sale, authorised or otherwise.[1] Those instructions post-dated the actual sale of the Vehicle, of which the Plaintiff was unaware. The Agent went into administration on 25 September 2017.

Pleadings, the evidence and submissions

4. On 8 August 2019 the Plaintiff commence proceedings by filing a Statement of Claim in the Local Court at Darwin. The Defendant filed a Defence on 12 September 2019, which was followed by an Amended Statement of Claim on 3 September 2020 and an

[1] Paragraphs [44] to [55] of the Plaintiff's Affidavit sworn 10 January 2020

Amended Defence on 7 September 2020. The proceeding was ultimately heard on 9 and 10 November 2020, and was assisted by counsel providing a Statement of Agreed Issues in Dispute, by way of aide memoir. Various allegations in the pleadings were not ultimately pressed.

5. By 9 November 2020, the principle issue for determination was how s5 of the *Factors (Mercantile Agents) Act 1923* (NSW) (the Act) should be legally applied to the Sale. That is, having regard to the facts and circumstances constituting the Sale, was the Sale valid by application of s5 of the Act, such that the Defendant obtained good title in purchasing the Vehicle. Alternatively, did the facts and circumstances of the Sale prevent the Defendant from relying on s5 in defence of the relief sought by the Plaintiff.

6. As a result of programming directions made prior to trial, evidence in chief was by way of Affidavit, with cross-examination of any witnesses required. The Plaintiff's Affidavits were sworn 10 January and 25 March 2020, with the Defendant's principal evidence being sworn and filed on 5 February 2020. In addition, Affidavits of Mr Bradley Clark sworn 4 February 2020, Mr Michael Howard Selby sworn 16 March 2020, Mr Alistair Koenig sworn 28 October 2020 and Ms Tamara Parker sworn 5 November 2020 were also filed and received into evidence.

7. Each of the Plaintiff and Defendant, together with Mr Koenig and a Mr Altamonte (below), were called for cross-examination. The Affidavits of Mr Clark, Mr Selby and Ms Parker were tendered by consent, with those witnesses not called for cross-examination.

8. In addition, shortly prior to trial on 5 November 2020 the Plaintiff served an expert report of a Mr Anthony Altamonte, together with interlocutory application seeking to adduce that evidence. The evidence of Mr Altamonte was objected to, with the three-page report and associated brief on engagement being received as MFI1. Mr Altamonte's report sought to give evidence on what constituted "*in the ordinary course of business*" in the context of motor vehicle dealers, and the transaction the subject of the proceedings. He had in excess of 30 years' experience in the motor vehicle industry at the time of writing the report and had been Managing Director of the "Alto Group" in New South Wales for approximately 25 years. That group comprises 15 motor vehicle dealerships selling 10 brands of volume, premium and luxury vehicles, with a turnover of approximately 12,000 vehicles each year.

9. There is no doubt that Mr Altamonte is an expert in the sale of premium and luxury vehicles, and the manner in which a business selling such vehicles would ordinarily operate. That conclusion is on the basis of expertise rather than qualification. The factual basis on which Mr Altamonte's opinion concerning what constitutes "*in the ordinary course of business*" was his extensive experience in the industry. In addition, he also had the Defendant's Affidavit sworn 5 February 2020 to provide the factual basis for opinion relating to the particular transaction. I consider his evidence is relevant to the issues in dispute and does satisfy the requirements set down in *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 and also satisfies s79 of the *Evidence (National Uniform Legislation) Act 2011*.

10. Despite the potential unfairness of admitting his evidence so late in the piece, in my conclusion the evidence should be admitted with his report and answers in cross-examination comprising part of the evidence. The report becomes exhibit P4.

11. Written submissions of the Plaintiff and Defendant were filed with the Court on 10 November 2020, with the Defendant then providing Further Written Submissions on 3 December 2020 and the Plaintiff also doing so on 10 December 2020.

12. The Defendant bears the onus of proving the essential elements comprising s5 of the Act, on the balance of probability. Despite the significance of the issues in the proceeding to each of the parties, it is not my conclusion that the *Briginshaw* principle strictly applies, including because it is the Defendant who bears the onus. However, proof to the standard of reasonable satisfaction is certainly required to rely on s5 of the Act.

Section 5 and the relevant law

13. Section 5 of the Act provides;

> ***5 Powers of mercantile agent***
> *(1) Where a mercantile agent is entrusted as such with the possession of any goods or the documents of title to goods, any sale pledge or other disposition of the goods made by the agent in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if the agent were expressly authorised by the owner of the goods to make the same:*
> *Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.*
> *(2) Where a mercantile agent so entrusted continues in possession of goods or of the documents of title to goods, any sale pledge or other disposition, which would have been valid if the entrusting had continued, shall be valid notwithstanding the determination thereof, provided that the person taking under the disposition has not at the time thereof notice of such determination.*

14. Having regard to s5, the issues for determination are, firstly, whether the Sale of the Vehicle was made "*in the ordinary course of business*" of a mercantile agent. Second, whether the Defendant acted at all times "*in good faith*". It is noted that a potential relationship exist as between the two requirements, depending on the facts and circumstances of any transaction. For example, extraordinary actions by a mercantile agent in the conduct of any transaction could possibly give rise to bad faith on the part of a purchaser, or vice versa.[2]

[2] *Mercedes-Benz Financial Services Australia Pty Limited v State of NSW & Anor* [2011] NSWSC 1458 at [92].

15. The court was referred to 9 authorities, with the leading authorities being *Associated Midland Corporation v Sanderson* (1983) 3 NSWLR 395 and *Mercedes-Benz Financial Services Australia Pty Limited v State of NSW & Anor* [2011] NSWSC 1458.[3]

16. The Defendant bears the onus of proof in relation to both the 'ordinary course of business' and 'good faith' issues. In relation to the first issue, may be noticed that the Act was passed in 1923 and modelled on earlier English legislation, and that both the term "*mercantile agent*" and the extent of functions recognised by s5(1) in such persons are very broad. It is also probable that the phrase "*in the ordinary course of business*" is ambulatory, and attracts a more flexible and sophisticated meaning as the commercial world develops. This would not be inconsistent with the proposition that the terms of an Act must also be read and interpreted having regard to its context and purpose.[4]

17. In relation to the first issue, I accept that application of the phrase entails an objective assessment.[5] That is both *per se* and having regard to the facts and circumstances known to a reasonable person in the position of the Defendant. Those conclusions are consistent with the interpretation and application of "*in the ordinary course of business*" discussed in both *Associated Midland* and *Mercedes-Benz*.[6] The requirement to prove that limb of s5 of the Act has regard to both the general business conduct of the mercantile agent, and to there being nothing to lead a reasonably minded purchaser "*to suppose that anything wrong is being done*". That is, 'to objectively suppose that anything wrong is being done'. There would also be no justification to limit consideration of whether "*anything wrong is being done*" simply to the question of whether the mercantile agent had sufficient actual or ostensible authority to dispose of the goods.

18. *Associated Midland* also explained the necessity to have regard to "*the particular commercial area*" in which the Agent conducts business. It is obviously essential in determining the issues to have appropriate regard to what constitutes the ordinary course of business of a motor vehicle dealer. However, it is also my conclusion that the more apposite any evidence is to the particular business operation conducted by the Agent, the more relevant the evidence may be to determining "*in the ordinary course of business*". That is, evidence concerning the nature, scale and marketplace of the business conducted by the Agent may be most relevant.

19. In relation to the 'good faith' issue, I consider such a finding must be supportable both subjectively and objectively.[7] That conclusion is supported by the passage from *Associated Midland* that; "*Good faith connotes "honesty" and whilst negligence of itself, would not establish an absence of good faith, lack of reasonable care may, when coupled*

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[3] Noting the application of *Oppenheimer v Attenborough & Son* [1908] 1 KB 221 in both and *Magnusson v Flanagan* [1981] 2 NSWLR 926 in the latter.

[4] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, and *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34.

[5] I note that at the time the Act was drafted, the "reasonable person" suggested by paragraph [30] of the Defendant's Further Submissions was not common in the law.

[6] PP 400G to 401A and paragraphs [89] to [92], respectively.

[7] As to the second limb of that paragraph, I note that it would be difficult to envisage any circumstance where a purchaser had notice of an absence of authority, but could nonetheless act in good faith.

with other facts and circumstances, lead to an inference that the purchaser was suspicious and refrained from inquiring because of a fear that he would become aware of irregularity."[8] The potential relationship or connection between the 'ordinary course of business' and 'good faith' requirements (depending on the relevant facts and circumstances) is noted, and that possibility can also be relevant to 'notice'. To that extent, whether the court in *Magnussen v Flanagan* meant "*and*" or "*or*" is not determinative.[9]

Discussion and findings

20. In relation to the 'ordinary course of business' issue, I consider that three aspects of the Agent's conduct in the Sale require close consideration.[10] Namely, the ultimate purchase price of the vehicle and the manner that was informed to the Defendant. Second, acceptance of one third of the purchase price in cash. Third, the cash component of the transaction being carried out in a room at a hotel.

21. The Agent, through its principal dealer Mr Bevan Clayton, was intimately aware of what communications had and had not been engaged in with the Plaintiff, however that information was confidential to those persons. The Defendant became aware of the Vehicle in September 2016 and that the asking price at that time was $235,000. On 27 and 28 October 2016 the Defendant met with the Agent's representatives, Mr Clayton and its sales specialist, Mr Koenig.[11] At that time, amongst other things, he inspected and test drove the Vehicle, reviewed paperwork including previous registration for the Vehicle, and showed the Agent a XY GT Ford Falcon which was superior in quality and value to the Vehicle, but which had recently sold for $195,000. Over 29 October 2016 through to 27 April 2017 the Agent and Defendant had various communications, mostly by email.

22. That included on 29 October 2016 the Defendant detailed all aspects of the Vehicle which he considered to be defects, then offered to purchase the Vehicle for $100,000 EFT and $45,000 cash. On 24 November 2016 the Agent emailed the Defendant advising that the plaintiff had reduced the asking price for the Vehicle to $175,000. The Defendants response on 25 November 2016 was that he had just become aware of another superior vehicle "*which sounds like a better deal than your revised offer*", and concluded the email with "*I'll keep in touch*".

23. The next contact was initiated by the Defendant on 4 February 2017, more than two months later, enquiring whether the Vehicle had been sold. The Agent's response was; "*Unfortunately not. The vendor is happy to wait for the rite buyer*". On 15 April 2017 the Defendant advised the Agent he was aware from its website that the Vehicle had not yet sold, and that he would be in Sydney in a few weeks, and asked whether his previous offer of $145,000 could be put to the Plaintiff again. The emails in evidence indicate that less than an hour later, the Agent responded; "*I spoke to the vendor, $165,000 is*

[8] Supra p401E.

[9] [1981] 2 NSWLR 926

[10] Noting again that the concept 'in the ordinary course of business' can, and in this case does, incorporate acts and omissions of the purchaser in the transaction.

[11] For this part of the decision, the term "Agent" should be understood as including either Mr Clayton or Mr Koenig, or both.

now the price". The Defendant did not accept that counteroffer, and pointed to what he considered to be significant defects and that similar vehicles in mint condition were fetching $180,000.

24. On 22 April 2017 the Defendant increased his offer to $100,000 EFT and $50,000 cash. On 24 April 2017 the Agent responded; "*I have* (sic) *a long hard chat with the vendor and to my amazement he has accepted your offer of $150,000. To proceed can you please supply me with your driver's license so I can draw up a contract. Along with this could we arrange the EFT component until you are ready to collect the vehicle. Congratulations with the purchase and persistence!*" The Defendant's response on 25 April 2017 was; "*Please send me the contract, once I have received and reviewed I'll EFT the money*". On 26 April 2017 the Defendant also advised by email that; "*I might swing over this afternoon to look over the car, to ensure there has been no changes since my last visit and the Battery is fully charged etc. After am satisfied I'll transfer the money*".

25. Various other communication occurred leading to the Defendant then attending and inspecting the vehicle on 27 April 2017, signing a contract, attending the Commonwealth Bank and transferring $100,000 by EFT to the Agent, then meeting the Agent at a room near the foyer of his hotel in order to hand over the $50,000 cash in final purchase monies. Various other aspects, including in relation to the paperwork for the Vehicle and its collection from the Agent for the purpose of transportation was also discussed.[12]

26. The extensive negotiations between the Defendant and the Agent over a period of months, including various offers and counteroffers and appreciable reductions in the price, together with one increase on the part of the Defendant, all have the hallmarks of a hardily fought negotiation. That is particularly in the context of the length of time the Vehicle had been on the market, and the specialist goods and marketplace in which the Agent conducted business. The Defendant clearly drove a hard bargain and was prepared to bide his time, and was perhaps more realistic in his understanding of market value of the Vehicle than was the Plaintiff.[13] The evidence of Mr Selby is particularly relevant in this regard, albeit that his evidence rises no higher than to conclude that the price paid by the Defendant was; "*… on the face of it, good value for the purchaser. However it is within the price range that I would expect that particular type of vehicle to sell for, at the time.*"[14]

27. The Agent's willingness to accept one third of the purchase price in cash was not its usual business practice. However, this aspect of the transaction arose through the Defendant's persistence in wishing to utilise cash savings as part of the purchase price, which position had been raised then consistently maintained by the Defendant since October 2016. True it is that the Agent could perhaps have insisted the money be deposited to a bank account then transferred by EFT (or even deposited directly to the Agent's account), however the evidence of Mr Koenig was that the Agent had received

[12] Paragraphs [21] to [25] of Defendant's Affidavit sworn 5 February 2020. The reference to 2019 at [24] is an obvious typographical error.

[13] Noting that the Plaintiff originally requested listing the Vehicle for $300,000 and ultimately was willing to give instructions for sale of the Vehicle in the sum of $180,000.

[14] Affidavit of Mr Michael Selby sworn 16 March 2020.

cash for vehicles "…*on a number of occasions in varying and often large amounts*". I also accept Mr Koenig's evidence that while employed he believed he was working for a reputable car dealer.[15]

28. The evidence of Mr Altamonte also included that the vast majority of motor vehicle sales within the Alto Group are financed one way or another, which the subject transaction was not. In addition, the Alto Group "*sometimes*" received cash payments in the form of deposits on vehicles, but that cash payments of $10,000 or more were not accepted by the Alto Group, due to reporting requirements under the *Financial Transaction Reports Act 1988*. Lastly, Mr Altamonte observed that; "*In **recent times** it* (sic) *unusual for a reputable motor dealer to take $50,000 in cash for vehicle payments*" (**emphasis** added) and that in the circumstances proposed by the Defendant, he would at least arrange for the purchaser to deposit the cash directly into the Alto Group's bank account.[16]

29. The scale, business model and market of the Alto Group's operations is vastly different to those which prevailed with the Agent. It is also noted that the subject Sale did not entail any financial or insurance component, leading to a conclusion that the legislative and regulatory requirements referred to by Mr Altamonte are likely irrelevant. Although Mr Altamonte's evidence is otherwise relevant, I am unable to accord it significant weight in the circumstances.

30. In relation to the Defendant meeting the Agent at a room near the foyer of his hotel to finalise payment for the transaction, no doubt Mr Koenig was keen to finalise that aspect, including due to the instructions he had received from Mr Clayton. The EFT of $100,000 had already occurred, the cash was at the hotel, and the security issues which must have existed throughout the Defendant's reliance on his cash savings persisted. Concluding the transaction at the hotel in the circumstances could also not be considered usual, but is explicable. Due to the position and general credibility of Mr Koenig, and noting that with hindsight he would "*perhaps*" conclude aspects of the transaction to be unusual, I prefer and accept his evidence.

31. The most unusual aspect of the transaction was the Defendant's insistence on the use of cash for a significant portion of the purchase price.[17] That is against the background of the cash having been accumulated by the Defendant over a significant period of time, and held in a safe at his residence, and in circumstances where he operated both a company bank account and a personal bank account.[18] In the final analysis, the Defendant's persistence in wishing to ensure that the purchase price included a cash component has a bizarre quality, including because I consider the crux of the issue was a reluctance on the part of the Defendant to deposit those monies to a bank account.

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[15] Paragraphs [15], [16] and [18] of Affidavit of Alistair Koenig sworn 28 October 2020.

[16] Paragraphs 3.3 to 3.12 of Mr Anthony Altamonte's statement of 5 November 2020.

[17] The Plaintiff's Submissions and Further Submissions focussed on this aspect particularly in relation to the 'good faith' (and associated 'notice') issue.

[18] On 27 April 2017 the Defendant accessed his company account which then held a balance of in excess of $850,000, and transferred $100,000 to the Agent. He also withdrew an amount in excess of $5000 from a personal account in order to top up the cash component to $50,000.

Although it was not the subject of specific or pointed cross-examination, it may be open to conclude that the Defendant's reluctance was the product of some improper motive.

32. However, even were that the case, in my view it would be irrelevant to the issues of both 'ordinary course of business' and 'good faith'. The Agent was entitled to receive cash, despite that EFT (and for that matter financing) were the most common means of payment in the industry. Secondly and most relevantly, it is the Defendant's good faith or otherwise in the conduct of the transaction itself which is crucial. How the Defendant had come to accumulate almost $50,000 in cash, and why he was reluctant to pay those monies through a financial institution, do not in my view bear upon the Defendant's *bona fides* in his conduct and involvement in the transaction.

33. In my view, having regard to the evidence and the facts and circumstances of the transaction, I consider the Sale was made by the Agent in the ordinary course of business, and that the Defendant acted in good faith in the Sale and had no notice of the Agent's lack of authority.

34. I therefore find that by the Sale effected 27 April 2017 the Defendant obtained good and valid title to the Vehicle the subject of this proceeding.

Dated this 21st Day of September 2022

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Judge Greg Macdonald
Local Court Judge