EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT TIMARU

CIV-2015-076-136
[2016] NZDC 15063

BETWEEN	MCCAW CONTRACTING LIMITED Plaintiff
AND	POWER FARMING NEW ZEALAND LIMITED Defendant

Hearing: 05 August 2016

Appearances: E Middlemass and W Dean for the Plaintiff
S Jass for the Defendant

Judgment: 10 August 2016

RESERVED JUDGMENT OF JUDGE J E MAZE

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[1] McCaw Contracting Limited (McCaw Contracting) owned a Deutz 165 tractor (the tractor). Between late 2013 and August 2014 the tractor was undergoing repairs. McCaw Contracting did not renew insurance on the tractor after February 2014. In August 2014 McCaw delivered the tractor from the repairers to Power Farming New Zealand Limited, Otago branch (Power Farming), asking Power Farming to sell it on McCaw Contracting's behalf. Power Farming recommended an asking price of $45,000 plus GST. Power Farming then took possession of the tractor to sell it.

[2] On 1 November 2014 Russell Burgess of Power Farming telephoned Gavin McCaw asking whether McCaw Contracting would be interested in leasing the tractor to a third party, then unnamed, pending sale. Knapdale Farms Limited (Knapdale) had asked Mr Burgess whether they could lease a tractor. Mr Burgess

did not advise Mr McCaw of the name of the possible lessee. Mr McCaw and Mr Burgess discussed nothing other than a proposed hourly rate for hire of $45 plus GST, with Mr McCaw being told McCaw Contracting would have to bill the lessee direct. Mr McCaw instructed Mr Burgess to 'make it happen', and Mr Burgess said he would 'sort out the paperwork'. Nothing else was said about the tractor

[3] Mr McCaw next heard about the tractor on 12 November 2014 when Mr Burgess sent a text to Mr McCaw asking "Is your deutz tractor insured? Cheers russ". Between 1 and 12 November however several crucial events had occurred :

- On 7 November an employee of Power Farming (Tony) released the tractor to Knapdale;

- Knapdale's driver asked who was to insure the tractor and Mr Cox, the yard man, said he did not know;

- On an unknown date between collection on 7 November and 12 November Knapdale asked Power Farming to look at the tractor as they were experiencing problems; Power Farming sent a workman to Knapdale's farm and he worked on the tractor;

- The tractor caught fire on or about 12 November and was destroyed.

[4] It is clear Power Farming had told McCaw Contracting nothing of the events in paragraph [3] above until after 12 November 2014. When the tractor was destroyed by fire it was not covered by insurance. The question is who should bear the loss of the tractor.

[5] Mr Dean submits McCaw Contracting should succeed in negligence because Power Farming had a duty of care to McCaw Contracting to keep the tractor secure, under the agreement to sell the tractor on behalf of McCaw Contracting. They breached that duty of care by releasing the tractor to Knapdale before they had enabled McCaw Contracting to reach an agreement with Knapdale for the lease of the tractor. He submits that evidence that Mr Burgess said "I will sort out the

paperwork", that Power Farming sent a mechanic to work on the tractor on Knapdale's complaint, without advising McCaw Contracting or telling Knapdale to approach McCaw Contracting, and that they considered they still held the tractor for sale on behalf of McCaw Contracting, all reinforce the conclusion that Power Farming believed itself throughout to be under a duty of care to McCaw Contracting in respect of the tractor. He further submits that Power Farming remained under that duty of care until it had given notice to McCaw Contracting of a change. Therefore Power Farming in liable to McCaw contracting in negligence for the value of the lost tractor.

[6] In the alternative Power Farming had contracted with McCaw Contracting to act as agent in arranging the lease to Knapdale and it failed to perform its obligations (based upon Mr Burgess' evidence he said to Mr McCaw: "I will sort out the paperwork") before releasing the tractor.

[7] In the further alternative, Power Farming held the tractor under a bailment, and released it in breach of the obligations under the bailment.

[8] Mr Jass for Power Farming submits there was neither an agency nor a bailment governing interactions between Power Farming and McCaw Contracting. For there to be an agency, Power Farming must have been able to conclude a legal contract on behalf of McCaw Contracting. Merely communicating agreed terms between two parties does not constitute an agency. Power Farming was not authorised to conclude the lease agreement with Knapdale on behalf of McCaw contracting.

[9] While Power Farming had the tractor under a bailment for the purposes of selling it, the conclusion of the lease and the release of the tractor terminated the bailment and any obligations there under.

[10] In any event a bailee is not obliged to insure the chattels which are the subject of the bailment, nor is he obliged to warn the owner about the need for insurance. Therefore Power Farming had no obligation in relation to the insurance of the

tractor. The provision of a mechanic to work on the tractor is irrelevant. Power Farming assumed no responsibility from what was a gesture of goodwill.

[11] Mr Jass submits McCaw Contracting's loss arises from its own failure to insure the tractor, and the loss is not properly quantified and proven.

[12] The starting point is to define the legal relationships if any between McCaw Contracting and Power Farming. Two legal relationships are established. Firstly Power Farming was the agent of McCaw Contracting for the sale of the tractor, a relationship which still existed at the time of the fire. That relationship did not require Power Farming to have physical possession of the tractor at all times. I do not have evidence of the terms of that relationship (such as the amount of any commission payable on the sale), and that impacts upon this decision as set out below. The second relationship was one of bailor/ baileee in relation to possession of the tractor. Under the bailment, Power Farming had possession of the tractor to enhance the agency for the sale of the tractor. I accept entirely that under the bailment Power Farming had no obligation to insure or discuss insurance of the tractor. It does however seem the Power Farming did attempt to claim under its own insurance policy (refer texts to Mr McCaw exhibited to his affidavit).

[13] As was foreshadowed by the conversation between Mr Burgess and Mr McCaw, the bailment was capable of being terminated by the completion of the lease to a third party; that would not have ended the agency agreement however.

[14] So had the bailment come to an end? It had not because of a range of reasons:

- Mr Burgess asked Mr McCaw whether McCaw Contracting would be willing to lease the tractor and an hourly rate was fixed. It was stated that any lease would be between McCaw Contracting and the lessee; that is, that Power Farming would not be a party to the lease.

- Mr Burgess offered to provide directly to Mr McCaw some papers to assist in formalising a lease; Mr Burgess would have known he had not done that when the tractor was released to Knapdale;

- Mr Burgess knew he had not provided the name of the proposed lessee to Mr McCaw before the tractor was released;

- As someone professionally involved in commercial leases of farm equipment, Mr Burgess would have known that a lease agreement for farm machinery and equipment would usually be in writing, and provide for the lease rate and term, describe the equipment being leased, provide addresses for notice being given under the lease, set out obligations in respect of the care and maintenance of the equipment, specify who must ensure it was insured, specify obligations of the parties to any third party holding an interest in the equipment, set out how to terminate the lease and so on. Mr Burgess knew or ought to have known that these were the matters Mr McCaw would have expected to be provided to him when he heard the words "I will sort out the paperwork"; Mr Burgess did nothing to disabuse Mr McCaw of that understanding, and he did not provide the paperwork before Power Farming released the tractor to Knapdale.

[15] In specifying to Mr McCaw that the billing would be directly from McCaw Contracting to the lessee, Mr Burgess told McCaw Contracting it was for them to lease directly to the third party (unnamed) and that the lease would be a separate and independent contract between McCaw Contracting and the lessee. Power Farming therefore knew or ought to have known from the above matters all within Power Farming's direct knowledge that, when it released the tractor to Knapdale, no lease agreement had been concluded, nor would one be concluded until at the very least Power Farming supplied information to McCaw Contracting.

[16] It then follows that the bailment continued at the time Power Farming released the tractor to Knapdale, and therefore Power Farming was dealing with the tractor contrary to and in breach of its obligations under the bailment.

[17] I am reinforced in that analysis because Power Farming took the complaint about the operation of the tractor from Knapdale, and dealt with the tractor as if it was still obliged to do so. It did not notify McCaw Contracting and invite them to speak directly with the purported lessee; neither did it tell Knapdale to deal directly with McCaw Contracting over the repairs to the tractor. Power Farming did not then believe there was a concluded lease agreement; the response may have been a pragmatic one, but Power Farming needed consent to do the repairs from McCaw Contracting or confirmation that the account would be in Knapdale's name, if they honestly believed at the time there was a lease agreement in place.

[18] It then follows that Power Farming was in breach of its obligations under the bailment both when it released the tractor to Knapdale, and when the tractor was destroyed by fire on or about 12 November 2014. Power Farming had a readily foreseeable duty of care to McCaw Contracting in relation to control of that tractor while the bailment continued and it acted in breach of that duty.

[19] Power Farming disputes a sufficient causal link is established between the breach as established and the loss of the tractor. If the tractor had remained in the possession of Power Farming it would not have been operated and would not then have caught fire. It seems to be accepted that the tractor caught fire after it had been repaired by Power Farming to a satisfactory standard. It therefore must have caught fire while being operated by Knapdale. It would not have been operated by Knapdale but for Power Farming's breach of its obligations under the bailment. The required causal link is established. The evidence therefore shows that Power Farming was in breach of its obligations in releasing the tractor to Knapdale, and the fire and destruction occurred while the bailment continued. Power Farming is therefore liable for the loss incurred by McCaw Contracting.

[20] However the evidence is unsatisfactory as to valuation. Mr Burgess is a competent and qualified valuer, but fixing the price for sale seems to have been in the expectation it would be sold at an agreed lesser price. He seemed to put the value as being "in the high thirties" but as I have been given no evidence as to the commission or fees payable to Power Farming for selling the tractor, I cannot finalise quantum. Accordingly this judgment will be confined in the first instance to

liability and adjourned, with the parties having 14 days from release of the decision to agree on quantum, or confirm a further hearing is required for that purpose. I also need submissions on costs (unless they too can be agreed). Therefore both counsel have fourteen days from release of this judgment to indicate their position on valuation and whether a hearing is required, and to make submissions on costs.

[21] I am grateful to both counsel for their assistance and clarity at the hearing.

J E Maze
District Court Judge

Signed in Timaru on Wednesday 10 August 2016 at 9:00am