CITATION: *Shelton v Eureka Garages and Sheds* [2010] NTMC 059

PARTIES:	RICK SHELTON T/A RICK SHELTON MOBILE MECHANIC v OAKTECH PTY LTD (ACN 060 638 888) T/AS EUREKA GARAGES AND SHEDS
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	LOCAL COURT - ALICE SPRINGS
FILE NO(s):	20819899
DELIVERED ON:	17 September 2010
DELIVERED AT:	Alice Springs
HEARING DATE(s):	22 to 26 March 2010
JUDGMENT OF:	J M R Neill

CATCHWORDS:

Sale of goods - conflict of laws; effect of express reservation as to performance on implied term of fitness for purpose/merchantable quality. Expert evidence as to cause of defects.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Floreani
Defendant:	Mr McConnel

Solicitors:

Plaintiff:	Povey Stirk
Defendant:	Cridlands MB

Judgment category classification:	C
Judgment ID number:	[2010]NTMC 059
Number of paragraphs:	112

IN THE LOCAL COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20819899

BETWEEN:

RICK SHELTON T/AS RICK SHELTON MOBILE MECHANIC
Plaintiff

AND:

OAKTECH PTY LTD T/AS EUREKA GARAGES AND SHEDS
Defendant

REASONS FOR JUDGMENT

(Delivered 17 September 2010)

Mr NEILL SM:

1. These proceedings involve a dispute between the plaintiff and the defendant as to the fitness for purpose/merchantable quality of a large industrial shed purchased in an unassembled kit form by the plaintiff in Alice Springs from the defendant in Melbourne. The agreement to purchase followed negotiations between the parties as to the dimensions and some other design aspects of the shed. The shed was not purchased "off the shelf". It had to be manufactured to the plaintiff's specifications by the defendant. It was manufactured in Victoria. The plaintiff purchased the shed for commercial purposes for the price of $62,291. The major although not the only defect alleged in the final pleadings as giving rise to the dispute was the inadequacy of design/structures relevant to the operation and strength of the large sliding doors for the shed.

2. It was a term of the agreement between the parties that the plaintiff and not the defendant would be responsible for the erection of the shed on the plaintiff's land in Alice Springs - exhibit P14.7 at point 8 and exhibit P14.8 at point 5. The

plaintiff was to pay, and did pay, for the transport of the shed in kit form from the defendant's place of business in Melbourne to the plaintiff's place of business in Alice Springs. That transport was carried out by an independent carrier - exhibit P14.15. The shed in kit form arrived in Alice Springs on or about 21 February 2008.

3. The defendant did provide the plaintiff with the name of an experienced person to erect the shed, however the plaintiff alone made all the arrangements for the erection of the shed in Alice Springs by that person. The plaintiff's case was neither pleaded nor run on the basis of any warranty by the defendant in respect of that person whom the plaintiff retained to erect the shed.

4. On the basis of the foregoing undisputed facts I find that the goods the subject matter of this contract were the components of the shed as contained in its unassembled kit form rather than the shed as erected.

5. It is not clear when the erection of the shed was finally completed, but it is certain that it was still ongoing as at 31 March, 2008 - exhibit P14.18. On this date, Mr. Rick Shelton on behalf the plaintiff wrote a letter to an agent of the defendant, complaining about problems with the then ongoing erection of the shed. He did not at that time raise any problems specifically in relation to the sliding doors. By 2 emails dated 6 May 2008 (exhibits P14.19 and P14.20) Mr Shelton wrote to Domenic Sabatino, the director of the defendant, and attached 7 photographs, some of which did depict issues relevant to the sliding doors. Mr. Shelton subsequently on 24 June 2008 wrote again by e-mail to Domenic Sabatino and specifically complained about the sliding doors, and did so in terms which suggested a prior complaint had been made about them - 2nd attachment to exhibit D26.

6. The plaintiff commenced proceedings against the defendant out of the Local Court at Alice Springs on 24 July 2008. On behalf of the plaintiff, Mr. Rick Shelton himself drew up the handwritten Statement of Claim ("the first Statement of Claim") - exhibit D26. The first Statement of Claim was limited to complaints arising out of problems experienced by the plaintiff in the erection of the shed. Even though it was a term of the agreement that the plaintiff alone had the

responsibility for the erection of the shed, it nevertheless commenced proceedings demanding that the defendant compensate the plaintiff for various specified losses claimed as a consequence of delays in the erection of the shed, and inadequacies in that erection process generally. As at 24 July 2008 the plaintiff in these proceedings was not pleading any problems with respect to either the structure of the sliding doors or their operation.

7. On 22 September 2008 Alice Springs experienced very high winds, peaking at 101.9 km/h at 1:23pm that day - ex D35. Mr Shelton was working in the shed with others. He described seeing the sliding doors on the western side of the shed flexing inwards with each gust of wind - p.166.3 - and eventually the doors blew into the workshop.

8. The first Statement of Claim was subsequently amended. The person who erected the shed for the plaintiff, a Mr Frank Matiuzzio through his company Steeltrue Constructions Pty Ltd, was joined by the plaintiff as a second defendant and the issue of the sliding doors was now central to the proceedings. There were thereafter further amendments to the pleadings, but by the hearing the second defendant had been released by the plaintiff following a settlement between those parties on undisclosed terms.

9. At the hearing, the parties to the litigation were once again limited to the plaintiff and the defendant. The plaintiff's final position was to be found in its Third Further Amended Statement of Claim filed 25 March 2010 ("final Statement of Claim"), and the defendant's in its Further Amended Notice of Defence filed 29 March 2010 ("final Defence"). The plaintiff relied on the Trade Practices Act (Cth), on two NT Acts namely the Consumer Affairs and Fair Trading Act and the Sale of Goods Act, and on common law implied terms in business agreements, to establish implied conditions as to merchantable quality and/or fitness for purpose in the contract. The plaintiff pleaded that specified defects in the shed became apparent in May 2008 and ongoing - paragraphs 9 to 9.6 inclusive - such that the defendant was in breach of the pleaded implied conditions and that the plaintiff suffered loss and damage thereby - paragraph 10. The plaintiff did not plead any other basis for compensation nor did it run its case at hearing on any other basis.

The plaintiff subsequently in submissions abandoned any reliance on the Trade Practices Act.

10. The plaintiff in the final Statement of Claim pleaded that the shed was not of merchantable quality and/or not fit for its purpose because of three separate categories of defects. The first category involved consequences of what I shall describe as alleged inadequate design/materials relevant to the sliding doors and their method of attachment - paragraphs 9.1 to 9.3 inclusive of the final Statement of Claim. The second category did not involve the sliding doors. In this category the plaintiff claimed for the coming apart of flashing around the guttering on the roof line, and its then bending as a result of wind force - 9.4 - and for the provision of insufficient flashing in a number of corners of the shed - 9.5. The third category involved the event when wind force allegedly led to the dislocation of the sliding shed doors and buckling of door frames and sheet metal - paragraph 9.6.

THE APPLICABLE LAW

11. The plaintiff seeks to rely on the two NT statutes pleaded in the final Statement of Claim. The defendant submits that the law of the State of Victoria is the proper law of the contract.

12. The plaintiff submits that the NT legislation nevertheless has extra territorial applicability even if the contract arose in Victoria. The plaintiff submits that it would be an "absurd" result if an NT consumer who was supplied with goods by a merchant from another jurisdiction was not afforded the same protection as an NT consumer who was supplied with goods by an NT merchant. The problem with this submission is that it does not distinguish between contracts entered into in the NT and those entered into in another jurisdiction. When this distinction is taken into account then the apparent absurdity vanishes. We live in a federation encompassing 8 independent self-governing jurisdictions, each operating under its own laws. It is not surprising therefore that consumers who enter into contracts in different jurisdictions operating under different laws might be afforded different levels of protection.

13. Australian States do have power to legislate with extra-territorial effect - see Australia Act 1986 (Cth) subs 2(1) - however I am not satisfied that this applies to the Northern Territory of Australia. In any event, even if this power might exist it would not be found to operate in any particular NT legislation unless such an intention appeared "expressly or by necessary intendment" from the terms of the legislation. No such intention appears in either of the two NT statutes relied on by the plaintiff. The purposive approach to statutory interpretation, notwithstanding section 62A of the Interpretation Act (NT), does not unassisted fill this gap - see *Ramsay v Vogler* [1999] NSWSC 120 at paragraph 21.

14. The proper law of a contract is "…the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection" - *Bonython v The Commonwealth* [1950] 81 CLR 486 (Privy Council) at paragraph 25. If there is no reference to such a system of law in the contract (as there is not in this case) then we must look at the transaction and its closest and most real connection.

15. The place of the contract will be significant although not necessarily determinative of the question - *Re Fine Braid Limited; Budai Holdings Pty Limited and Astor Glass Works Pty Limited Trading As "Astor Glass Industries" v ADA Articoli Diamantati Affini S A S Di Gariglio Claudio EC* [1989] FCA 296 at paragraphs 75 and 76. In the present case the contract involved a written offer being forwarded by the defendant in Victoria to the plaintiff in the NT, being signed in the NT for the plaintiff and then acceptance of the offer was achieved by the return of that signed document to the defendant in Victoria by facsimile.

16. The plaintiff says this means the place of acceptance was the NT. In support of this the plaintiff relies on section 13(1) of the Electronic Transactions (Northern Territory) Act 2000. However that subsection does not support that submission. Subsection 13(1) says no more than that "…the despatch of the electronic communication occurs when it enters that communication system". It deals solely with the time of despatch. It does not speak about either the time or the place of receipt of the communication. The receipt is dealt with in subsections 13(3) and (4) of the Act in terms of the time of the addressee's receipt. Subsection 13(5) (b) identifies the addressee's place of business as the place of receipt in the absence

of agreement to the contrary. There was no evidence in this matter of any agreement to the contrary. It is common ground that the defendant's place of business was in Victoria.

17. There is authority to the effect that acceptance communicated by telex is deemed to be made at the place at which the telex was received - *Brinkibon Ltd v Stahag Stahl Und Stahlwarenhandelsgesellshaft m b H* (1983) 2 AC 34. This was accepted in Re: *Fine Braid Pty Limited* (above) at paragraph 78. Transmission by email of acceptance of an offer has likewise been held to make a contract at the place where the acceptance is actually received. It was held that this arose "…by analogy with cases concerning the position with what were, or were treated as, other forms of instantaneous communication" - *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA* (No 4) [2009] FCA 522 at para 25. I find that the same reasoning applies to facsimile transmission.

18. I find that the place of the contract in this case was the defendant's place of business in Victoria. This however does not finally determine the question of the proper law of the contract. Are there other close and real connections relevant to this transaction?

19. The plaintiff has submitted that the shed was supplied in Alice Springs and/or that the place of performance of the contract was Alice Springs. It submits that "…the mere fact that Oaktech supplied goods that ultimately ended up in the Northern Territory would be sufficient to establish a connection with the Northern Territory such that section 64 (of CAFTA) would apply to the contract…". This submission as to the supply of the goods requires a consideration of when and where the property in the goods was transferred from the defendant to the plaintiff.

20. Once the contract between the parties was entered into, the goods were manufactured by the defendant in Victoria and then collected by a carrier from the defendant's place of business in Victoria and delivered to the plaintiff's place of business in the Northern Territory - see para [2] above. I heard argument as to whether this carriage was organised by the plaintiff or by the defendant. I conclude that it makes no difference which party organised that carriage. This is because the law in each of Victoria and the Northern Territory is effectively the

same on the issue of transfer of property in goods which are delivered to a carrier, and that law does not distinguish between a carrier chosen by the buyer or by the seller.

21. Section 23 rule 5 of the Sale of Goods Act (NT) deals with a contract for future goods, as in this case. The property in the goods passes to the buyer once they are in a deliverable state and are unconditionally appropriated to the contract - subrule 5(1).Where under the contract the seller delivers the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer…the seller is deemed unconditionally to have appropriated the goods to the contract - subrule 5(3).

22. Section 39(1) of the Goods Act 1958 (Vic) has the same effect -" Where in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be delivery of the goods to the buyer".

23. Both enactments have the effect of identifying the point and place of transfer of property in the goods as the point and place of delivery of the goods by the seller to the carrier for transmission to the buyer. In this case, I find that that occurred at the defendant's place of business in Victoria.

24. Accordingly, the contract arose in Victoria, the goods the subject of the contract were manufactured in Victoria, and the supply (delivery) of the goods to the plaintiff occurred in Victoria. I find that the proper law of the contract is the law of Victoria.

25. Given the plaintiff's pleadings and the way the case was run, that means the Fair Trading Act (Vic) and/or the Goods Act 1958 (Vic) will be the law in Victoria applicable to the plaintiff's pleadings of breaches of the conditions implied by statute of fitness for purpose and/or merchantable quality. This is because these are issues of substantive rather than merely procedural law. Although this case was argued before a Northern Territory court, the law to be applied must be the proper law of the contract rather than the law of the forum where the argument was heard - *John Pfeiffer Pty Ltd v Rogerson* 203 CLR 503 at para 20.

26. The plaintiff has no remedy under the Fair Trading Act (Vic) which is the equivalent of the Consumer Affairs and Fair Trading Act (NT) because section 32D of the Victorian Act limits the operation of the relevant Part of the Act to contracts for goods having a price of not more than $40,000, except for goods supplied for personal, domestic or household use or consumption. It is common ground in this matter that the shed was supplied for a commercial purpose and that it cost more than $40,000. However, the Goods Act 1958 (Vic) which is the equivalent of the Sale of Goods Act (NT) may still apply to the contract.

FITNESS FOR PURPOSE - SUBSECTION 19(a) GOODS ACT 1958 (VIC)

27. Subsection 19(a) of the Goods Act 1958 (Vic) provides as follows: "Subject to the provisions of this part and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contact of sale, except as follows- (a) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose".

28. It is common ground that the plaintiff through its director Rick Shelton entered into negotiations with agents of the defendant to purchase a shed to be manufactured by the defendant. Those negotiations dealt with the dimensions of the shed, the dimensions of the sliding doors, the number and configuration of the bays, and the price to be paid. Mr Shelton explained to a Mr Hutchinson on behalf of the defendant what he had in mind and what he needed. On page 165.4 of the transcript he said he needed "... the two bays with four sliding doors that could be slid back...". The shed needed to be 4.6 metres tall so that a road train fitted with a stock crate could be driven into it; it needed to have opening doors at both ends so that the road train could be driven right through without having to reverse. He said the shed was to be used for mechanical repairs. He said he needed "two open

bays, one enclosed bay and one bay that was not enclosed, which give me the four bays all up" - transcript p165.8. This was the extent of the evidence as to what the plaintiff made known to the defendant about the particular purpose for which the goods were required. It was always perfectly clear that the shed was to have these sliding doors and that they would perform the function of doors, namely to be able to be opened and closed.

29. He received from the defendant a brochure stating that " (i) At Eureka Garages and Sheds we believe that to make a better shed we make it to suit you which means our designs are fully customisable and manufactured under precise factory conditions from durable quality materials. (ii) All structures are fully customised to meet your specific needs, be that a stable, machine shed or workshop" - exhibit P14.3. The shed was subsequently manufactured by the defendant and paid for the plaintiff.

30. I find that the goods supplied under this contract were goods of a description which it was in the course of the seller's business to supply.

31. In the course of the parties' negotiations the defendant forwarded to the plaintiff a letter clearly setting out a reservation as to the performance of the proposed sliding doors of the shed because of their large size. That reservation stated: "Due to the size of the doors Eureka Garages and Sheds cannot guarantee the doors (sic) performance in high wind situations" - exhibit D23.

32. Mr Shelton for the defendant was equivocal in his evidence whether he had read that reservation at the relevant time. In cross examination he was asked:" Are you asking the court to accept that you didn't read and didn't understand that one qualification on that document?" He answered: "No, I'm saying I did read that" - transcript page 210.3. However, in re-examination at transcript page 301.1 Mr Shelton said:" I cannot remember reading it but when - the reason I say I have read it, it's there in - it was there in black and white, so, but I can't recall really reading it". I find that it is more probable than not that he did read it when he received the letter. His evidence was that he had otherwise read and reacted to communications and quotations from the defendant which formed part of the parties' pre-contract negotiations.

33. On the basis of my finding that Mr Shelton read this reservation in the course of negotiating the contract, I find that the plaintiff did not rely on the defendant's skill or judgment in relation to the performance of the doors in high wind situations. I find that there was no implied condition pursuant to subsection 19(a) as to the fitness of the shed for its purpose as identified in para [28] above, with respect to the performance of the doors in high wind situations.

34. I find that the plaintiff did otherwise rely on the defendant's skill and judgement in manufacturing and supplying the shed in unassembled kit form to meet the agreed specifications and for the purposes expressly and impliedly made known to the defendant. I find there was a condition implied in the contract pursuant to subsection 19(a) that the shed, including its large sliding doors, would otherwise be reasonably fit for the purposes made known to the defendant as identified in para [28] above.

35. Mr McConnel for the defendant has submitted that the goods supplied were the shed and that the shed was reasonably fit for the purpose made known even if there were problems with the sliding doors. I do not accept that submission. I have already found that the goods supplied under the contract were the components of the shed in its unassembled form rather than the shed as assembled - para [4] above. I find that the successful operation of the sliding doors was an integral part of the purpose of the shed as made known by the plaintiff to the defendant both expressly and by implication. For the unassembled shed to be reasonably fit for that purpose those large sliding doors and their associated structures had to be designed and their necessary components supplied so that once correctly assembled and erected, the doors would be capable on an ongoing basis of being opened and closed with reasonable efficiency.

36. To determine whether this was so in this case I shall have to analyse the evidence before me, including the expert evidence. I do that later in these Reasons.

MERCHANTABLE QUALITY - SUBSECTION 19(b) GOODS ACT 1958 (VIC)

37. Subsection 19(b) provides: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed".

38. "Goods bought by description" is not defined in the Goods Act 1958 (Vic). Neither is "of merchantable quality". Sutton in the fourth edition of Sales and Consumer Law deals with goods bought by description. He says at page 304.4: "It is a sale by description when the ground upon which the goods are selected or identified is their correspondence to a description and when, therefore, it may be said that the buyer relies primarily or to a substantial degree upon their classification or possession of attributes. If the buyer is not influenced by the description but relies on his or her own assessment it is not a sale of goods by description. In the vast majority of cases nothing will be expressed, and the fact that a sale is a sale by description will be inferred from all the circumstances. It has indeed been said that all sales must be by description unless they are sales of specific goods, sold as such, and neither expressly nor impliedly held out as having any particular description; or unless any statement is not essential to their identity; or unless, though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are".

39. I find that the sale of the shed in unassembled kit form in all the circumstances of this case was a sale by description.

40. I have found in paras [32] and [33] above that the plaintiff was aware of the defendant's reservation as to the performance of the sliding doors in high wind situations and did not rely on the defendant's skill or judgment in that regard. Knowledge of defects in goods can be relevant to the issue of merchantable quality. In Sutton's text above he says at page 310.3: “Where a buyer is told of specific defects before or at the time of the sale… he or she cannot thereafter complain of the defects if only on the ground that the description under which he or she bought the goods included those defects".

41. Merchantable quality commonly involves a lesser obligation than fitness for purpose. If the goods sold are of a quality which makes them fit for the purpose for which such goods are generally sold then they are of merchantable quality even if they are not fit for some less common purpose. In this case I find that the

buyer's desire to be able to utilise a commercial shed by opening its doors, and to secure it and its contents by also closing those doors, is part of the purpose for which such sheds are generally sold. Accordingly I find that the statutory condition in subsection 19(b) of the Goods Act 1958 (Vic) can be implied in this case. That condition can be applied to the shed in its unassembled kit form but does not apply to attributes of any components relevant to the performance of the doors in high wind situations.

42. Once again, to determine whether the goods were of merchantable quality in this limited sense I shall have to consider the evidence, which I do later in these Reasons.

COMMON LAW IMPLIED TERMS

43. The plaintiff has pleaded its reliance on common law implied terms of merchantability and fitness for purpose in business agreements"…as a matter of business efficacy and on the basis of custom or usage" - para 6.4 of the final Statement of Claim. The defendant has denied this pleading - para 6.4 of the final Defence. The plaintiff's counsel Mr Floriani in submissions simply asserted that terms of fitness for purpose and merchantability can be implied "…in the circumstances of this case…". He did not refer to any authority on which he relied in support of this assertion. He asserted that such an implication arose in this case"…because it is just and equitable, it is necessary to give efficacy to the contract, it is so obvious that 'it goes without saying'…". He did not in his submissions attempt to justify any of these assertions by reference to the facts of this case.

44. I do not need to rule on the existence of any such implied terms in the contract in this case. Such common law terms if they did exist would be subsumed in the statutory implied terms discussed above. They would not establish additional or more extensive rights than those created by statute in the circumstances of this case.

DEFECTS 9.1, 9.2 AND 9.3

45. The plaintiff has pleaded that in May 2008 and ongoing, various defects became apparent. These included (i) the top C purlin structure along the roofline bowed, (ii) there was buckling in top leading tracks to sliding doors, and (iii) support braces where sliding door guides were fixed to the shed structure were bending - paras 9.1, 9.2 and 9.3 of the final Statement of Claim ("the first three defects").The defendant does not admit any of the first three defects - para 9.1 of the final Defence. It says that if the defects occurred then it denies that they arose by virtue of the materials supplied - para 9.2 of the final Defence. The plaintiff accordingly bears the onus of proving the occurrence and the circumstances of each one of the first three defects.

46. The defendant pleads in paragraph 12 of the final Defence that "...if, which is denied, the shed is defective or damaged as alleged or at all, then any defect or damage to the shed was caused or contributed to by the plaintiff's own negligence". The defendant then pleads:

> " 12.1 The Plaintiff failed to take adequate steps to ensure that the shed was erected in accordance with the plans, industry standards and in a workman-like manner;
>
> 12.2 The Plaintiff directed the former Second Defendant to erect and hang the sliding doors before the floor slab had been poured and the bottom track for the sliding doors was in place thereby causing the purlin and bridging to bend;
>
> 12.3 The Plaintiff permitted the former Second Defendant to assemble the shed door frames using tek screws to join the panels instead of welding them together which resulted in a substantially weaker door frame;
>
> 12.4 The Plaintiff modified the doors by removing the top rollers and replacing them with an improvised pin device that did not sit securely in the top track, allowing the door to dislodge from the track and come loose; and

12.5 The Plaintiff installed or allowed to be installed the bottom track for the sliding doors out of alignment, causing the doors to jam. "

47. The plaintiff has not filed a Reply to the final Defence traversing paragraphs 12 to 12.5 inclusive. I may have to consider therefore whether by operation of rule 5.14(1) of the Local Court Rules the allegations of fact in the defendant's pleadings are to be taken as admitted by the plaintiff. This possible consequence will not fall to be determined unless and until I might find that the shed was defective or damaged as alleged in the plaintiff's pleadings.

48. The defendant effectively conceded the occurrence of the first three defects. It did this by submitting they all arose because of the plaintiff's hanging the sliding doors without bottom support. The two experts who in fact inspected the shed, Messrs Ward and Proud, identified and discussed the first three defects. I find that the first three defects did occur.

Hanging The Doors Unsupported

49. Mr. Rick Shelton for the plaintiff told engineer Mr. Ross Proud that the sliding doors to the shed had been difficult to open from the day that they were installed -- the report of Ross Proud dated 14 November 2008 at page 2.4 being exhibit D. 28, and also transcript of Mr Shelton's evidence in chief p.176.7. Mr. Shelton also said that the sliding doors gradually got harder to open and close from the time of their installation - transcript page 149.5. Finally the top rollers jammed altogether. Mr. Shelton inspected them on or shortly before 6 May 2008 and while doing so noted that a support strut from a C purlin (which housed the top rollers of the sliding doors), was bent - p.150.3. He also noticed that the C purlin itself was bent - p.150.9. Mr Shelton was unable to recall whether the support strut was bent when the shed was first erected - p.155.4.

50. Mr Shelton gave evidence that he had originally instructed Mr Matiuzzo whom he had retained to erect the shed, to hang the sliding doors from their top supports before they could be supported at the bottom. This was because the concrete slab had not yet been poured for the floor of the shed and the sliding door's bottom rail could not then be laid. He gave evidence that Mr Matiuzzo cautioned him that it may not be advisable to do this - transcript p 222.5. Mr Shelton was equivocal as

to whether Mr Matiuzzo said he was concerned about the possible effect of the weight of the doors on their top supporting structures. He did not deny that this was said, but he said he was not sure - transcript p 223.2. Mr Shelton went ahead notwithstanding this caution, but he had the doors hung without attaching their cladding, to reduce their weight - transcript p 223.5. He did not explain why the weight of the doors was a matter of concern to him if Mr Matiuzzo had not in fact raised this with him as a problem. He did concede that hanging the doors unsupported at the bottom with the cladding on "..would have been a concern" - transcript p 223.3. He ultimately conceded that he was aware of the risk that the doors might be too heavy for the top tracks if hung unsupported at the bottom - transcript p 230.8.

51. I find on the balance of probabilities that Mr Matiuzzo did warn Mr Shelton against hanging the sliding doors without bottom support because of the risk of overloading the top tracks - that is, the C purlin and its bracing but that Mr Shelton nevertheless proceeded to do so with full knowledge of the risk.

52. Mr Shelton gave evidence that he caused the sliding doors, once hung, to be tied at one end, the southern end "...so that they wouldn't roll along the frames"- transcript p 144.3.

53. Engineer Mr Duncan Ward gave evidence. He attended to inspect the shed and the doors. He was not aware when he prepared his report that the sliding doors had been hung without bottom support - transcript p 76.8. This affects his conclusions as to the causes of the problems with the sliding doors. He gave no evidence on the possible or probable effects on the top structures of hanging the sliding doors unsupported at the bottom.

54. Engineer Richard Liney gave evidence. He had not actually attended to inspect the shed or the doors. He relied on a letter of instructions. He was instructed that the sliding doors had been hung without bottom support. However, he assumed that the doors had been meant to be top supported only - page 9.2 of his report exhibit P13. If this assumption was incorrect then this affects his conclusions as to the adequacy of the structures at the top of the doors.

55. Mr Liney was instructed, or at least he understood, that the buckling of the bridging member bracing the C purlin occurred during the high wind event - para 4.2 on page 7 of his report exhibit P13. This was incorrect - see on the evidence of Mr Shelton in paragraph [49] above. Mr Liney expressed the opinion that " ... when the doors, which were estimated to weigh approximately 350 kgs were hung offset from this cold formed section (i.e. the C purlin) , there were significant torsional forces on the light gauge section which would have rotated the bottom flange into the building" - page 7.7. He considered the respective contributions to the twisting inwards of the C purlin of the lateral wind load and of the weight of the doors. He concluded at page 8.3 of his report: “Of this total torsion the effect of the door dead weight constitutes a significant proportion of the total".

56. Engineer Ross Proud gave evidence. He had attended and inspected the shed and the doors. He was told by Mr Shelton that the doors had been difficult to operate from the day they were installed, and that they were hung without bottom support - exD28 report 14/11/08 page 2.4. He concluded that the dead weight of the doors hung without bottom support would twist the eave purlin (i.e. the C purlin).

57. In Mr Proud's third report which was dated 22/2/09 but which still formed part of exD28, he said that the top rollers of these sliding doors were only for guidance and to permit adjustment - these doors were always intended to be bottom supported - page 3 para 8. He concluded in this report that the system for these doors would have failed even if the eave purlin had been more substantially braced by more or stronger bridging, because of the hanging of the doors from the eave purlin without bottom support prior to the installation of the bottom track - page 3 para 11. He gave evidence that the doors were designed to be bottom supported - transcript page 254.10, 259.9. His opinion that this was so was based on the shed plans Details A and B in exP14.16.

58. ExD23 is a quotation from the defendant to the plaintiff. It states that the sliding doors will have "bottom roller support". Mr Shelton agreed that he knew that - transcript p 207.8.

59. I accept the foregoing evidence on this point. I find that the sliding doors were designed to be bottom supported.

60. Mr Proud gave evidence that it did not matter how long the doors hung unsupported. The deflection of the purlin would have occurred as soon as it took the weight of the doors - transcript p 266.8. He gave evidence that the twisting of the eave purlin was not permanent. If the buckled strut was replaced, the purlin would untwist and return to its original shape - transcript page 250.5.

61. Mr Proud gave evidence that even though he had assumed in the preparation of his reports that the doors had been hung unsupported with their cladding in place, the fact that the cladding was not in place did not affect his conclusion. The weight of the doors even unclad was still sufficient to deflect the C purlin once hung unsupported, although possibly not so much as if the cladding had been in place - transcript p 266.10 and 267.1.

62. Mr Proud gave evidence that the tying up of the doors at one end while hung unsupported, would have doubled the concentration of their load at the point where hung - transcript p 267.4. This would have increased the deflection of the purlin.

63. I find that the hanging of the unclad doors, unsupported at the bottom, caused each of the first three defects at or very shortly after the time the doors were so hung.

Incorrect Installation Of Bracket

64. Mr Shelton gave evidence that he attached a bracket to the C purlin upside down and using one bolt rather than the two provided, and by using that bolt in the lower of the two holes pre-drilled for that purpose. He said he did this because it appeared to him that it "...made sense to me a lot that they did go that way" - transcript p 139.8. I find that the bracket was incorrectly installed by being attached upside down and by only one bolt rather than two and only to the lower of the two holes pre-drilled in the C purlin for the attachment of that bracket.

65. Mr Ward gave evidence that the incorrect attachment of the bracket to the purlin would in general result in a weaker connection - transcript p 55. If installed upside down and bolted only to the lower hole in the C purlin then that would add to the twisting of the purlin - transcript p 69.

66. Mr Liney did not discuss this issue.

67. Mr Proud gave evidence that this incorrect installation of the bracket would impart a different twisting effect - transcript p 260.8. 261.1.

68. On the basis of this evidence, I am unable to draw any definite conclusion as to the relevance of the incorrect attachment of the bracket to the problems associated with the sliding doors.

The Bridging Struts

69. Mr Proud gave evidence that the design for the doors should have provided for two rather than only one bridging strut - transcript p 254.5 and 262.3. This would have given sufficient bracing to the C purlin if the doors had been correctly installed - i.e. not hung unsupported at the bottom.

70. Mr Domenic Sabatino was a director of the defendant. He gave evidence that he supplied additional bridging struts with the unassembled shed, to allow two struts to be installed. He did not do this only with this shed - he said this was his standard practice - transcript p 360.2. He gave evidence that he advised Mr Matiuzzo that this extra bridging had been supplied and should be used for this purpose. He said that this advice was given at a meeting between Mr Sabatino and Mr Matiuzzo prior to Mr Matiuzzo's traveling to Alice Springs to erect the shed for the plaintiff - transcript p 332.5, 334.5 and 335.4.

Credibility Of Mr Sabatino

71. This was not the first time Mr Sabatino had held such a meeting. He said he had organised such meetings previously with Mr Matiuzzo in relation to other sheds supplied to other buyers than the plaintiff in this case - transcript p 356.3.

72. Mr Sabatino gave evidence that he advised Mr Matiuzzo at this meeting not to hang the doors unsupported at the bottom - transcript p 338.3, 338.5.

73. Mr Sabatino said he advised Mr Matiuzzo at this meeting to weld the four panels of the doors together - transcript p 333.3, 346.6 and 361.2.

74. Mr Sabatino gave evidence that he had a second meeting with Mr Matiuzzo, this time by telephone, after Mr Sabatino became aware of the complaints being made by Mr Shelton - transcript p 337.3. He gave evidence that in that conversation Mr Matiuzzo had told him that the doors had been hung unsupported, prior to the bottom track being laid - transcript p 338.2.

75. Mr Floreani, counsel for the plaintiff, attacked Mr Sabatino's credibility on all these foregoing issues. Mr Floreani submitted that Mr Sabatino's evidence should not be accepted because it was too convenient. He submitted that Mr Sabatino had invented the alleged practice of supplying additional bridging with all his company's sheds. He submitted that the meeting between Sabatino and Matiuzzo had never taken place. He had put all this to Mr Sabatino who denied it.

76. Importantly, Mr Floreani then submitted that the defendant's failure to call Mr Matiuzzo in the defendant's case to corroborate Mr Sabatino's evidence on these issues should lead me to draw an inference adverse to Mr Sabatino, namely that Mr Matiuzzo's evidence if called would not assist the defendant's case.

77. Mr Floreani referred me to *Jones v Dunkel* [1959] 101 CLR 298. In this case at para 15 in his judgement, Windeyer J approved the statement of principle in Wigmore on Evidence 3rd edition as follows: "The failure to bring before the Tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance, document or witness, if brought, would have exposed facts unfavourable to the party".

78. It was Mr Floreani on behalf of the plaintiff who claimed that the evidence of Mr Matiuzzo would elucidate the facts. However, the "facts" in the form of Mr Sabatino's evidence do not need elucidation. They were quite clear. He gave his evidence of events of which he had first hand knowledge, duly affirmed, and he was not shaken in cross examination. It is the plaintiff which wishes to advance the proposition that Mr Sabatino's evidence concerning his meeting with Mr Matiuzzo should not be believed. It is the plaintiff which settled its action against Mr Matiuzzo's company in these proceedings on undisclosed terms. It is the

plaintiff which did not call Mr Matiuzzo in its case notwithstanding his close involvement with the relevant events of the case. It is the plaintiff which did not seek leave to reopen its case to adduce evidence from Mr Matiuzzo after the evidence of Mr Sabatino in the defendant's case. It is the plaintiff which bears the onus of proof.

79. The principle in *Jones v Dunkel* is indeed relevant in these circumstances, however the inference to be drawn arising from the failure to call Mr Matiuzzo is to be drawn adversely to the plaintiff rather than to the defendant in all the circumstances identified above.

80. I infer that the evidence of Mr Matiuzzo if it had been called would not have assisted the plaintiff's case. I accept on the balance of probabilities the evidence of Mr Sabatino in relation to his relevant meeting with Mr Matiuzzo and the matters discussed at that meeting and in the subsequent telephone conversation.

81. I accept on the balance of probabilities the evidence of Mr Sabatino that it was his standard practice to supply additional bridging material to brace C purlins in the sheds supplied by his company.

82. That being so, given the evidence of Mr Proud set out in para [68] above as to the sufficiency of the design and the materials for the C purlin if two bridging struts were used, I find that that design and those materials as provided in this case would have given sufficient bracing for the C purlin if the shed had been correctly erected.

Use Of Tek Screws

83. Mr Shelton gave evidence that Mr Matiuzzo linked the four panels making up each sliding door using Tek screws - transcript p 145.2, 145.8.

84. Mr Liney in his report at page 4.1 said it would make no significant difference to have welded rather than Tek screwed the door panels.

85. Mr Ward gave evidence that the door panels had been joined using Tek screws placed 1200mm apart - transcript p 58.2. He said this was inadequate - p 58.3. He

said the connections of these panels would have been improved if the panels had been welded.

86. Mr Proud said that the door panels were supposed to be stitch welded rather than Tek screwed - transcript p 248.9. He gave evidence that he calculated the Tek screws had a capacity to resist a prying force of 3.5 kilonewtons but that the prying force actually experienced by the doors in the high winds on 22 September 2008 was more like 10 kilonewtons - transcript p 249.6.

87. He gave evidence that he recalled noting "some sheer" having taken place on some but not all of the Tek screws in the collapsed door - transcript p 272.4.

88. He concluded that if the doors had been stitch welded rather than Tek screwed then they would have been slightly more rigid; the overall integrity of the door would have been far more secure; but "...it doesn't have any effect on the final strength outcome or the deflection outcome" - transcript p 272.5.

89. Mr Shelton said the doors "folded in" - p.166.3. He enlarged upon this, saying: "…We noticed the doors that they didn't exactly pull in from the top. The Tek screws that were - were held - with the panels on the door, seemed to - the two end panels seemed to fold in like this, and then the doors let go at the top and blew in" - p.166.4. He was then asked: "So we're not talking about the sheeting or cladding on the doors or panels; we're talking about something more fundamental or…?" - to which Mr Shelton replied: "No, the doors that were actually in photographs, it actually shows that the doors were sheeted, because they were assembled in panels, four panels, Tek screwed panels. The Tek screws let go in the - two of the panels folded in and let the door give way at the top" - p.166.5.

90. Mr Shelton saw this described failure of the Tek screws with his own eyes. He saw two of the door panels fold in as a consequence of this failure, and he said this let the door give way at the top and fall into the shed.

91. I find on the balance of probabilities that the assembling of the door panels by the use of Tek screws resulted in a less rigid and less secure door which gave way when the Tek screws sheered and so the door deflected inward earlier than might have been the case if the panels had been stitch welded.

92. I have earlier accepted the evidence of Mr Sabatino that he instructed Mr Matiuzzo to weld these panels - para [72]. I find that the plaintiff and not the defendant is responsible for the use of the Tek screws and the adverse effects of that.

Removal Of The Top Rollers

93. Mr Shelton gave evidence that he removed the top rollers from the doors and replaced them with pins, because the doors could not be slid forward or back. The doors then "...worked fine" - transcript p 175.3. This occurred before the wind event.

94. Mr Ward gave evidence that if the top rollers had not been removed then the doors would not have failed at that point - transcript p 75.5. They would probably have failed where the panels were joined with the Tek screws - p75.6.

95. He gave evidence at transcript page 76.1 that these pins had bent out of the upper track and that this was the likely mechanism for the dislodgement of the door during the high wind event.

96. Mr Proud gave evidence that the top rollers were there only for guidance and to permit adjustment - page 3 para 8 of his report dated 22/2/10, part of exhibit D28. He said that replacing the top rollers with a pin increased lateral movement of the door at the top - page 3 para 9. However, it did not matter to the function of the doors that the top rollers were removed - transcript p 259.8.

97. Mr Proud gave evidence that the pins replacing the top rollers were too short, so that they inserted insufficiently deep into the C purlin - transcript p 264.5. He agreed at transcript page 264.7 that there were 3 factors which led to the door's collapsing inward into the shed at the time of the wind event. These were: (1) the level of deflection in the framing members of the door; (2) the ability or inability of the C purlin to withstand lateral loading; and (3) the length of the pin.

98. I find that the first three defects did not arise because "...the materials and services supplied in the erection or the shed were not of a merchantable quality or

fit for the purpose for which the shed was supplied...” as pleaded in para 10 of the final Defence.

99. I find that the defendant had no responsibility for the first three defects or any one of them. I dismiss those claims.

DEFECTS ALLEGED IN PARAGRAPHS 9.4 AND 9.5

100. There was evidence before the court in relation to these alleged defects in the form of photographs - exhibits P14.19 and P14.20 - and also from Rick Shelton on behalf of the plaintiff - transcript p.155.10 and 156.1 to 156.3. However, there was no evidence that these defects were caused by anything other than failures during the erection process. That is, there was no evidence that these problems involving flashing were the results of any design fault or of a failure by the defendant to supply sufficient materials or fastenings. At pages 232.4 to 233.2 of the transcript Mr McConnel for the defendant put to Mr Shelton that loose flashing simply needed to be secured. Mr Shelton was not sure how it could be secured but provided no explanation for his uncertainty nor any alternative explanation. He agreed that there was additional flashing, additional guttering, and “…extra building material…" supplied with the kit. That is, there was no evidence of insufficient material having been supplied with the shed in unassembled kit form.

101. I find that these alleged defects pleaded in paragraphs 9.4 and 9.5 of the final Statement of Claim were erection issues. I reiterate that the defendant had no responsibility for the erection of the shed. In any event, both of these alleged defects had a merely cosmetic effect. There was no evidence that they in any way affected either the merchantable quality or the fitness for purpose of the shed.

102. Accordingly, in the absence of any other legal basis pleaded for the claims in respect of the defects alleged in paragraphs 9.4 and 9.5 of the final Statement of Claim, I dismiss those claims.

DEFECT 9.6

103. The plaintiff has pleaded in para 9.6 of the final Statement of Claim that in May 2008 and ongoing the following defect became apparent: "dislocation of sliding shed doors and buckling of door frames and sheet metal as a result of wind force". Once again the defendant responded by not admitting this, and by denying that the defect arose by virtue of the materials supplied - paras 9.1 and 9.2 of the final Defence. Accordingly, the plaintiff bears the onus of proving the allegation.

104. The plaintiff has limited its claim as pleaded in para 9.6 to the occurrence of this defect "as a result of wind force". It has further limited this claim in these terms to breaches of the implied terms as to merchantable quality and/or fitness for purpose. I have found in paras [33] and [41] above that these implied terms did not extend to the performance of the sliding doors in high wind situations.

105. It was eventually conceded by Mr McConnel for the defendant that under-gauge steel of the wrong grade was used in the frames of the sliding doors - page 1 of the Defendant's Submissions. There was a concession to this effect from the defendant itself - exhibit P14.26 - and evidence from each of the expert witnesses - report Duncan Ward exP2, report Richard Liney ex P13 clause 1.2. and Ross Proud at transcript page 262.1. The plaintiff's pleadings in paras 9.6 and 10 are broad enough to encompass this inadequacy.

106. However, there was no evidence that the provision of the inadequate frames alone was or might have been a problem for the operation of the sliding doors except in high wind situations.

107. The evidence is that the doors were subjected to very high winds on the occasion that they dislocated and buckled - para [7] above. I find that the inadequate frames contributed in part to this failure, but only to a minor degree I find that the first three defects pleaded in paras 9.1, 9.2 and 9.3 together with the replacement of the top rollers with a pin and the use of Tek screws instead of welding were overwhelmingly responsible for the failure of the door on 22 September 2008. In any event, I have earlier found that the implied terms as to merchantable quality and/or fitness for purpose do not apply to the goods supplied in high wind

situations and therefore I find they do not apply to the inadequacy of the sliding door frames in high wind situations.

108. The plaintiff fails on this claim. There is no other basis pleaded by the plaintiff for any entitlement to relief arising out of this event. I dismiss this claim.

CONCLUSION

109. I find that the unassembled shed in kit form was reasonably fit for its purpose and that it was of merchantable quality.

110. I have found against the plaintiff with respect to each of the defects pleaded in the final Statement of Claim. Accordingly I do not need separately to consider the defendant's pleading as to contributory negligence. I order that there be judgement for the defendant in the proceedings.

111. The plaintiff has been entirely unsuccessful in the proceedings. The plaintiff shall pay the defendant's costs. That requires a consideration of Rule 38.04 of the Local Court Rules. The amount of the claim in the final Statement of Claim exceeds $50,000.00 when the claim for loss of income in paragraph 11.1(e) is calculated at $4,032.33 per month over the 18 months from September 2008 to the commencement of the hearing on 22 March 2010. The issues of law and of fact were complex.

112. Accordingly I order that the plaintiff pay the defendant's costs of and incidental to the proceedings to be taxed in default of agreement at 100% of the Supreme Court scale.

Dated this 17th day of September 2010.

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John Neill
STIPENDIARY MAGISTRATE