

AUSTRALIA / JUDGMENT

Liu v Ye [2024] NSWSC 1485

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Supreme Court

New South Wales

Medium Neutral Citation: Liu v Ye [2024] NSWSC 1485

Hearing dates: 21 November 2024

Date of orders: 27 November 2024

Decision date: 27 November 2024

Jurisdiction: Common Law

Before: Davies J

Decision: 1. Grant leave to the plaintiff to appeal pursuant to s 40 of the Local Court Act 2007 (NSW).

2. Dismiss the summons.
3. The plaintiff is to pay the defendant's costs.

Catchwords: APPEALS – appeal from Local Court to Supreme Court – claim in detinue for the failure of the defendant to return an emerald – plaintiff entrusted defendant to sell an emerald in China in 2014 – defendant failed to sell the emerald – plaintiff demanded return of emerald from 2015 – whether the plaintiff's demands were unequivocal – no requirement for demands to identify a particular time or place – where plaintiff could only attend on the defendant to require the return of the emerald – held that demands were clear, specific, unequivocal and unconditional

LIMITATION OF ACTIONS – detinue – where demands made in 2015 and 2016 – proceedings commenced in 2023 – whether defendant's actions amounted to a refusal – where a refusal can be demonstrated by the passing of a reasonable period of time without response – evidence indicated defendant went to China but did not return with the emerald – where more than a reasonable time had elapsed – defendant's inaction a clear refusal of demand – where time commenced to run from refusal – claim statute-barred

Legislation Cited: Customs Act 1901 (Cth) s 225

Limitation Act 1969 (NSW) ss 14, 21, 63, 65

Local Court Act 2007 (NSW) ss 39, 40

Cases Cited: CHEP Australia Ltd v Bunnings Group Ltd [2010] NSWSC 301

Clayton v Le Roy [1911] 2 KB 1031

Crowther v Australian Guarantee Corporation Ltd [1985] Aust Tort Reports 80-709

Fitzgerald v Kellion Estates Pty Ltd (1977) 2 BPR 9181

Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd (1993) Aust Torts Reports 81-244

Grant v YYH Holdings Pty Ltd [2012] NSWCA 360

John F Goulding Pty Ltd v Victorian Railways Commissioner (1932) 48 CLR 157; [1932] HCA 37

JWR Productions Australia Pty Ltd v Duncan-Watt (No 2) [2020] FCA 236; (2020) 377 ALR 467

Helga Henriette Schwarzschild v Harrods Ltd [2008] EWHC 521

Lloyd v Osborne (1899) 20 LR (NSW) 190

Ming Kuei Property Investments Pty Ltd v Hampson [1995] 2 Qd R 251

R v The Secretary of State for the Home Department [2011] EWHC 1388 (Admin)

Slaveski v State of Victoria and Others [2010] VSC 441

Zarfati v McMillan [2021] NSWSC 944

Texts Cited: Nil

Category: Principal judgment

Parties: Coco Yin Liu (Plaintiff)

Thomas Feng Ye (Defendant)

Representation: Counsel:

A Britt (Plaintiff)

A J Macauley (Defendant)

Solicitors:

Direct brief (Plaintiff)

GOH Lawyers (Defendant)

File Number(s): 2024/273540

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Decision under appeal Court or tribunal: Local Court of NSW

Jurisdiction: Common Law

Citation: Nil

Date of Decision: 3 July 2024

Before: Brender LCM

File Number(s): 2024/273540

Judgment

1. The plaintiff filed a statement of claim in the Local Court on 17 March 2023 seeking damages for the failure of the defendant to return an emerald to her which she had entrusted to him for sale in China.
2. Although the parties appear to have argued the matter before the Magistrate on the basis that the causes of action involved were, breach of contract, bailment, agency, conversion, detinue and specific restitution (as the Magistrate noted in his judgment) the focus appears to have been on detinue, and that was the only cause of action relied upon in the appeal to this Court.
3. The proceedings were defended on two bases. First, it was pleaded that the emerald did not belong to the plaintiff; rather, it belonged to a joint venture between the defendant and a person named Norman Keith Stringer. Secondly, it was defended on the basis that the claim was statute barred because the cause of action in detinue arose sometime in 2015 or 2016 when demands were first made by the plaintiff for return of the emerald.
4. On 3 July 2024, the Magistrate found judgment for the defendant on the basis that the claim was statute barred. The Magistrate found further that if he was in error on the limitation defence, the plaintiff was entitled to damages for a failure to return the emerald.
5. The plaintiff, by summons filed on 25 July 2024 seeks that the judgment of the Magistrate be set aside and that the defendant pay the plaintiff the sum of \$24,568.00 with interest from 17 October 2022, being the date of a letter of demand written by the plaintiff to the defendant. Although the plaintiff in the summons appeals as of right under s 39 of the Local Court Act 2007 (NSW), the plaintiff accepts in her submissions that the issues in the appeal are questions of mixed law and fact, with the result that leave to appeal is needed.
6. The grounds of appeal in the summons are these:
 1. The Court made an error of law in finding that by the time the plaintiff commenced proceedings in the Local Court on 17 March 2023 that her claim against the defendant was statute barred by reason of s 14 of the Limitations Act NSW.
 2. The Court made an error of law in respect to the application of s 14 of the Limitations Act NSW and when the plaintiff's causes of action first accrued to the plaintiff.

3. The Court made an error of law in failing to determine a "reasonable time: at [18] and [19] of the Decision and thus failed to determine when the cause of action first accrued to the plaintiff.
4. In the alternative to 3 (above) the Court made an error of law in failing to provide reasons in respect to the determination of what is a reasonable time in order to determine when the cause of action first accrued to the plaintiff.
1. There is no cross-appeal by the Defendant in respect of the determination that, if the proceedings are not statute-barred, he is liable in damages to the plaintiff.

The emeralds and the demands

1. The plaintiff and the defendant married in 1996 in China. They moved to Australia and were divorced in 2004. Thereafter the plaintiff commenced a de facto relationship with Mr Stringer. The defendant and Mr Stringer subsequently went into business together.
2. The plaintiff said that she had a discussion with the defendant in about 2013 when the defendant told her that if she bought expensive stones in Australia he could take them to China and sell them for her.
3. In 2014 the plaintiff gave the defendant three rings which she had purchased at First State Auctions. During 2014 the defendant travelled to China and, on his return, he paid the plaintiff the original amount payable on each ring together with an amount for GST.
4. On 8 June 2014 the plaintiff purchased an emerald ("the First Emerald") at First State Auctions. She gave it to the defendant for him to sell in China. Although he did not sell it, he paid to her the amount of the purchase price together with GST and returned the emerald to her.
5. Subsequently, on 10 July 2014 the plaintiff purchased a further emerald ("the Second Emerald") at First State Auctions. The purchase price was \$24,568.
6. A friend of the plaintiff's, Jenny Yan, also bought a green emerald ring at First State Auctions. With Ms Yan's agreement, in late 2014, the plaintiff gave both the First Emerald and the Second Emerald and the one purchased by Ms Yan to the defendant to sell in China.
7. The plaintiff said that in early 2015 she called the defendant when she was with Jenny Yan. They had a conversation to this effect:

PLAINTIFF: How are the sales going?

DEFENDANT: No one wants to buy emeralds.

PLAINTIFF: In that case can you bring Jenny's ring and my two stones back to Australia.

DEFENDANT: Yes. Next time I go to China I will bring them back.

Ms Yan gave evidence of that conversation in similar terms.

1. At the end of 2015 the defendant returned Ms Yan's ring to the plaintiff. The parties then had this discussion:

PLAINTIFF: Where are my stones?

DEFENDANT: They are still in China.

PLAINTIFF: Why don't you bring them back to me?

DEFENDANT: I can't since they are checking my arse at Airport Security.

PLAINTIFF: I want my stones back.

DEFENDANT: I will go to China soon and bring the stones back.

1. Later in 2015 the plaintiff and defendant had a further discussion where the plaintiff asked where the Second Emerald was and the defendant that it was in a safety deposit box in Shanghai because someone in China was interested in it, and he might be able to sell it. The plaintiff said, "Bring it back". The defendant said he would do so the next time he visited China.
2. The plaintiff and the defendant had a further conversation to similar effect in early January 2016 and subsequently in 2017. The plaintiff asserted that there were similar discussions from 2017 to 2020 and the defendant did not return the Second Emerald to her.
3. On 17 October 2022, the plaintiff wrote a letter to the defendant in these terms:

I refer to our previous discussions concerning the return of my emerald which have confirmed remains in a safety box in Shanghai in China.

As you are aware I bought the emerald in 2014 for a total cost of \$24,568.

I gave you this emerald to sell in 2015 and to provide the sale proceeds to me so I could pay our daughter's school fees.

You informed me that you did not sell the emerald nor have you returned the emerald to me or paid me for the emerald.

As you are aware I have on numerous times asked for about the emerald or where is my money. You informed me that you had not sold the emerald and that the stone is in a safety deposit box in Shanghai in China. You repeatedly asserted that you would return with the stone when you next go to China.

The above representations were made by you on numerous times between 2017-2020.

Despite the above you have recently asserted you know nothing of the above.

In these circumstances you have 28 days to return the emerald to me or pay me \$24,568 [check].

If this does not occur, I will have no option but to commence proceedings against you to recover the emerald or its value.

In any such proceedings in addition to the above, I shall seek interests and legal costs and shall rely on this correspondence.

I trust that proceedings will not be necessary and look forward to receipt of the emerald or \$24,568 [check].

(text as in original)

1. The defendant said that he ignored this letter because he had already returned the Second Emerald to Mr Springer.
2. The defendant's account of the matter differs somewhat from the plaintiff's account. He said that by July 2013 he had got to know Mr Stringer well and they worked together in the business of importing building materials. They began to discuss selling low quality sapphires from the gem fields in Queensland to China.
3. The defendant said that in about June 2014 Mr Stringer gave him the First Emerald and asked him to sell it in China. He took it to China but was not able to sell it. He explained to Mr Stringer that it was of poor quality and no one was interested. He cannot recall when he brought it back to Australia.
4. In relation to the Second Emerald, he annexed to his affidavit a copy of the same tax invoice that the plaintiff annexed showing her purchase of the second emerald. However, the defendant's copy contains the words "customer Thomas picked up the goods on 15 Sept 2014" and there is a signature by someone called Alex who the defendant says is a staff member from First State Auctions.
5. Thereafter, the defendant borrowed \$100,000.00 from Mr Stringer on a short-term basis to assist in paying for a property. He appears to have used the two emeralds and some sapphires as some form of security.
6. He said that on 5 September 2016 he returned the Second Emerald and the sapphires to Mr Stringer.
7. He said that when the plaintiff demanded the return of the emeralds in mid-September 2016 and 2017 he said that he had given them back to Mr Stringer because they belonged to him. As noted earlier, he said that was the reason he ignored the plaintiff's letter of 17 October 2022.

The Magistrate's judgment

1. The Magistrate first made reference to ss 14, 21, 63 and 65 of the Limitation Act 1969 (NSW). His Honour then set out paragraphs 40 to 56 of the defendant's submissions followed by extracts from the plaintiff's written submissions. Both extracts of the submissions were concerned with the limitation issue raised by the defendant.
2. In the section of his judgment headed "Consideration" the learned Magistrate said this:

9 The plaintiff's largely uncontested evidence is that she divorced the defendant sometime after 2002 and commenced a de facto relationship with Keith Stringer in 2006. The defendant and Mr Stringer commenced some business dealings in about 2010.

10 She purchased a stone on 10 July 2014 (the Second Emerald). She has a tax invoice that support that evidence. She says in late 2014 she then entrusted the stone for sale to her former husband, together with another stone she had bought earlier (the First Emerald) and a ring owned by a friend (Jenny Yan).

11 In early 2015 the defendant told her that the emeralds couldn't be sold so she asked for them to be given back. This was in the presence of Ms Yan. At the end of 2015 she asked again and he said he would. A third conversation is also deposed to, where the defendant said he had given the First Emerald to Mr Stringer. The plaintiff again asked for the Second Emerald back. A fourth conversation is also set out from January 2016. Other conversations to similar effect were mentioned in general terms or on unspecified dates. A letter of demand was written in 2022.

12 Jenny Yan confirms the first conversation requesting return of the goods.

13 In addition Ms Chen gave evidence, unchallenged, that she heard the plaintiff ask the defendant in January 2016 for the emerald back and he said he would do so.

14 The defendant denies or does not recall these demands. He says he gave the Second Emerald to Mr Stringer in September 2016. He says he asserted to the plaintiff, and believed, it was owned by Mr Stringer. That state of knowledge may be true because the defendant and Mr Stringer entered a deed on 24 November 2014 which records a \$100,000 loan by Mr Stringer to the defendant, but also records the defendant having taken delivery of "a quantity of valuable emeralds worth \$125,000 and sapphires worth \$25,000 from Keith and is trying to sell them for Keith".

15 The Deed was between Mr Stringer and the defendant. The plaintiff witnessed a signature on the Deed and knew something about its contents. I will return to that. On the front of page of the deed is a note dated September 2016 to the effect the deed is at an end. It says "Thomas Ye has returned the emerald and the two sapphires", with the "agreement dated 24/11/2014" described as "now ended".

16 The limitation point is that whatever the cause of action, it accrued upon demand in 2015 or 2016 latest, and hence is statute barred as accruing more than 6 years before the action was commenced in 2023.

17 The plaintiff's reply in relation to the contract count is that while the cause of action for breach of contract accrues upon breach, the discussions recorded in 2015-2017 do not amount to a breach because the defendant is said to have agreed to return the stone, and no omission (or other breach) occurred until 2022. Alternatively there is a "concealment" within s55 of the Limitation Act, namely the fact he had returned the stone to Mr Stringer, first revealed in the Amended Defence.

18 This cannot be accepted. The demands for the stone's return were clear, repeated, and not met. It was, simplifying the terms, a breach of contract to have taken the goods for purposes of a sale or return in 2014 and done neither. The numerous demands for its return were not met within a reasonable time, even if that involved the need to return to China to re-obtain and return it.

19 I accept the reasoning of the defendant I have set out at length above as to each of the causes of action. In my view there is no answer to it. For detinue, refusal is found by the failure to return the stone within a reasonable period of the demands in 2015 and 2016. For conversion the intentional dealing inconsistent with the rights of the owner is found in retaining the goods after demand, or, on the defendant's version, in giving it to Mr Stringer. Any unjust enrichment action must similarly have arisen well before 2017 upon failure to return the stone upon demand.

20 The plaintiffs (sic) four answers recorded at [8] above are not persuasive – (1) There was an omission to return the goods within a reasonable time of 2015/2016. (2) There was no concealment. (3) The defendant did not seek to honour the contract until 2022. He failed to comply with the demand to comply with the implied term to return it within a reasonable time if called on to do after an unsuccessful sale process. (4) There was an identifiable date to comply with the demand – namely within a reasonable time of the demands in 2015 and 2016.

21 Nor was there any "concealment". Section 55 provides:

- (1) Subject to subsection (3) where --
 - (a) there is a cause of action based on fraud or deceit, or
 - (b) a cause of action or the identity of a person against whom a cause of action lies is fraudulently concealed,
- (2) the time which elapses after a limitation period fixed by or under this Act for the cause of action commences to run and before the date on which a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the fraud deceit or concealment, as the case may be, does not count in the reckoning of the limitation period for an action on the cause of action by the person or by a person claiming through the person against a person answerable for the fraud deceit or concealment...

22 A cause of action or identity of a person must have been fraudulently concealed. A fact may have been concealed, but the cause of action or identity of any person was not.

23 For those reasons, any claim is barred and I will dismiss the claim.

- 1. There is no appeal about the finding on concealment in paras 21 and 22.
- 2. His Honour then went on to consider the substance of the claim in the event that he was in error about the limitation issue. As noted, there is no cross-appeal in relation to that determination, and it is sufficient to state briefly what the Magistrate found.

3. The Magistrate said that it was common ground that the plaintiff paid for the Second Emerald although the defendant may have picked it up from First State Auctions. The Magistrate found that if the defendant gave the Second Emerald to Mr Stringer he was never authorised to do so. Accordingly, the Magistrate found that the plaintiff had a cause of action in bailment, conversion or detinue. The Magistrate said he would have ordered damages and not the return of the emerald because he was not persuaded that the defendant still had the emerald.

Grounds of appeal

Ground 1: The Court made an error of law in finding that by the time the plaintiff commenced proceedings in the Local Court on 17 March 2023 that her claim against the defendant was statute barred by reason of s 14 of the Limitations Act NSW.

Ground 2: The Court made an error of law in respect to the application of s 14 of the Limitations Act NSW and when the plaintiff's causes of action first accrued to the plaintiff.

Submissions

1. The plaintiff submitted that the "demands" she made in 2015 and 2016 were not demands for the purposes of the tort of detinue, and the "refusals" of the defendant were not refusals for the purposes of the tort of detinue.
2. The plaintiff submitted that a demand for goods must:
 1. Be an unequivocal demand for the goods;
 2. Specify time and place at which, and the person to whom, the goods are to be delivered;
 3. Be unconditional;
 4. Be clear; and
 5. Be specific.
1. The plaintiff submitted further that a refusal to provide the goods must be:
 1. Unconditional;
 2. Deliberate;
 3. Clear; and
 4. Unequivocal or unqualified.
1. In oral submissions, the plaintiff focused on the matters in paras [32](b) and [33](b) above.

2. The plaintiff submitted that none of the discussions recorded by the plaintiff satisfied the requirements of a demand because they were not unequivocal in the sense that the plaintiff was prepared to accept that the defendant would return the stones to her after he had an opportunity to visit China, and because the demand did not specify a time and place at which goods were to be delivered.
3. The plaintiff submitted that the defendant's response to what the plaintiff asked could not be a refusal because it was conditional and was not deliberate, clear, unequivocal and unqualified. The defendant did not delay in responding to the demand but responded each time by promising to return the Second Emerald once he had the opportunity to go to China to collect it. In those circumstance the plaintiff submitted that no refusal could be inferred from the circumstances.
4. The defendant submitted that on the plaintiff's own evidence there were clear, emphatic and unconditional requests by her for her emerald. The defendant pointed to her statements, "Can you bring...my two stones back to Australia", "I want my stones back", and "Bring it back".
5. The defendant submitted that there was no ambiguity as to what the plaintiff wanted and no conditions were attached to the return.
6. The defendant submitted that on the plaintiff's analysis, the plaintiff would have failed in an action for detinue if she had brought her claim prior to the writing the letter on 17 October 2022 because no unconditional demand had been made. The defendant submitted that that was absurd.
7. The defendant submitted that it was clear the emerald was to be returned to her. It was not necessary in the circumstances for a time and a place to be specified in that regard.
8. The defendant submitted that there was no evidence that the plaintiff was prepared to accept that the defendant would return the stones to her after he had an opportunity to visit China. The defendant submitted that that was at odds with the plaintiff's repeated demands.
9. The defendant submitted that the evidence clearly demonstrates that he refused to comply with her demands over some years. The defendant submitted that the plaintiff never agreed to any condition that he needed the opportunity to go to China to collect it. If, as the Magistrate accepted at para 35 of his judgment, the defendant gave the Second Emerald to Mr Stringer, that constituted a refusal to comply with the plaintiff's demands. In doing so the defendant put it out of his power to comply with her demands to return to emerald to her.
10. The defendant submitted that a failure over a reasonable time to comply with the plaintiff's demands amounted to a refusal. Given the period during which the plaintiff's demands were made more than a reasonable time had passed long before 17 March 2017.

Consideration

1. In *Grant v YYH Holdings Pty Ltd* [2012] NSWCA 360 McColl JA (with whom Tobias AJA agreed) said at [43]:

The essence of detinue lies in a wrongful refusal to deliver up goods to a person having the immediate right to the possession of those goods: *CHEP Australia Limited v Bunnings Group Limited* [2010] NSWSC 301 (at [183]) per McDougall J. Similarly, the cause of action in detinue accrues once a lawful demand for the return of possession of the chattel is made and the demand is refused: *Philpott v Kelley* (1835) 3 Ad & El 106; (1835) 111 ER 353; *Miller v Dell* [1891] 1 QB 468; *Lloyd v Osborne* (1899) 20 LR (NSW) 190. Accordingly at the end of six years after the accrual of the cause of action, the title of the original owner to the converted or wrongfully detained chattel, and hence any cause of action for conversion and/or detinue, is extinguished: s 65(1) Limitation Act. There may be different limitation periods if the facts establish that the causes of action in conversion and detinue accrued at different times: *John F Goulding Pty Ltd v Victorian Railways Commissioners* [1932] HCA 37; (1932) 48 CLR 157 (at 169 -170).

1. Her Honour said at [45]:

Where, prima facie, that title has been extinguished by operation of s 65, the plaintiff bears the burden of proving the cause of action accrued within time: see *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27 (at 74, 76).

1. In *Fitzgerald v Kellion Estates Pty Ltd* (1977) 2 BPR 9181 Hutley JA (with whom Hope and Mahoney JJA agreed) said, in answer to an argument put in that case that an effective demand had to enumerate the goods whose return was demanded and that a mere general demand was not sufficient:

The demand cannot throw any burden on the person in whose possession the chattels are. As Lord Denning MR said in *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603; 1 WLR 323 at 329: "There is no obligation on a person who has another person's goods to return them to him, except by contract. The rule is accurately stated in *Salmond on Torts*, 13th ed at p 264: 'No one is bound, save by contract, to take a chattel to the owner of it. His only obligation is not to prevent the owner from getting it when he comes for it.' That has been the law ever since the case to which we were referred of *Clements v Flight* (1846) 16 M & W 42 at 49. The judgment of the court makes it quite clear that, in order that there should be a wrongful detention of goods, the defendant must withhold the goods and prevent the plaintiff from having possession of them. He is not bound to be active and send the goods back unless there is an obligation by contract to do so." (Cf *Lloyd v Osborne* (1899) 20 NSWLR 190 at 194.)

The American rule is stated by Prosser: *Law of Torts*, 4th ed at 90, as follows: "Ordinarily the defendant is not required to do more than permit the plaintiff to come and get the goods but if some positive act, easily done, is called for, such as the disclosure of their location or turning over a key, a failure to perform it may be a conversion".

1. The plaintiff submitted that a demand must specify a time and a place at which, and the person to whom, goods are to be delivered. The particular authority relied on for this proposition was *Lloyd v Osborne* (1899) 20 LR (NSW) 190. Darley CJ (with whom Owen and G B Simpson JJ agreed) said at 194:

But the demand is not sufficient. The letter says, "You will at once deliver to her or her agent all the sheep," but it does not say where they are to be delivered, nor does it say who the agent is. Is Mr Osborne to drive the sheep into Jugiong for delivery to this lady? The law casts no such duty on him. If the letter of demand had said, "You must deliver the sheep to the bearer of this letter," and the bearer had then gone to Mr Osborne and demanded the sheep, and Mr Osborne had then done nothing, there would have been sufficient evidence of the demand and a refusal. But this demand was insufficient, in that it does not state where the sheep are to be delivered or to whom.

1. In *Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993) Aust Torts Reports 81-244, Young J considered that passage and noted, thereafter, what Hutley JA had said in *Fitzgerald* that the demand cannot throw any burden on the person in whose possession the chattels are. Justice Young went on to say:

This statement is supported by respectable authority including *Clemence v Flight* (1846) 16 M&W 42, 49; 153 ER 1090, 1094; *Capital Finance Co Ltd v Bray* [1964] 1 WLR 323, 329 and *Moffatt v Kazana* [1969] 2 QB 152, 157. In *Von Lieven v Sherlock* – 8 April 1987, Unreported, I said that the law in detinue was that the defendant must merely make available the plaintiff's goods again to the plaintiff by informing the plaintiff of the whereabouts of the goods and by indicating that there would be no interference with the plaintiff retaking possession.

1. The contractual arrangements between the plaintiff and the defendant meant that the general principle established in cases like *Fitzgerald* could not apply. It was not possible for the plaintiff to do other than attend on the defendant to require the return of the emerald. She was in no position to be given access to the emerald itself because, by the contractual arrangements made between them, the emerald had been taken to China with the intention of selling it.
2. In the circumstances, the only obligation on the part of the defendant was to return the emerald to the plaintiff after the defendant had brought it back from China as he said he would. However, there was no requirement that any demand on the part of the plaintiff needed to identify a particular time or place when that would occur. The factual situation was far removed from the situations in cases like *Fitzgerald*, *Flowfill*, *Grant* or *CHEP Australia Ltd v Bunnings Group Ltd* [2010] NSWSC 301.
3. In my opinion, the demands made by the plaintiff in 2015 and 2016 (paras [14], [15], and [16] above) were clear, specific, unequivocal and unconditional. Nothing more was required.
4. In relation to what must be shown to constitute a refusal, the plaintiff relied on what was said in *Clayton v Le Roy* [1911] 2 KB 1031 at 1048 where Fletcher Moulton LJ said:

It would mulcting the real owner of his rights, if the law did not thus insist upon some definite or deliberate withholding as being necessary preliminaries to the arising of this cause of action. If something less were sufficient, the Statute of Limitations might commence to run against the owner without his knowledge.

1. In *Zarfati v McMillan* [2021] NSWSC 944, Harrison AsJ said at [31]:

... It must also be shown that the refusal to return/redeliver the equipment is categorical and unqualified. Detinue is a continuing cause of action which accrues at the date of wrongful refusal to deliver up the equipment and continues until the equipment is recovered or judgment is obtained: see *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1936] 1 WLR 644 per Diplock LJ.

1. In *Slaveski v State of Victoria and Others* [2010] VSC 441, Kyrou J said at [323]:

There must be a clear and unqualified refusal by the defendant to comply with the plaintiff's demand for the return of the goods. One reason for this rule is that the cause of action in detinue accrues at the time of the refusal: *John F Goulding Pty Ltd v Victorian Railways Commissioners* (1932) 28 CLR 157 at 166.

1. What was said in *Slaveski* was adopted by Thawley J in *JWR Productions Australia Pty Ltd v Duncan-Watt (No 2)* [2020] FCA 236; (2020) 377 ALR 467 at [699].
2. However, a refusal, can be demonstrated by an ignoring of the demand or where a reasonable period of time has passed and the demand has not been met.
3. The claim in *Ming Kuei Property Investments Pty Ltd v Hampson* [1995] 2 Qd R 251 was a claim for return of a motor cruiser seized by the Australian Customs Service. Section 225 of the Customs Act 1901 (Cth) imposed a six month limitation period for bringing the proceedings. The question was whether the cause of action arose on one or other of two dates.
4. Justice Kiefel said (at 256):

The "cause" referred to in s 225 is that made the subject of the proceedings, here that arising in detinue. Regardless of other causes of action which may have accrued to the plaintiff, the cause of action in detinue arises when there is a wrongful withholding: 3 Blac. Comm. 151 shown usually by a request or demand for the return of the goods and a refusal to do so: *John F. Goulding Pty Ltd v. Victorian Railways Commissioners* (1932) 48 C.L.R. 157, 166, 169–170, *Spackman v. Foster* (1883) 11 Q.B.D. 99, *Clerk & Lindsell on Torts*, (15th ed., 1982), 21–24. And where a letter is ignored or a reasonable time has passed, a refusal is made out (respectively, *Lloyd v. Osborne* (1889) 20 L.R. (N.S.W.) 190 and *Johns Perry Industries Pty Ltd v. International Rigging (Aust.) Pty Ltd* (1986 No. 1196; Ryan J., 7 October 1986, unreported).

It follows that for the purpose of this action the act of seizure alone will not be sufficient. The defendants then point to the letter of 26 May 1989 giving notice of claim. Section 205(6) requires only that a person notify of that person's claim to the goods in question. Whilst such a notice might combine with it a demand for the return of the goods and thus ground an action, the terms of the letter here do no more than make the claim. The fact that the plaintiff has pleaded it as one of two possible 'demands' is factually incorrect and cannot affect my determination.

Then it is submitted that the lack of response to the letter written to the Minister on 28 June 1989 might fulfil the requirements of demand and refusal. The letter was not however addressed to the person in possession of the goods and in any event its terms were a plea for consideration. The Minister's reply takes the matter no further.

The letter of 28 October 1991 addressed to the "Collector" (who I take to be Mr Hampson) does however contain a clear demand and includes details of the point of delivery. Refusal can be inferred by the failure to respond to it in a reasonable time.

1. In *Helga Henriette Schwarzschild v Harrods Ltd* [2008] EWHC 521, Eady J said at [22]:

It is true that there are passing references in some authorities to "neglect" or "failure" (as alternatives to "refusal"): see eg *Cullen Allen & Co v Barclay* (1881) 10 LR Ir 224, 233 (per Fitz Gibbon LJ); *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, 207, [1969] 2 All ER 504, [1969] 2 WLR 1268 (Donaldson J). Yet these are not easy to reconcile with the much fuller reasoning of *Fletcher Moulton LJ* cited above. The answer may be to focus on the absence of equivocation. Inaction or neglect may perhaps in some circumstances be interpreted as an unequivocal response, but that is unlikely to be at all common. At all events, it is right that I should be guided by the *Clayton* decision in the Court of Appeal which, as it happens, was not cited to Donaldson J in *Alicia Hosiery*.

1. The issue of what constitutes a refusal was subsequently considered in *R v The Secretary of State for the Home Department* [2011] EWHC 1388 (Admin). In that case, Stephen Morris QC, sitting as a Deputy Judge of the High Court, said:

[88] I make the following observations on *Schwarzschild*. First, Eady J held that a clear refusal is required and, on the facts, there was no such refusal. Notably he accepted that the refusal may arise from inaction or neglect, as long as it is unequivocal. Secondly, however, the claim there was for "lost or destroyed" goods under s.2(2) (which formerly lay in detinue only). It was not strictly a "goods kept" case. *Clayton v Le Roy* which Eady J applied was, by contrast, a "goods kept" case. Eady J does not refer to any such distinction. Thirdly, in so far as it suggests that, in such a "lost or destroyed" case, there is a requirement for a refusal as well as a demand, then it seems at odds with *Mitchell* [*Mitchell v Ealing LBC* [1979] 1 KB 1] (and *Shaw* [*Shaw & Co v Symmons & Sons* [1917] 1 KB 799]) which the judge does not cite. Those two cases suggest that there is no need for a refusal, whether goods are lost before or after demand. In a s.2(2) "lost or destroyed" claim, there is no additional requirement for a refusal as well as a demand; mere failure to return goods following a demand is sufficient to render the bailee liable as insurer thereafter: see *Clerk & Lindsell* §17-20 fn 90 citing *Mitchell*.

[89] It is not straightforward to reconcile the various authorities on this issue, and in particular Mitchell (and Shaw) on the one hand, and Clayton v Le Roy on the other or why, it appears that a refusal is required in a "goods kept" case, but not necessarily in a "goods lost" case. My conclusions are as follows. First, for there to be conversion by "keeping", there has to be conduct which amounts to deliberate withholding or interference: see Clayton, supra, per Farwell LJ in particular and Barclays Mercantile, supra, per Millett J. Secondly, such conduct is commonly, but not invariably, found in a demand followed by a refusal: see Barclays Mercantile supra. Thirdly, where demand and refusal is relied upon, the refusal must be clear or unequivocal. Fourthly, however that does not mean the refusal must be found in express words. A refusal may be inferred from other action or inaction. This is the essence of the analysis in Schwarzschild §22. Whether such action or inaction amounts to an unequivocal refusal is a question of fact, in all the circumstances. Thus, fifthly, delay in responding to a demand, beyond a reasonable time, is a common example of a refusal inferred from circumstances: see Clerk & Lindsell §17-26 above and Mitchell. Further, in any particular case, mere failure to redeliver or inaction or silence may be sufficiently unequivocal to constitute a refusal. In this way, the conduct cited in footnote 115 to Clerk & Lindsell (a defendant who simply does nothing) would be sufficiently unequivocal to constitute a refusal, a result consistent with the analysis in Schwarzschild. To seek to "stymie" proceedings in this way is exactly the sort of case where the inference of refusal would properly be drawn.

1. In a similar way, in *Crowther v Australian Guarantee Corporation Ltd* [1985] Aust Tort Reports 80-709, Bollen J said at [69,103]:

[A defendant] "is entitled to seek advice and investigate the respondent's claim ... but, of course, a long delay made under the guise of seeking legal advice could, in some circumstances, amount to a denial of a claimant's rights."

That passage was endorsed by Young J in *Flowfill Packaging* at 62,520.

1. In my opinion, the conversation between the parties in early 2015, when Ms Yan was present, (para [14] above) constituted a sufficient demand by the plaintiff for the emerald to be returned. The terms of the conversation are sufficient to infer that the plaintiff was prepared to accept that the defendant needed to go to China to comply with her demand.
2. The plaintiff's evidence then records that at the end of 2015 the defendant returned Ms Yan's ring. The clear inference that I draw from that, together with the conversation the defendant had with the plaintiff about them "checking my arse at airport security" (para [15] above), is that the defendant had been to China between the two conversations. Accordingly, it can be reasonably inferred that the defendant's failure to have complied with the demand made in early 2015 to return the Second Emerald was a refusal. He had indicated that he would bring it back when he next went to China, a matter the plaintiff accepted, and he did not do so.

3. Even if that is not correct, the defendant's subsequent behaviour in saying each time he was asked for the stones that he would do it next time he went to China, and the reason he gave in late 2015 (para [16] above) that it was still in China because someone was interested in it and he may be able to sell it, is all a clear indication that the defendant was refusing to comply with the plaintiff's demands. As in *Crowther*, where a long delay under the guise of seeking legal advice amounted to a denial of the plaintiff's rights, so too the constant fobbing-off by the defendant in the present case under the guise of needing to go to China, similarly amounts to a refusal.
4. When the demand was made early in 2015 and the defendant had not returned it by the end of 2015 in the circumstances that I have identified, more than a reasonable time had elapsed, with the result that the defendant's failure constitutes a clear refusal to comply with the demand.
5. Although the Magistrate did not rely in the way I have dealt with the matter, his Honour was clear that the failures to comply over a period of time amounted to a refusal (see paras 18 and 19 of his judgment).
6. I do not, however accept the defendant's submission that the giving of the Second Emerald to Mr Stringer (on the assumption that that is what occurred) meant that the limitation period commenced to run at that time. Such a submission is inconsistent with what is said in *John F Goulding Pty Ltd v Victorian Railways Commissioner* (1932) 48 CLR 157 at 166, 167 and 169. That act may have constituted a conversion of the Second Emerald, but it did not amount to a refusal to return for the reasons given in *John F Goulding*.

Ground 3: The Court made an error of law in failing to determine a "reasonable time: at [18] and [19] of the Decision and thus failed to determine when the cause of action first accrued to the plaintiff.

Ground 4: In the alternative to 3 (above) the Court made an error of law in failing to provide reasons in respect to the determination of what is a reasonable time in order to determine when the cause of action first accrued to the plaintiff.

Submissions

1. The plaintiff submitted that where a demand is made but where there is then inaction by the party requested to provide the goods, that party will have a reasonable time to get the goods into his own hands. In that way, the cause of action only arises after the period of reasonable time. The plaintiff submitted that the Court did not determine what was a reasonable period of time. In that way, the plaintiff submitted, the Court failed in its obligation to provide adequate reasons for its decision.

2. The defendant submitted that it was not necessary for the Magistrate to specify precisely what constituted a reasonable time, if such was to be provided to the defendant. That is because, whatever the answer to the question is, it did not encompass a period of years from early 2015 to 17 March 2017, being the date six years before the proceedings were instituted.

Consideration

1. Paragraphs 18 and 19 of the Magistrate's judgment effectively dealt with the question of what constituted a reasonable time. The Magistrate found that refusal was evidenced by the failure to return the stone within a reasonable period of the demands in 2015 and 2016. The Magistrate, whilst considering a number of the causes of action together, found that detaining the goods up until 2017 when the demands were made in 2015 and 2016 was sufficient to demonstrate both conversion and unjust enrichment, as well as detainee.
2. Further, in paragraph 20, the Magistrate expressly found that the omission to return the goods within a reasonable time of 2015 and 2016 was the omission that amounted to a refusal.
3. I accept the defendant's submission that the Magistrate was not obliged to identify precisely when a reasonable time had passed in the circumstances of the case. When clear demands were made in early 2015 for the return of the second emerald, the failure of the defendant to have returned it by 17 March 2017 was a clear and unconditional refusal.

Conclusion

1. In my opinion, the issues raised in relation to the tort of detainee were significant enough issues to justify a grant of leave to the plaintiff. However, the Magistrate did not err in his judgment.
2. Accordingly, I make the following orders:
 1. Grant leave to the plaintiff to appeal pursuant to s 40 of the Local Court Act 2007 (NSW).
 2. Dismiss the summons.
 3. The plaintiff is to pay the defendant's costs.

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