44/08; [2008] VSCA 164

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SOUTHWICK v MOORE STEPHENS MELBOURNE PTY LTD

Maxwell P and Nettle JA

20 August 2008

CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE – PLEADINGS – WHETHER PLAINTIFF'S CASE AT TRIAL DEPARTED FROM THE PLEADINGS – STATEMENT OF CLAIM PROVIDED THAT PROFESSIONAL SERVICES WERE RENDERED FOR A COMPANY (CEDEL) OF WHICH THE DEFENDANTS WERE DIRECTORS – IN A REQUEST FOR FURTHER AND BETTER PARTICULARS THE PLAINTIFF DETAILED THE ENTITIES FOR WHOM THE SERVICES WERE RENDERED – EVIDENCE LED BY PLAINTIFF AS TO THE SERVICES RENDERED AND THE SIGNATURES TO THE GUARANTEE – FINDING BY MAGISTRATE THAT CLAIM MADE OUT – WHETHER MAGISTRATE IN ERROR IN UPHOLDING THE UNPLEADED AGREEMENT – WHETHER DEFENDANTS TAKEN BY SURPRISE – WHETHER DEFENDANTS HAD NOTICE OF THE CASE THEY HAD TO MEET – WHETHER THE PRINCIPLES OF PROCEDURAL FAIRNESS OBSERVED.

1. The agreement which the Magistrate found to exist was arguably within the scope of the pleadings; particularly given that the pleadings for the purposes of this case were taken to include the further and better particulars. They made plain that the claim was for services supplied to the named entities other than Cedel. It was open to the Magistrate to proceed on the basis that one of the issues which fell for determination was whether Cedel was bound to pay for accounting services supplied to the other named entities.

2. Counsel was on notice from well before the time of the trial that the case advanced was one for fees due in respect of work done for entities other than Cedel. The particulars made that plain. Counsel for the defendants was not taken by surprise by what occurred and the Magistrate's determination to consider the issue was not a denial of procedural fairness.

3. Pleadings in the Magistrates' Court are important. A litigant cannot expect to go to trial and advance a case not pleaded without consequences; sometimes so grave as to refuse leave to amend when it is too late in the day. The formalities of amendment should not be ignored. If a case changes shape, the pleadings should be amended to put the nature of the case beyond doubt. Nevertheless, where a case is run in a particular fashion, despite the pleadings, and is decided in accordance with the way in which it was run, the results should be upheld unless some injustice be done.

4. The Court of Appeal will enforce the observance of the requirements of procedural fairness in litigation. They are fundamental. What those principles require is that a party have adequate notice of the case which it has to meet and a reasonable opportunity to respond to that case. The function of pleadings and particulars is to provide that notice and that opportunity. If at any stage in a proceeding the legal representative of a party apprehends either that there has been insufficient notice of the case or an inadequate opportunity to respond to it, then it is for that party and its representative to insist on the observance of the requirements of procedural fairness and, in the appropriate case, to seek an adjournment to enable that party to deal with the point.

5. In the present case, there was reasonable notice of the case which the defendants had to meet. Nothing was said or done in the litigation to suggest that they had not had a reasonable opportunity to respond to that case. In particular, no steps were taken to secure a further opportunity to respond.

MAXWELL P:

1. I will invite Nettle JA to deliver the first judgment.

NETTLE JA:

2. This is an application for leave to appeal from an order of a judge in the Common Law Division refusing leave to appeal from a judgment of the Magistrates' Court.

3. In brief substance, in the proceeding in the Magistrates' Court, the respondent, Moore Stephens Melbourne Pty Ltd, sought payment by the applicants, Keith Jacob Southwick and

Neville Bruce Southwick, as guarantors, of a sum of $73,799.79 due under a guarantee of the obligations of Cedel Products Australasia Pty Ltd (Cedel).

The pleadings

4. As it was first pleaded in the respondent's Statement of Claim dated 30 August 2007, the claim appeared as follows:

> 2. Cedel Products Australasia Pty Ltd ... is indebted to the plaintiff in the sum of $73,799.79 together with interest on same pursuant to statute for professional services rendered by the plaintiff to the company at the request of and on behalf of the company between the period January 2001 and December 2004.
>
> 3. Pursuant to agreements in writing dated 29 September 1998 (the agreements) Keith Jacob Southwick and Neville Bruce Southwick, the guarantors, guarantee to the plaintiff payment of all moneys outstanding by the company to the plaintiff. The guarantors are therefore indebted to the plaintiff in the sum of $73,799.79 together with interest on same pursuant to statute.

5. Following service of the statement of claim the applicants delivered a request for further and better particulars dated 28 September 2007, in which they asked the respondent:

> To state the usual calculations of how the sum of $73,799.79 has been calculated or arrived at. Please ensure that you also identify in respect to each and every fee the entity for which the accounting services were performed.

6. To that, the respondent replied on or about 19 October 2007 with a copy of an annotated debtors and work in progress ledger showing each ledger entry in respect of which a claim was made and, in a separate document entitled 'Cedel Fee Summary', a tabular presentation listing at the head of the page the name of each company or other entity for which the professional service was performed, and beneath the name of each such entity, the amounts debited for professional services performed for that entity, and at the foot of the document the total for each entity together with the aggregate (which at that stage stood at $72,677.79). In notes set out near the end of the document, it was explained that the services in the case of the entities which were companies involved Accounting Tax Queries, Preparation of Financial Accounts, Income Tax Returns, review of IAS and BAS and, in the case of family matters, involved providing information as requested by 'Keith Southwick and/or other directors, Smith-Read, M Flaganbalt, Investec, Wentworth, *et cetera*, as requested.' That information was then summarised in a table headed 'Entity Summary' at the end of the document which identified precisely the amount claimed from the applicants for services rendered to each entity and individual.

7. In their defence dated 16 January 2008, the applicants pleaded that they did not admit that they had signed the guarantees and, in the alternative, that the guarantees were not supported by consideration. In the further alternative they averred that:

> If the documents constitute a binding contract and guarantee, which the defendants deny, the terms of the agreements were that the plaintiff would invoice the entities named in the documents for accounting work performed for those entities and each invoice would provide sufficient detail about what work was performed and ... how the fee was calculated, so that those entities would be liable to pay the plaintiff's fees for the work done for that entity so that the guarantee would only be called on if that entity that was liable to pay the plaintiff's fees failed to do so and each entity could, if necessary, query the amount charged.

And in particulars given under that averment it was alleged that:

> The terms are partly express and partly implied.
> In so far as the term is express, the document states that the guarantor would guarantee only outstanding fees owing by the said entities. In so far as the term is implied, it is implied because:
> (a) it is reasonable and equitable,
>
> (b) necessary to give business efficacy to the contract, and
>
> (c) so obvious as to go without saying.

I observe in passing that it was not alleged in the defence that Cedel was not liable for professional services rendered to other entities in the group. On the contrary, the defence and the request for particulars appear to have been premised on the assumption that it was.

The Magistrates' Court hearing

8. At the outset of the hearing before the Magistrate on 6 February 2008, counsel for the respondent explained to his Honour that there had been some payments made in reduction since the claim was issued and she sought leave to amend the amount of the claim to $71,852.79 and to amend the dates between which the professional services were alleged to have been rendered to between January 2001 and August 2007. After ascertaining from counsel for the applicants that he had no objection to that course, the Magistrate granted the leave which was sought. Counsel for the respondent then opened the case in these terms:

> This is a claim for moneys pursuant to a guarantee signed by both defendants on 29 September 1998 to guarantee all debts and liabilities of several entities, including a company called Cedel,

and went on to explain to the Magistrate that the debts the subject of the complaint were incurred by Cedel 'by reason of the raising of accountancy services through the plaintiff over a period of time from 2003 through 2007' and that Cedel was a company in a group of companies of which the Southwicks were directors.

9. At that point, the Magistrate asked counsel for the applicants to identify the issues which he saw as arising from the way in which the case had been opened, and counsel for the applicants responded that there were two issues. As he put it:

> The first issue is, that by reason of the further and better particulars that have been provided by the plaintiff to my instructing solicitors, it is clear that this plaintiff cannot bring this claim for the sum claimed. That is the case because in due course, if we get that far, it will be obvious from the invoices that have been submitted to my solicitor said to be owing that it is not Cedel that is indebted to the plaintiff but it is a number of other companies in respect of which work has been done and in respect of work has been done and in respect of which – well, we think work has been done and in respect of which no claim has been made.
>
> The second point is this. We say, in any event, that it is a term of the guarantee, either express or implied, and that will be a legal argument, but we say it flows directly from the wording of the guarantee that indeed there was an obligation on the part of this plaintiff to, in the first instance, provide invoices to the relevant entities and for those invoices to become outstanding before any entitlement arose in the plaintiff to call upon the guarantee and, on my instructions, not a single invoice in respect of the work, and I use that word neutrally, has been sent to any of the parties for which the work's been done.

10. Counsel for the respondent then called Mr Stewart, who was an associate director of the respondent, who gave evidence that there had been an arrangement in place for years whereby all work done by the respondent for entities in the group was invoiced to, and paid for by Cedel:

> Keith Southwick and/or Keith Famen, who was another employee at Cedel, would bring in the documents or send them in, which would be accounting books, bank statements, whatever, for the whole family and we were engaged to do the accounting work, preparing accounts, tax returns, et cetera, for all the entities within the group and all the family members within the group.

Mr Stewart further swore that:

> The arrangements were that we would invoice Cedel and/or Keith Southwick, or that it was addressed to Keith Southwick being the managing director and the person that basically ran the family businesses.

And that:

> Cedel made all the payments as far as I'm aware ....

And Mr Stewart added that the arrangement had, to his knowledge, been in place constantly since at least 1992 and also that he recognised the signatures on the instruments of guarantee as being those of the applicants.

11. The applicants did not give evidence. Instead, in final submissions, counsel for the applicants contended that the respondent's claim failed at a number of levels. First, he argued that the respondent had failed to prove execution of the guarantees because Mr Stewart had not been present when they were executed, and further because his evidence did not accord

with s148 of the *Evidence Act* 1958. Secondly, he contended that if the Magistrate were against him on that point, paragraph 2 of the respondent's statement of claim alleged that Cedel was indebted for professional services rendered to Cedel at the request of Cedel and it had not been demonstrated that any of the claim was for services rendered to Cedel. Thirdly, he argued that if Cedel were liable for services rendered to the other entities, the guarantees could only be called on in circumstances where the other entities had first been billed. Finally, he submitted that:

> The claim was misconceived. It should have been a claim made by this plaintiff against numerous defendants. They chose to bundle it all up into one. There's no evidence at all that Cedel would be responsible for payment of other people's bills. That's the other problem they've got which I apologise, I've overlooked Mr Stewart's evidence and I pressed him twice and your Honour heard the evidence. He wasn't able to say what the position was.

12. Counsel for the respondent in her submissions replied that:

> In relation to Cedel not owing debts, Yes, sir. It would just be my submission that there has been evidence given by Mr Stewart of the arrangement and agreements that were in place over a number of years and that these arrangements and agreements have taken place from 1992 right up to 2003, being that Cedel instructed them to provide services on behalf of themselves and a series of companies.

13. The Magistrate then enquired whether counsel submitted that he should draw the inference from that evidence that there was an agreement between Cedel Products on the one hand and the plaintiff on the other, that Cedel would be responsible for the payment of work done for other entities, and counsel said that she did. There was then a luncheon adjournment.

14. Following that adjournment, counsel for the applicants made a number of submissions about other issues and then, in what he described as his final submission, contended that counsel for the respondent had sought to recast her case as one whereby Cedel would be responsible for all the obligations of the other parties and that that was not the pleaded case which the applicants had come to meet. He added that it had been open to counsel for the respondent from the outset to amend and that she had not done so and, in any event, that the arrangement or agreement for which she contended was contrary to the evidence given by Mr Stewart.

15. Counsel for the respondent replied that the evidence did establish that Cedel required services whether they were for itself or for other entities and that an agreement by Cedel to pay for such services was thus within the pleading.

The Magistrate's decision

16. In his reserved decision, the Magistrate held that he was satisfied that the Southwicks had signed the guarantee. As his Honour explained

> The only oral evidence bearing on the issue was that of the associate director of the plaintiff, Colin Stewart (Stewart). Since 1994, he had performed work for Cedel on behalf of the plaintiff. From 1997 or 1998, he had had frequent contact with Keith Southwick or, as Stewart put it 'he rang me all the time'. Stewart identified the signatures on the guarantees as those of the defendants. He did so on the basis of his long experience of seeing the signature of each defendant on various documents. He was far less certain of the respective initials.

That part of his Honour's decision is not disputed.

17. The Magistrate next noted that the applicants had attacked Mr Stewart's evidence as not complying with s148 of the *Evidence Act* 1958 but rejected that contention on the basis that the provision was inapplicable. As he explained:

> The operation of s148 is discussed in *Cross on Evidence*, Australian edition at [39105]. S148 controls the way a specific method of identifying handwriting may be used but it does not exclude other ways. The method adopted in this proceeding is discussed in the preceding paragraph of that text under the heading 'Opinion'. Not only was the evidence of Stewart admissible but it carried sufficient weight to satisfy me that the signature on the respective guarantees were those of the defendants.

That part of his decision is also not disputed.

18. The Magistrate also rejected the contention that the guarantee was not supported by

valuable consideration and, not surprisingly, that part of his Honour's decision is not disputed either.

19. The Magistrate rejected the applicant's contention concerning implied terms on the basis that at least two of the requirements for the imposition of an implied term were not satisfied. As his Honour explained:

> The conditions required to be satisfied before a term will be implied into a written contract are set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[1] Of the five stated conditions, two are not satisfied in this case. The guarantees are effective without implication of either term when seen in the light of the circumstance existing at the time of the execution of the guarantees, namely, the agreement between the plaintiff and Cedel. In addition, when seen in the light of that circumstance, the implied terms were not so obvious that it goes without saying that they should form part of the guarantees.

That is not disputed either.

20. Finally, the Magistrate held that there was an agreement for Cedel to pay for professional services rendered to other entities in the group. As his Honour explained:

> The plaintiff's claim is brought against the defendants upon their guarantees, which cast an obligation upon them in respect of named entities. The question remains whether there was an agreement between the plaintiff and Cedel whereby the latter was chargeable with any debt incurred by all entities associated with the Southwicks whether listed in the guarantee or not.
>
> Over many years, the practice was that invoices were sent for work performed by various persons to Keith Southwick and were paid by Cedel. The practice continued without alteration after the execution of the guarantees. Additionally, there were other arrangements for the payment by Cedel of outstanding accounts when it fell behind in its payments. These practices are strong evidence of an agreement between the plaintiff and Cedel for the latter to pay for the work performed for it and for others by the plaintiff. It remains satisfactory evidence of such an agreement even though the guarantees specify a group of entities (including Cedel) rather than Cedel alone. Accordingly, the defendants are liable under their respective guarantees in relation to the indebtedness of Cedel to the plaintiff and it does not matter whether the invoices identify the person in respect of whom an item of work was performed.

That part of his Honour's decision is disputed.

The appeal to the judge below

21. The application for leave to appeal to the judge below was put on two bases. First, it was contended that the Magistrate's finding as to the scope of the agreement the subject of the guarantee went beyond the plaintiff's pleaded case and thus was unfair; and secondly, it was said that it was not open on the evidence to find an agreement of the kind which the Magistrate found to exist. The judge rejected both contentions.

22. As to the first, his Honour held that it was arguable that the agreement as found was within the scope of the pleading but that, even if it were not, it was plain that the appellants had gone to trial well aware that the amount claimed was for accounting services provided to entities other than Cedel – as was demonstrated by the defence of 28 September 2007 and the amended defence of 16 January 2008 – and had sought positively to confront the situation by claiming in respect of accounting services performed for entities other than Cedel that there were implied terms requiring that the recipient of the services be invoiced before making a call under the guarantee; and had also served a request for further and better particulars, seeking precise particulars of the services and fees in respect of each company.

23. Further, as his Honour held, the way in which the case was conducted before the Magistrate squarely raised the issue of the existence of the agreement and left it for the Magistrate to determine. Counsel for the respondent had opened the case by saying that the claim was for fees for accounting services provided by the respondent. She had called Mr Stewart, who had given evidence of the arrangements which the Magistrate found to exist. And in final addresses, counsel for the applicants had addressed on the contention that Cedel, and thus the applicants, were liable for services rendered to the other companies and objected that it went beyond the pleading and, in any event, there was insufficient evidence to support it.

24. As to the second issue whether there was evidence sufficient to support the existence of the agreement found by the Magistrate, the judge held that in light of all of the evidence, Mr Stewart's testimony provided sufficient foundation for the finding of an agreement between the respondent and Cedel for Cedel to pay for the work performed for it and others by the respondent.

Judge's reasons not attended by doubt

25. In my view, the Judge's reasons are not attended by sufficient doubt to warrant the grant of leave of appeal. I see no error in his Honour's conclusion[2] that the agreement which the Magistrate found to exist was arguably within the scope of the pleadings; particularly given that the pleadings for the purposes of this exercise are taken to include the further and better particulars.[3] They made plain that the claim was for services supplied to the named entities other than Cedel. Nor do I see any error in his Honour's conclusion that, despite the pleadings, it was open to the Magistrate to proceed on the basis that one of the issues which fell for determination was whether Cedel was bound to pay for accounting services supplied to the other named entities. [4] In effect it was the principal issue.

26. Counsel for the applicants spent a good deal of time this morning attempting to persuade us that the judge was in error in not accepting that the Magistrate had denied the applicant's procedural fairness by deciding the case on a basis which was not pleaded. But in my view, the judge's rejection of that contention was right. High authority makes clear that, when deciding whether or not a point was raised at trial, no narrow or technical view should be taken of what was in issue. Rather, it is necessary to look at the actual conduct of the case and see whether a point was or was not taken, especially where particulars may be equivocal. Thus, the judge was right that, when one looks at the way in which this case was conducted from the opening until final address, it is clear that it was in issue as to whether Cedel had agreed with the respondents to be liable for the costs of professional services rendered at its request to the other entities.

27. Counsel for the applicants urged us to accept that, because of the state of the pleadings, he had in effect been lulled into a false sense of security that the only case which he had to meet was the pleaded case, and he was neither in a position to deal with the case in fact advanced nor should he have been required to do so, at least while the pleadings remained in their unamended form. He says he made it plain to the Magistrate that it would not be appropriate for his Honour to decide the case on any basis other than the pleaded case and, since there had been no application for amendment, the claim should have been dismissed.

28. There are, however, a number of answers to that, of which but two will suffice. First, as the judge observed, counsel was on notice from well before the time of the trial that the case advanced was one for fees due in respect of work done for entities other than Cedel. The particulars made that plain. Secondly (and assuming for the moment that counsel had believed or, as the judge put it, been so foolhardy as to assume, that the applicants needed to do no more in the trial than point out that the case advanced was not within the pleadings), it was obvious from the outset that such an approach was unlikely to find favour with the Magistrate and that the Magistrate intended to consider the issue of whether an agreement of the kind contended for had been proved.

29. Counsel for the applicants may not have wished his Honour to do so, no doubt because it was a harder case to meet, and he made plain that it was his preference that the Magistrate not do so. But of itself, the Magistrate's determination to press ahead on the issue in face of such objection was not a denial of procedural fairness. It would only have been so if counsel had been taken by surprise by what occurred, and it is clear that he was not surprised. There was perhaps a faint suggestion before the Magistrate that counsel for the applicants had restricted his cross-examination of Mr Stewart because of what counsel had believed to be the limits of the pleaded case. I take that at face value despite its apparent inconsistency with the content of the cross-examination. But I am not aware of whether that suggestion was persisted with before the judge below and, more importantly, nothing of the kind was put to us this morning.

30. So to say is not to suggest that pleadings in the Magistrates' Court are not important; they are. Nor is it to imply that a litigant can expect to go to trial and advance a case not pleaded without consequences; sometimes so grave as to refuse leave to amend when it is too late in the day. Nor is it to suggest that the formalities of amendment can be or should be ignored; they should not.[5] If a case changes shape, the pleadings should be amended to put the nature of the

case beyond doubt.[6] Nevertheless, where as here a case is run in a particular fashion, despite the pleadings, and is decided in accordance with the way in which it was run, the results should be upheld unless some injustice be done.

31. If in truth counsel for the applicants had been taken by surprise, one may expect that he would have told the Magistrate that he was embarrassed because of the way in which the case had been conducted, or because he did not have available the evidence needed to meet the case as put, and to seek an adjournment in order to prepare. To my mind, it says all that it is needed to decide this application that no such submissions were made.

32. In the result I would dismiss the application for leave to appeal.

MAXWELL P:

33. I, too, would dismiss the application for the reasons which his Honour has given. I add only this for myself in relation to the general question of the observance of the principles of procedural fairness in litigation.

34. This Court will, of course, be astute to enforce the observance of the requirements of procedural fairness in litigation. They are fundamental. What those principles require is that a party have adequate notice of the case which it has to meet and a reasonable opportunity to respond to that case. The function of pleadings and particulars is to provide that notice and that opportunity. If at any stage in a proceeding the legal representative of a party apprehends either that there has been insufficient notice of the case or an inadequate opportunity to respond to it, then it is for that party and its representative to insist on the observance of the requirements of procedural fairness and, in the appropriate case, to seek an adjournment to enable that party to deal with the point.

35. In this case, for the reasons Nettle JA, there was reasonable notice of the case which the defendants had to meet. Nothing was said or done in the litigation to suggest that they had not had a reasonable opportunity to respond to that case. In particular, no steps were taken to secure a further opportunity to respond.

36. The order of the Court is: Application refused with costs.

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[1] [1977] HCA 40; (1977) 16 ALR 363; (1977) 45 LGRA 62; (1977) 52 ALJR 20; 32 ALT 41; (1977) 180 CLR 266, 283; see also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596, 605; 26 ALR 567; (1979) 53 ALJR 745; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337, 347; (1982) 41 ALR 367; (1982) 56 ALJR 459.
[2] Reasons, [35] and [36]-[42].
[3] *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491, 497; (1988) 77 ALR 193; (1988) 62 ALJR 209; [1988] Aust Torts Reports 80-160.
[4] *Banque Commercial SA (in liq) v Akhill Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279, 287; (1990) 92 ALR 53; 64 ALJR 244.
[5] *Wong v Mura* [2001] NSWCA 366 [4].
[6] *Donis v Donis* [2007] VSCA 89 [61]; (2007) 19 VR 577; [2007] V Conv R 54-737.

APPEARANCES: For the applicants Southwick: Mr A Herskope, counsel. Klaus Kenny Solicitor. For the respondent Moore Stephens Melbourne Pty Ltd: Mr RA Brett QC with Ms KR Campana, counsel. White Cleland, solicitors.
