

Indexed as  
**Chester Industrial Tool Supply Ltd v. Cantec Wire and Cable Ltd.**

Between  
Chester Industrial Tool Supply Ltd. (carrying on business as Gescan Electrical Distributors), Plaintiff, and Cantec Wire and Cable Ltd., Harold D. Saunders, The Trustee of the Estate of Cantec Wire and Cable Ltd., A Bankrupt, Blaire Robert Smith, Kenneth Robert Brown, Michael Venditti, John Benjamin Venditti, Victor James Elderton, Elvic and Associates, Normax Transport Inc., Norman Robert Smith, Chambers Electrical Corp., Ronald H. Chambers, Texcan Cables Limited and Dynamic Industrial Equipment Ltd., Defendants, and Blaire Robert Smith, Victor James Elderton and Elvic and Associates also known as Elvic and Associates Ltd., Third Parties

Vancouver Registry No. C854119

[1988] B.C.J. No. 1857

**British Columbia Supreme Court  
Vancouver, British Columbia  
Boyle L.J.S.C.**

Heard: October 4, 1988

Judgment: October 14, 1988

Counsel for the Plaintiff: F.G. Potts.

Counsel for the Defendant: I.P. Epstein.

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**BOYLE L.J.S.C.**:— This was an 18A application brought by the Plaintiff against only one of the Defendants (Texcan Cables Limited "the Defendant").

A narrow issue is argued here, whether or not title passed to a bona fide purchaser for value without notice. The issue is narrow because, for the purpose of this application, the Plaintiff asks the Court to decide the law on the basis of the Defendant's "best case" on the evidence. The Plaintiff does not admit as fact the Defendant's allegations but says, even if they were proven to be true, the Defendant could not succeed.

The Plaintiff's claim is in conversion. The Plaintiff sells cable. The goods in question are reels of cable valued for these proceedings at \$31,648.00. An employee (Smith) of the Plaintiff told an acquaintance (Venditti) that Smith had a quantity of surplus cable available from a source other than Smith's employer. Smith asked Venditti to find a buyer. Venditti did. The buyer was the Defendant.

Smith then prepared fraudulent documentation which resulted in delivery from the Plaintiff's stock of the quantity of cable to the premises of a firm named Cantech of which Venditti was a principal. The delivery was simply to a place, not to Cantech as a business entity.

The cable had been sold by Venditti to the Defendant before the cable came into Venditti's possession. He made the sale on the basis of Smith's promise to deliver. The sale was in Venditti's personal capacity, unrelated to Cantech.

Delivery of the cable to Cantech was a surprise to Venditti. His understanding was that it was to have gone direct to the buyer, the Defendant. The cable remained at Cantech overnight. The purpose of its delivery there appears to have been so that the Plaintiff's identifying tags could be removed. Venditti deposed to the effect that he believed the tags were removed to forestall later direct ordering by the Defendant from the Plaintiff even though he believed the cable to be from a surplus source, not from the Plaintiff. The stopover at Cantech is not material to the issue and is recorded here simply as a matter of narrative.

Once the cable was on its way, Smith destroyed the documentation. The consequence of that was that the Plaintiff was unaware of where the cable had gone or that it had gone at all.

The Defendant paid Venditti and Venditti paid Smith.

For the "best case" argument it is accepted in this application that Venditti did not know the cable was obtained illegally, neither did the Defendant. It is accepted that the Plaintiff knew nothing of Smith's illegal activities, nothing of Venditti, nothing of Cantech and nothing of the Defendant Texcan. Plaintiff and Defendant are innocent parties.

Smith has been convicted of fraud. Venditti has been acquitted.

The argument here hinges upon Section 58(1) of the Sale of Goods Act, RSBC ch. 370:

58(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent is, subject to this Act, as valid as if he were expressly authorized by the owner of the goods to make the same, if the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Venditti was a person who, at times but not invariably in the normal course of his business, properly could be defined as a mercantile agent. For the purpose of this application he can be said as well to have been acting in the ordinary course of his business. The Defendant says it took from Venditti in his capacity as a mercantile agent.

For this "best case" argument I have assumed both Venditti and Smith to be mercantile agents.

Could Venditti pass title to the cable to the Defendant?

The answer is no.

First, Venditti was not in possession at all at the material time because the wording of Section 58 requires possession at the time of sale. The cable was in the Plaintiff's possession when Venditti "sold" it to the Defendant. "Sale" under the Act (see S. 1 & S. 23) includes a bargain and sale, here complete when Venditti "sold" the cable while the cable still was in the Plaintiff's stock.

Second, even if Venditti had been in actual possession at the material time, he could not be said to be in possession of the cable with the consent of the owner, the Plaintiff. The owner, if asked where the cable was, would have replied: In our stock. Any authority Smith had delegated to him by the Plaintiff as salesman giving him power to direct deliveries cannot be invoked under S. 58 to construct a mantle of deemed consent over

Venditti. He was a stranger to the Plaintiff, and he believed the cable was from a surplus source, not from the Plaintiff. There was no willing transfer of possession to Smith because the Plaintiff didn't know the cable was gone and Smith destroyed any argument for deemed consent when he had the identifying labels removed.

Third and in any event, Fridman, in *The Sale of Goods*, 2d Edition, P. 141 refers to the effect of a mercantile agent getting possession of goods by fraud on the owner. Fridman observes: "... the better and, probably most accepted view, is that however fraudulently the consent has been wrested from the owner by the mercantile agent ... it will be deemed to be consent to the agent's having possession of the goods". But here Smith took himself outside S. 58. What he did was to convert the cable fraudulently and without colour of right to his own use, that use being sale to the Defendant. The phraseology I have employed is from the Criminal Code definition of theft.

The Code does not bind the common law nor the Sale of Goods Act but it provides a description of what happened here. Smith stole the wire by fraudulent means. I take as confirmation of that conclusion *Canadian Laboratory Supplies Ltd. v Engelhard Industries of Canada Ltd.* (1979) 1 DLR (3d) 1 at 15 and 16: "... simply another instance of a fraudulent agent's inability to give a good title to goods stolen from his principle", Laskin, C.J.C, dissenting on quantum only. The *Canlab* case cites with approval *Farquharson Brothers & Co. v King & Co.* [1902] A.C. 325 at 329: "Assuming always the element of fraud ... what element is there wanting to make that stealing?"

Section 29 of the Code provides:

- 29(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.
  
- (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in the goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

Subsection 2 does not save the Defendant because this fraud does amount to theft. Goods may be obtained by fraud which does not amount to theft. That is how S. 29(2) is distinguished here.

The cable cannot be returned. The Defendant has sold it. The Defendant is liable for its conversion, *Mackenzie and Mackenzie v. Blindman Valley Cooperative Association Limited* [1947] 2 WWR 443 even though the Defendant stands in good faith down the line from the theft.

In this transaction Venditti was Smith's agent. "Broker" might be more descriptive. Smith had no right to or in the cable and so had none to transfer to Venditti. None accrued to Venditti by virtue of his mercantile agency.

Fourth, to the Defendant, Venditti may have appeared to have authority to sell the cable but that appearance was not the result of any action or omission on the Plaintiff's part, nor was it the result of any negligence by the Plaintiff. There is no estoppel here.

Fifth, I find the sale did not take place in market overt.

The Plaintiff will have Judgment. Compensation Damages will be the total of the amount the Defendant paid Venditti plus 15% mark-up on resale and plus \$3,500.00 for the reels on which the cable was wound.

Counsel for the Plaintiff has addressed a letter to the Court concerning notice. It is in the file. I accept his

proposal that the Order be without prejudice to the rights of all Defendants other than Texcan and the two Chambers.

BOYLE L.J.S.C.