Nguyen v Weber [2003] NTCA 8

PARTIES:	NGUYEN, THI PHOUNG
	v
	WEBER, JOE
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP14 of 2002 (9908732)
DELIVERED:	4 April 2003
HEARING DATES:	11 March 2003
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J Dearn
Respondent:	P Cantrill

Solicitors:

Appellant:	Brian Johns
Respondent:	T S Lee

Judgment category classification:	B
Judgment ID Number:	mar0312
Number of pages:	10

mar0312

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

Nguyen v Weber [2003] NTCA 8
No. AP14 of 2002 (9908732)

BETWEEN:

NGUYEN THI PHUONG
Appellant

AND:

JOE WEBER
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 4 April 2003)

MARTIN CJ

[1] I agree with Riley J, for the reasons he advances, that the respondent excluded the appellant from possession of the machine in question and prevented her from exercising her rights as a co-owner. In so doing he acted in a manner inconsistent with her rights and thus was guilty of conversion.

[2] The respondent's claim to a lien for monies advanced to Tai, a co-owner of the machine, can not be maintained given the respondent's delivery of the machine to the appellant as held by Angel J. That being so, the respondent has no claim against the appellant for monies advanced by him to Tai.

[3] I agree with the orders proposed by Justice Riley.

MILDREN J:

[4] I have had the opportunity to read in draft a copy of the judgment of Riley J. I agree with his Honour that unless the respondent had a valid lien over the machine, the respondent converted the machine for the reasons given by his Honour.

[5] However, in my opinion, there is no evidence that the respondent ever had a lien over the machine. I am unable to see how Angel J concluded that when the respondent facilitated the return of the machine to Tai Huu Nguyen, he acknowledged that he held the machine for and on behalf of Tai. The respondent's claim to a lien seems to have rested on the assumption that as he had paid the bailiff the moneys Tai Huu Nguyen owed to Mr Gilbert and thereby released the machine from the warrant of seizure and sale, he acquired a lien over the property. No authority was cited for this proposition. In my opinion a lien did not arise in these circumstances. Nor was there any evidence of a pledge. The cross-appeal must therefore be dismissed.

[6] I agree with the orders proposed by Riley J.

RILEY J

[7] In 1998 the appellant and Tai Huu Nguyen (Tai) entered into an agreement to purchase a mango cleaning and grading machine. There is now no dispute that the machine was purchased by the appellant and Tai as tenants in common in equal shares. Pursuant to the agreement between the appellant

and Tai the machine was delivered to the appellant's mango farm at Baddington Road Humpty Doo in September 1998.

[8] In March 1999 Tai removed the machine from the appellant's property without her permission. The appellant subsequently secured the return of the machine and, fearing that it may be removed again, directed that it be taken to the property of a neighbour, Mr Gilbert. This turned out to be an unfortunate move because Tai was indebted to Mr Gilbert, who had obtained a judgment against him which Mr Gilbert wished to enforce. Mr Gilbert caused a warrant of seizure to be issued and the Local Court bailiff attended at the premises of Mr Gilbert and seized the machine. Thereafter discussions took place between Mr Gilbert and the appellant and also between Mr Gilbert and Tai directed towards obtaining the release of the machine. Eventually the respondent to the present proceedings, Mr Weber, satisfied the debt of Tai to Mr Gilbert and the machine was released to Tai and conveyed to the respondent's property. There it was used for the processing of the respondent's mango crop by Tai who had contracted to process that crop along with others.

[9] The appellant demanded the return of the machine from Tai and when the machine was not returned she commenced proceedings in the Local Court against the respondent as first defendant and Tai as second defendant, claiming the return of the machine and damages for conversion. The respondent counterclaimed against the appellant seeking payment of an amount being the sum paid to the bailiff of the Local Court to obtain release

of the machine. He claimed that the machine was in his possession as security for the monies advanced on behalf of Tai to clear the debt.

[10] In the proceedings in the Local Court many issues were aired. Of importance for present purposes, the learned Magistrate found that Tai and the respondent had wrongfully converted the machine and he ordered that Tai deliver the machine to the plaintiff. He also ordered that the appellant pay to Tai "half the value" of the machine "such value to be determined upon return of the property to the (appellant)".

[11] On 2 June 2000 the learned Magistrate entered judgment for the appellant against Tai and the respondent "in the sum of $2.10 plus interest" as damages for conversion of the machine. There has been no challenge to the assessment of quantum. He further ordered that the appellant pay Tai the sum of $9827.12 representing the amount found to be due by her in relation to the second defendant's interest in the machine.

[12] In the process of resolving the issues as between the parties his Worship failed to deal with the counterclaim of the respondent. It seems that claim was simply overlooked.

[13] The judgment of the learned Magistrate was appealed to the Supreme Court and, on 29 August 2002, that appeal was allowed in part. It was held that the judgment in conversion against the present respondent in favour of the present appellant was wrongly entered and ought to be set aside. His Honour went on to dismiss the counterclaim of the present respondent

against the appellant which had previously been overlooked. In the counterclaim the respondent had asserted a right of lien over the machine arising out of the payment he made on behalf of Tai to the bailiff of the Local Court in order to have the machine released. Without definitively determining whether a lien was able to be created in the circumstances his Honour concluded that the evidence showed that the respondent held the machine for and on behalf of Tai which was "inconsistent with him having a lien over the machine and any lien that he might have had … was defeated by the return of the machine … there is simply no room for any liability of the (appellant) towards the (respondent) for that pay out figure.".

[14] The matter comes before this Court by way of appeal and cross appeal.

Conversion

[15] The first issue to be resolved is whether the finding of conversion made against the respondent was wrongly entered. Tai did not appear in either the Court below or in this Court and there is no challenge to the finding that he wrongly converted the machine. The only live issue is in relation to the actions of the respondent.

[16] In the Supreme Court the learned trial Judge found that there was no basis for the learned Magistrate concluding that the respondent converted the machine as against the appellant. The basis of that finding by his Honour appears to have been that Tai was a co-owner of the machine with the appellant and one co-owner cannot convert against another. His Honour

treated the respondent as the agent of Tai and as having simply facilitated the return of the machine to Tai. The respondent held the machine "for and on behalf of" Tai. It followed that he had not converted the machine as against the appellant.

[17] It was submitted by the appellant that his Honour erred in concluding that the appellant and Tai, being tenants in common, "one cannot convert against the other". His Honour referred to *Jones v Brown* (1956) 25 Ex (NS) 345. In more recent times the issue has been addressed by Finn J in *Re Gillie & Ors; Ex parte Cornell* (1997) 150 ALR 110 where his Honour said (at 113):

> "For present purposes I should accept, despite the justifiable criticism made of it, that the rule to be applied is that a co-owner will only be guilty of converting the chattels co-owned if he deals with those chattels 'in a manner inconsistent with the rights of the (other) co-owner by excluding him from possession and preventing him from exercising his rights': *Kitano v Commonwealth* (1974) 129 CLR 151 at 172 per Mason J; see also *Baker v Barclays Bank Ltd* (1955) 1 WLR 822 at 827 …".

[18] On the appeal to this court we are not concerned with the situation of co-owners. It cannot be suggested that the respondent was a co-owner. He did not claim any title to the machine. At the highest he claimed a lien over the machine that would entitle him to possession but not to any right of ownership.

[19] For reasons that will be addressed shortly I have concluded that the respondent did not have any right over the machine pursuant to a lien. He did however assert a right to possession of the machine until he had been

repaid the sum he expended in securing the release of it from the bailiff. He first made his claim of entitlement to possession in response to the claim of the appellant that he had unlawfully converted the machine. In so doing he asserted a right inconsistent with the rights of the true owners, being the appellant and Tai. In the absence of a right to possession vesting in him at that time he acted in a way which was inconsistent with the owners right of possession. He thereafter refused to surrender the machine notwithstanding the proceedings commenced by the appellant. He maintained his claimed right to retain possession of the machine without reference to the rights of Tai, indeed his claim was to possession against both the appellant and Tai. He maintained he had a right to retain possession of the machine until he was paid the sum that he had expended to satisfy the debt of Tai.

[20] This aspect of the matter was not addressed in the court below. The respondent asserted a right inconsistent with the rights of both co-owners to possession. He did so in his pleading. He maintained that position in the course of the trial before the learned Magistrate, on appeal before the learned trial Judge and then again in this court. Before the learned Magistrate his position was that he was not prepared to return the goods to the possession of either co-owner unless he was paid the amount he had expended on behalf of Tai.

[21] In my view, and subject to any right the respondent may have by way of lien or pledge to the machine, the finding of his Worship was correct. The respondent by his conduct in the proceedings converted the machine as

against each of the co-owners and, of importance for present purposes, the appellant in these proceedings.

The Lien

[22] In proceedings before this court the respondent maintained a claimed entitlement to the possession of the property both pursuant to a pledge and under a lien.

[23] The evidence on this issue was meagre. The effect of the evidence, insofar as it went, was that the debt was paid by the respondent to Mr Gilbert and the machine was released to Tai. At the direction of Tai the machine was delivered to the farm of the respondent. Tai had an agreement with the respondent to pick mangoes on that property and "it was easy for (him) to work there". Although the machine was on the farm of the respondent there was no evidence to suggest that at that time possession had passed to him either actually or constructively. It was located there as a matter of convenience for Tai to enable him to perform the work which he had contracted to perform. Indeed, as his Honour noted in his reasons for decision, the respondent facilitated the return of the machine to the appellant following the earlier order of his Worship and "in doing so acknowledged he was holding the machine for and on behalf of" Tai. That was, as his Honour held, inconsistent with the respondent holding any lien over the machine. If there was a lien it was defeated by the return of the machine to the appellant in those circumstances. In my opinion no lien was

created and, in any event, his Honour was correct in concluding that if a lien did exist it had been defeated.

[24] It is difficult to see how a pledge could arise in the circumstances. The learned Magistrate did not address the issue and there was nothing in the evidence of the relevant witnesses to suggest the parties contemplated a pledge. The claim of the respondent in his defence to the statement of claim was simply that "the goods were stored in the shed of (the respondent's) property as security for a loan." In the counterclaim the respondent did not plead any basis for alleging that a pledge had arisen and simply sought repayment of monies paid on behalf of Tai for the release of the machine. It is an essential element of the granting of a pledge that the item pledged should be actually or constructively delivered to the pledgee. In this case it was not pleaded that possession of the machine had been delivered to the respondent in the relevant sense. As is noted above the evidence is to the contrary.

[25] In my opinion the appeal of the appellant on the issue of whether the respondent converted the machine should be allowed. The judgment of the learned Magistrate should be restored. I note there is no challenge to the assessment of damages made by his Worship.

[26] The cross-appeal of the respondent from the findings of his Honour as to the existence of a lien should be dismissed.

[27] The costs orders of the learned Judge should be set aside and the costs orders of the learned Magistrate restored. The respondent must pay the appellant's costs of the appeal to this court and of the appeal in the court below.
