30/13; [2013] VSC 320

SUPREME COURT OF VICTORIA

MENDELSONS LAWYERS PTY LTD v HANLON

Pagone J

17, 20 June 2013

CIVIL PROCEEDINGS – AGREEMENT BETWEEN EMPLOYER AND EMPLOYEE AS TO RATE OF REMUNERATION – EMPLOYEE INCURRED AN INJURY AND WAS UNABLE TO PERFORM WORK – CLAIM BY EMPLOYEE THAT HIS EMPLOYER WAS OBLIGED TO PAY HIM MOTOR CAR LEASE PAYMENTS – FINDING BY MAGISTRATE IN FAVOUR OF THE EMPLOYEE – CONSTRUCTION OF AGREEMENT – NO WORK NO PAY PRINCIPLE – WHETHER MAGISTRATE IN ERROR.

HELD: Appeal allowed. Magistrate's order set aside and the matter remitted to the Magistrate for determination of certain issues.
The agreement which the parties reached by the exchange of emails did not constitute an agreement by the employer to make continuing payments for the car lease, or the book allowance, or any of the other payments, independently of the employee's ability to work. The agreement reached between the parties contemplated that the employee would work for his employer and provided for how the employee was to be remunerated for that work. The consideration for the employee's work was in part to be by what was described as a base salary and in part by, amongst other things, payment of the car lease. No part of the agreement constituted the assumption of an obligation by the employer separate from the employee's ability to work. Each of the promises given by the employer were in return for the employee's work and dependent upon it.

PAGONE J:
1. The Appellant ("Mendelsons") appeals against a decision of the Magistrates' Court of Victoria given orally on 4 March 2013. The grounds of appeal, and the fundamental issue in the proceeding, concerns the construction of a contract of employment between Mendelsons and the Respondent ("Mr Hanlon"). The issue in contention between them is essentially whether the terms of employment by Mendelsons of Mr Hanlon obliged Mendelsons to make certain payments, in particular for lease payments of a motor vehicle, during the period of employment but whilst Mr Hanlon was not able to perform work. Mr Hanlon suffered an injury which resulted in him being unable to perform his employment duties from 13 January 2012 onwards. On 24 January 2012 Mr Hanlon submitted a worker's injury claim form to Mendelsons which was submitted to the latter's workers compensation insurance agent, QBE Workers Compensation (Vic) Limited. The claim was accepted by QBE on 24 February 2012.

The employment of Mr Hanlon was not formally terminated by Mendelsons during the period in respect of which Mr Hanlon claimed that Mendelsons was obliged to make the motor car lease payments. The proceeding before the learned Magistrate, and before me, proceeded without evidence of the employment relationship having come to an end, although I was informed from the Bar table that it had been terminated (as was the learned Magistrate during argument about costs). No issue appears to arise about whether or not the employment relationship has come to an end, it being conceded that the employment relationship continued to exist in form after 13 January 2012, and that the Magistrate's orders were carefully expressed to apply "while the plaintiff [was] employed by the defendant".

2. The parties are all lawyers. Mendelsons is a company carrying on practice as barristers and solicitors. Mr Hanlon is a solicitor who commenced employment with Mendelsons as a legal practitioner on 10 March 1994. On 27 January 2009 Mendelsons and Mr Hanlon varied the terms of the latter's employment. The relevant variations were set out in email correspondence between Roger Mendelson on behalf of Mendelsons and Mr Hanlon on his own behalf.

3. On 27 January 2009 Roger Mendelson sent an email to Mr Hanlon setting out the former's understanding of their agreement:

Dear Tony

My understanding of our agreement is as follows:
New base salary = $132k pa from May 1 2008.
Book increase to $7,500 pa effective from July 27, 2009.
Car lease to continue at current rate until March 2010, when it will increase from $8,116 pa to $9,316 pa.
Next review on May 1 2009, when base will increase to $145k pa.
Further review to take place on May 1 2010, when the increase will be to $160k pa.
Super to be calculated on the base pay only.
To justify this pay rate, I will be looking for annual revenue to be written by you of a minimum of $250k in the next 12 months plus EVS to write an additional $50k pa in her own name. In addition, you will provide mentoring and leadership within Mendelsons.
If the above sets out your understanding, please confirm. If it doesn't, please advise.

Regards
Roger Mendelson

Mr Hanlon replied to this email at 5.09 pm on the same day:

Dear Roger,

1. I agree with the base rates and the dates referred to.
2. I agree super to be calculated on base pay only.
3. I hold revenue of $90k for the current figure period (after 20 weeks). Based on that average, $250k is achievable.
4. Eva will take time to build up as we discussed. There is no problem with her work ethic and willingness to learn. Revenue she earns will depend largely upon the volume and quality of file (as it does for me).
5. My understanding was that the book increase (agreed at $7500pa) was to take effect January 2009.
6. My understanding was that the car lease would continue at the current rate until February 2010 and would increase to $12,000 pa from March 2010.
7. Next review 1 May 2011.

I am happy to discuss this with you to further clarify if required.

Two days later, on Thursday 29 January 2009, Mr Mendelson sent an email to Mr Hanlon indicating his agreement with Mr Hanlon's points and informing Mr Hanlon that Mr Mendelson was that day doing the authority to accounts and that the agreement would be done on the following pay day but backdated to 1 May. No specific point was taken of the subject matter of the correspondence but, for completeness, each of the three emails had as their subject matter "salary review".

4. The agreement between the parties required Mendelsons to make lease payments for a car leased by Mr Hanlon through St George Finance Limited. Mr Hanlon had acquired an Audi A4 sedan through a lease with St George entered into on 11 June 2010. That agreement required Mr Hanlon to make lease payments. A separate agreement, styled a "novation agreement" was entered into dated 14 July 2010 (but apparently signed on 15 July 2010) between St George Finance Limited (as owner), Mendelsons (as employer) and Mr Hanlon (as employee). Under the novation agreement Mendelsons, amongst other things, assumed the lease rights and obligations of Mr Hanlon under the original lease agreement which had been entered into by St George and Mr Hanlon. The novation agreement was no doubt designed to ensure that lease payments made by the employer were made pursuant to an obligation of the employer and not in discharge of an obligation of the employee. Were it otherwise, the lease payment would, presumably, be regarded as income derived by the employee by application of money for the employee's benefit in discharge of a debt. Nothing, however, turns upon that.

5. Mr Hanlon's illness prevented him from performing his duties as employee from 13 January 2012 and Mendelsons ceased making lease payments under the novation agreement from about mid February 2012. It was not until 3 May 2012 that Mendelsons purported to terminate its obligations under the novation agreement by purporting to notify St George that it had novated the lease agreement back to the employee.

6. On 2 May 2012 Mr Hanlon commenced proceedings in the Magistrates' Court seeking

to require Mendelsons, amongst other things, to make the lease payments. Paragraph 14 of his statement of claim alleged:

> On or about 29 January 2009, the plaintiff and the defendant agreed, among other things, that in addition to the plaintiff's salary the defendant would pay an allowance (called a "book allowance") to the plaintiff in the sum of $7,500 per annum (that amount being effective from January 2009) and also make car lease payments in respect of a motor car for the plaintiff's use in the sum of $12,000 per annum (that amount to be effective from March 2010).

The agreement alleged in paragraph 14 was particularised as having been contained in the email correspondence which I have referred to and have largely set out. Paragraph 15 of the statement of claim alleged other terms of the agreement concerning the allowance of $7,500 per annum, and those terms were particularised by reference to a document setting out the method of allocation of the allowance. There were no other particulars of any other term of the agreement alleged in para 14, nor any particulars stating that the terms of the agreement alleged in para 14 might be found in any place other than the written correspondence exchanged by email between Mr Roger Mendelson and Mr Hanlon.

7. Mendelsons filed a defence to the Magistrates' Court proceeding admitting the allegations in para 14 but, relevantly, adding that the payments of the amounts were subject to the matters alleged in two other paragraphs of the defence. I put to one side the allegations in the defence that the payments formed part of what was described as "the plaintiff's total salary package" or "a salary sacrifice arrangement" between Mendelsons and Mr Hanlon. More important for the way in which the proceeding was conducted, however, was the allegation in the defence that the payments which Mr Hanlon claimed were said to be subject to Mr Hanlon's ability to work. Paragraph 10(d) of the defence (which was referred to in response to Mr Hanlon's allegation in para 14) was:

> During the period that the plaintiff has no capacity for work, the plaintiff is not entitled to be paid, and the defendant is not obliged to pay, the plaintiff's total salary package, including payments under the novation agreement and/or the salary sacrifice.

Particulars were given to this sub-para, namely, that s93A(3)(a)(ii) of the *Accident Compensation Act* 1985 (Vic) prescribes that for the period during which the plaintiff has no current work capacity, he is only entitled to receive twice the State average weekly earnings, currently $1,930 per week. The defence did not plead that a term of the agreement between the parties only obliged Mendelsons to make such payments as the lease payments, as long as Mr Hanlon was capable of performing his duties as employee. The case before the learned Magistrate was conducted solely on the basis that the statutory provisions, of which s93A was the principal provision, prevented Mr Hanlon from insisting upon Mendelsons making the lease payments.

8. Mendelsons appeal to this Court sought to contend that the learned Magistrate had erred in finding for Mr Hanlon because she had failed to give effect to what was described as the "no work, no pay" principle said to be found in *Automatic Fire Sprinklers Pty Ltd v Watson*.[1] The case before the learned Magistrate, however, had not been conducted by Mendelsons upon that basis. Mendelsons had not pleaded a term of the agreement to that effect nor had argued its application at the hearing in the Magistrates' Court. The adversarial system depends upon forensic judgments being made during the course of trial to which the parties are bound.[2]

9. Mendelsons contend, however, that they should be permitted to rely in this Court upon a point which was not taken in the Magistrates' Court because Mr Hanlon could not be said to be prejudiced. In *Mond v Lipshut*[3] Ashley J, as his Honour then was, said:

> Second, I am not able to say that I have before me all the facts bearing upon the issue as would have been the case had the issue been raised below – to paraphrase the judgment of Latham CJ, Williams and Fullagar JJ in *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438; [1950] ALR 820. It is, I consider, important to treat the principle expressed in that case as no empty incantation. Their Honours said (also at 438):
>
> Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.
>
> That emphasises the satisfaction which a judge should feel before entertaining a point of law raised

> for the first time on appeal – that is, a point which the appellant is not precluded from raising by some other principle.[4]

Counsel for Mr Hanlon said that Mr Hanlon would be prejudiced if Mendelsons was permitted to raise the point on appeal because there was a possibility that the case might have been conducted differently. In *Mond*, his Honour had concluded that the case might have been conducted differently had the point been taken in the earlier proceedings saying:

> In the present case counsel urged me to conclude that the evidence was clear in relevant respects; and that its import could not have altered. I cannot agree. Had the point been to the forefront the examination of the respondent and her husband may well have had a different emphasis. So, questions may have been asked more closely connecting the loan, its assignment and the cheques. The evidence of the administrator may have been more extensive. He might have advanced a reason why he did not treat either the loan or cheques as assets of the estate; or, if it could possibly be relevant, of some conduct on his part making purported delivery of cheques to the respondent.[5]

It is clear from this passage that what persuaded his Honour about the possibility that the case might have been conducted differently was that he could see the way in which that might occur. In the proceeding before me counsel could point to nothing to show that the case would have been conducted differently or to show how it might have been conducted differently other than a theoretical possibility that the case might have been conducted differently. In some cases it may be sufficient that counsel, acting responsibly, says that the raising of the ground at a primary hearing may have affected the evidence to be led[6] but there may need to be some foundation for that to be regarded as possible.[7] Counsel for Mr Hanlon did not, and could not, say that he would have conducted the case before the Magistrate any differently had the so called "no work, no pay" principle been raised. Indeed, I am unable to see on the pleadings how the leading of other evidence before the Magistrate could have been an actual possibility. What had been pleaded for Mr Hanlon was that the entirety of the relevant agreement was to be found in the email correspondence. His case was always that the agreement made with Mendelsons had been that the lease payments were additional to salary and were payable irrespective of Mr Hanlon's ability to work (at least as long as there was an employment relationship subsisting between them).

Furthermore, although the case conducted before me at times seemed to treat the so called "no work, no pay" principle as something independent of the terms of the contract, in my view, and as ultimately conceded by both parties, the so called principle depended upon the proper construction of the agreement. The learned Magistrate is not to be criticised for not having taken into account principles of construction which were not argued and were not pleaded, but the decision should not be allowed to stand if it is plainly wrong as a matter of the proper construction of the contract. If the Magistrate's conclusion was erroneous, the cause for that is to be found in the way in which the proceeding was conducted by Mendelsons and they may be required to bear the burden of costs thrown away by Mr Hanlon. That the case before the learned Magistrate was not conducted on the basis which it was conducted before me can be seen by a number of passages in the transcript of the proceeding, but, in particular, by the exchange between her Honour and counsel then appearing for Mendelsons. At one point her Honour sought clarification of the argument put on behalf of Mendelsons, giving rise to this exchange:

> **HER HONOUR:** So effectively – let's just get this straight – effectively what you're saying is that the defendant has no liability to the plaintiff in excess of its obligation to make weekly payments as set out in the statutory scheme; that any side agreement, if you like, if you can put it that highly or the terms of a novated lease or any contractual arrangements that they may have had in place referable to the employment and remuneration fall because of the provisions of s93A, if they exist.
>
> **COUNSEL:** Yes, and more so it is our position that there is no side agreement or anything else. It is a fairly straightforward agreement about remuneration and allowances based on the employment relationship. I should say, your Honour, that 93A is obviously the key to our defence, but it has to be read in reference with the other provisions that I've just taken you to.

The burden of the argument for Mendelsons was plainly not that the agreement was to be construed by reference to an implied term that such payments as the car lease payments were only payable if Mr Hanlon was able to work. The argument before her Honour, and as pleaded, was that it was the effect of the statutory provisions which prevented what might otherwise have been the contractual obligation arising from the agreement between the parties. Permitting Mendelsons

now to rely upon the so called "no work, no pay" principle is to permit them to rely upon an argument which had not been put below but which I consider may be put without prejudice to Mr Hanlon provided that any costs incurred by Mr Hanlon referable to the way in which the case was conducted below by Mendelsons be borne by the latter.

10. It is clear that the "no work, no pay" principle depends upon the terms of the agreement to be construed. In *Automatic Fire Sprinklers Pty Ltd v Watson*[8] the High Court considered the proper construction of a contract of employment expressing the view that the payment of wages or salary depended upon an employee's performance of work.[9] Counsel for Mr Hanlon contended that the principle enunciated in that, and other cases, was confined to an employer's obligation to pay wages or remuneration. I do not agree. The judgments in *Automatic Fire Sprinklers Pty Ltd* make clear that the contract in question extended beyond the payment of salary. Latham CJ said in respect of the contract before the High Court in that case:

> It is therefore, I think, clear in the present case that Watson was not entitled to salary *and other payments* under the contract unless he did the work of general manager for which the contract provided.[10] (Emphasis added).

Starke J referred to the consideration for an employee's service by reference to an annual sum "and various allowances"[11] and described the relevant principle by reference to the right to receive remuneration as depending upon the terms of the agreement.[12] Dixon J analysed the issue by reference to the nature of the contract as executory[13] and described a contract for the establishment of the relation of master and servant as falling into the same general category of agreements which required performance for a liability to arise.[14] None of the cases to which I was referred, and which counsel for Mr Hanlon sought to distinguish, confined the principle to the payment of salary and wages and I can see no reason in principle why it should be confined in that way. In each case it must depend upon a proper construction of the agreement between the parties and the determination of what had been agreed between them.

11. The agreement which the parties reached by the exchange of emails did not, in my view, constitute an agreement by Mendelsons to make continuing payments for the car lease, or the book allowance, or any of the other payments, independently of Mr Hanlon's ability to work. The agreement reached between the parties contemplated that Mr Hanlon would work for Mendelsons and provided for how Mr Hanlon was to be remunerated for that work. The consideration for Mr Hanlon's work was in part to be by what was described as a base salary and in part by, amongst other things, payment of the car lease. No part of the agreement constituted the assumption of an obligation by Mendelsons separate from Mr Hanlon's ability to work. Each of the promises given by Mendelsons were in return for his work and dependent upon it. The argument put before me ought to have been put to the learned Magistrate and it ought to have resulted in a different outcome.

12. Counsel for Mr Hanlon contended that Mendelsons' obligation was restricted to the period during which there existed an employment relationship between Mr Hanlon and Mendelsons even though the former was not able to work. Neither the terms of the contract nor business efficacy requires that conclusion. The agreement was not expressed to impose an obligation on Mendelsons to make payments irrespective of Mr Hanlon performing his duties but, rather, plainly contemplated the opposite. It was said for Mr Hanlon that the terms of the agreement contemplated payments being made irrespective of such matters as, for instance, whether Mr Hanlon was on holidays on the dates when the lease payments fell due. Such examples, however, do little to advance Mr Hanlon's case because the fact that he might be on holidays at a time when a lease payment falls due is consistent with the obligation arising at a time when Mr Hanlon is enjoying the entitlements flowing from the performance of work and is not analogous to the situation where Mr Hanlon is plainly no longer discharging any duties of employment but whose employment relationship has not formally been terminated because of the requirements of legislation applicable to injured workers.

13. Counsel for Mr Hanlon also sought to defend the learned Magistrate's decision by reference to an argument which her Honour had rejected. It had been contended before her Honour that Mendelsons was bound by the novation agreement to continue making the monthly lease payments and that her Honour had erroneously held that the novation agreement had been terminated by

its letter of 3 May 2012. Her Honour was correct in her conclusion that the novation agreement had been terminated on 3 May 2012. On that day Mendelsons wrote to St George Finance Limited stating:

> We hereby give you notice of termination of the above agreement pursuant to clause 2 of the agreement dated 14 July 2010.

Clause 2 of the novation agreement provides for novation back to the employee on the occurrence of specified events. Clause 2.1 relevantly provides:

> On the termination date the employer novates to the employee the employer's novated lease agreement to the extent of the then subsisting lease rights and obligations.

This means that upon the "termination date" the employee resumed the obligations thereafter arising. Clause 11.1(l) identified the termination date as the earliest of three dates. The relevant one for present purposes is that described in cl 11.1(l)(iii) namely:

> [T]he date upon which the employer notifies the owner that the employer's novated lease agreement will be novated back as provided for in clause 2.

By these clauses, what is provided for is the ability of the employer to be relieved of any further obligation under the lease agreement and to leave any future obligations entirely upon the employee. It is not surprising to find provisions to that effect where an employee receives the benefit of the lease payments as, in effect, part of a broad salary package. For present purposes it does not matter whether the lease payments were agreed by Mendelsons to be paid as part of a salary sacrifice or any other such arrangement as between them, but rather, that the novation agreement contemplates arrangements of that kind and provides a mechanism whereby the employer can notify the person entitled to the lease payments that future obligations are to be assumed by the employee. It is not surprising to find that the novation agreement might make it relatively easy for an employer to achieve that outcome, so as to maximise the flexibility to give effect to what might otherwise be agreed between employee and employer as part of the entitlements of the former from the latter pursuant to an employment contract. Indeed, cl 3.1 provides:

> The employer will until the termination date make the vehicle available for the use of the employee and the employee's associates (as defined in the *Fringe Benefits Tax Assessment Act* 1986) as part of the employee's remuneration package and during that period, the obligation under clause 4.1 of the original lease agreement that the goods be used predominantly in business operations will not apply.

Plainly, (whatever may have been the agreement as between Mr Hanlon and Mendelsons) the novation agreement was the kind of instrument used as part of remuneration packages permitting employee and employer flexibility about how the latter was to remunerate the former. It could be terminated by the giving of a notice as occurred in this case. Her Honour did not, in my view, err in rejecting Mr Hanlon's contention to the contrary.

14. Counsel for the parties put competing arguments about the orders to be made upon the conclusions which I might reach. The appeal was brought under s109(1) of the *Magistrates' Court Act* 1989 (Vic) which provides:

> A party to a civil proceeding in the Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding.

Provisions of that kind do not enliven this Court's jurisdiction beyond the question of law which is the subject of appeal.[15] The Court has wide powers when making orders,[16] but the jurisdiction is confined to the question of law which is the subject of the appeal. Counsel for Mr Hanlon submitted that I should find for Mr Hanlon on a counterclaim which had been brought in the Magistrates' Court by Mendelsons. Counsel for Mendelsons, in contrast, contended that there were issues yet to be agitated on the evidence on the counterclaim but that I should make final orders in favour of Mendelsons in respect of the contractual obligation to pay future lease payments.

In my view, the preferable course is for me to set aside orders numbered 1, 2 and 3 of the learned Magistrate and to remit the matter back to the Magistrates' Court for determination of the issues

in accordance with these reasons. It is conceivable that some orders may be inevitable in favour of one or other of the parties, but it strikes me that there may be other factual issues that the parties may need to agitate beyond the construction of the agreement on the case pleaded so far. It would leave open, for instance, the possibility of Mr Hanlon seeking to amend the pleadings if the suggested possibility of different terms could be made out.

15. The parties also made submissions concerning the costs that should follow upon, amongst other things, the possibility of my reaching the conclusions which I have expressed in these reasons. Counsel for Mr Hanlon asked to be heard concerning the basis of any costs be awarded in his favour and I will do so upon delivery of these reasons. Otherwise, however, I propose to make the same orders for the payment of Mr Hanlon's costs of the proceeding in the Magistrates' Court as was made by that Court, to order that Mr Hanlon pay Mendelsons costs of the proceeding in this Court, but otherwise to issue a certificate for Mr Hanlon's costs of the appeal.

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[1] [1946] HCA 25; (1946) 72 CLR 435; [1946] ALR 390.
[2] *Nudd v R* [2006] HCA 9; (2006) 225 ALR 161; (2006) 80 ALJR 614, [9]; (2006) 162 A Crim R 301; *Macnamara v Martin* [1908] HCA 86; (1908) 7 CLR 699.
[3] [1999] VSC 103; [1999] 2 VR 342.
[4] Ibid 349 [36].
[5] Ibid 349 [37].
[6] *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451, 455; (1991) 99 ALR 523; (1991) 72 LGRA 284; (1991) 21 ATR 1429.
[7] See, for example, *Federal Commissioner of Taxation v American Express Wholesale Currency Services Pty Ltd* [2010] FCAFC 122, [196]; (2010) 187 FCR 398; (2010) 273 ALR 501; [2010] ATC 20-212; (2010) 77 ATR 12.
[8] [1946] HCA 25; (1946) 72 CLR 435; [1946] ALR 390.
[9] Ibid 452-3, 460-1, 463-5, 473, 475-7.
[10] Ibid 453.
[11] Ibid 460.
[12] Ibid 461.
[13] Ibid 463.
[14] Ibid 465.
[15] *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320; (2010) 267 ALR 231 [21]; (2010) 84 ALJR 528; (2010) 116 ALD 1; *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* [1988] FCA 119; (1980) 82 ALR 175, 178; (1988) 19 ATR 1067.
[16] *Magistrates' Court Act* 1989 (Vic) s109(6).

APPEARANCES: For the appellant Mendelsons Lawyers Pty Ltd: Mr M Felman, counsel. Mason Sier Turnbull Lawyers. For the respondent Hanlon: Mr DG Robertson, counsel. Mahons with Yuncken & Yuncken Lawyers.
