05/01; [2000] VSC 426

SUPREME COURT OF VICTORIA

EQUUSCORP PTY LTD v CLARK

Hansen J

2 October 2000

CIVIL PROCEEDINGS – JURISDICTION OF COURT – CLAIM FOR MONEYS DUE UNDER A LOAN CONTRACT – PROVISION IN CONTRACT THAT PAYMENTS BE MADE IN VICTORIA – SUBMISSION OF LACK OF JURISDICTION MADE BEFORE ANY EVIDENCE LED – CLAIM THAT SOME PAYMENTS MADE INTERSTATE THEN TRANSFERRED INTERNALLY TO PARTY TO CONTRACT – FINDING BY MAGISTRATE THAT THE CAUSE OF ACTION AROSE INTERSTATE AND PAYMENTS MADE INTERSTATE – FINDING THAT THE MAGISTRATES' COURT HAD NO JURISDICTION – CLAIM STRUCK OUT – WHETHER MAGISTRATE IN ERROR.

Before any evidence had been called in a claim for moneys due under a loan contract, defence counsel submitted that the court lacked jurisdiction to hear and determine the complaint on the grounds that the contract was governed by the law of another State and that payments were made for a period of time in that other State.

Clause 2.2 of the loan contract required that payments "shall be made at the postal address" of the plaintiff E P/L in Victoria as set out in the contract. Clause 3 provided that C. would be in default if they failed to make payment of any amount due. There was no evidence that the parties to the contract had agreed to vary those contractual provisions. Defence counsel stated that payments were made to a post office box interstate and then transferred internally to E P/L in Victoria. As a result, he submitted that the cause of action did not arise in Victoria and accordingly, the court had no jurisdiction to entertain the claim. The magistrate agreed with this submission and struck out the claim with costs. Upon appeal—

HELD: Appeal allowed. Remitted for hearing and determination by another magistrate.
1. In view of the way in which the case was conducted, it could not be taken against E P/L that clause 2.2 did not remain applicable to the parties in their mutual relations. There was no mention in the Defence Notice that clause 2.2 had been varied by any particular fact or circumstance so that it had ceased to be applicable to the parties by the time of the alleged breach.

2. When the magistrate referred to clause 2.2 as providing a mechanism for the transfer of payments he overlooked the nature and effect of the term together with clause 3 in the contract. The magistrate read those provisions down as not meaning what they stated on their plain terms. The issue which the magistrate should have addressed was whether a material part of the cause of action arose in Victoria. On the face of things, there was sufficient to establish that a material part of the cause of action arose in Victoria. In those circumstances the magistrate was in error in striking out the complaint.

HANSEN J:

1. This is an appeal from an order of the Magistrates' Court made on 15 February 2000. On that day the appellant's claim against the respondents' came on for hearing. It had been commenced by a complaint filed as long ago as 8 December 1997. The claim was for $7,891.70 as moneys due under a loan contract.

2. There had been a judgment in default of defence on 3 July 1998 which was set aside on 7 June 1999, following which a defence was filed on 21 June 1999. Thereafter there were particulars and discovery and after adjournments the case came on for hearing on 15 February.

3. The hearing that day was transcribed. The parties were at court with their counsel ready to proceed with the hearing.

4. Counsel for the appellant, which is the plaintiff in the proceeding, briefly opened his case to the Magistrate. The claim was brought on a loan agreement made on 13 June 1991, the defendants defaulted in their repayments, a notice was served under s107 of the *Credit Act* as a precondition to suing, the default was not rectified and the plaintiff claimed the balance due.

There was a defence which, the Magistrate immediately noted, stated that: "The court does not have jurisdiction". Counsel then told the Magistrate that counsel for the defendants:

> "...wants to address you on [that]. I am not instructed to agree to that course. My instructions are to proceed as the normal rules would suggest."

At this point, counsel for the plaintiff having completed his opening, the Magistrate called on counsel for the defendants.

5. Pausing at this point, the situation was that the case had come on for hearing. Hence the parties were present with counsel. Neither on that day nor on any earlier occasion had the normal manner of trying a case by hearing witnesses on their evidence been ordered to be varied, whether pursuant to rule 23.01, rule 35.03 or otherwise. Nor had the parties agreed that a preliminary point be argued and determined prior to the calling of evidence. Nor had they prepared an agreed statement of facts for the purpose of the determination of any particular point raised by the defence or otherwise agreed as an issue for determination ahead of the calling of evidence. The remarks of counsel for the plaintiff quoted above were a plain statement to the Magistrate that the plaintiff required the case to be heard and determined in the normal way, that is, by the calling of evidence and a decision on the merits of the issues raised by the parties. The transcript discloses that he never departed from that position.

6. Counsel for the respondents then addressed the Magistrate. He immediately said that he raised the point that the plaintiff's complaint is based on the *Credit Act* 1984. It followed that the s107 notice of default was served under that Act, by which he meant the Victorian *Credit Act*. He then referred to facts for the purpose of the point which was that the Magistrates' Court had no jurisdiction because the contract was governed by the Queensland and not the Victorian *Credit Act*. The contract was entered into in Queensland to enable the defendants, who lived in Queensland, to acquire a time share unit in a Queensland resort. In the course of briefly outlining the facts for the purpose of his point, counsel stated that instalment payments "were commenced and paid to an address in Southport, Queensland for some period of time".

7. After some further discussion of the point raised by counsel the Magistrate took the matter up with counsel for the plaintiff. He submitted that the plaintiff could elect in which jurisdiction to sue, a notice had been given under the Victorian Act and the defendants had not objected to service or the venue under the *Service and Execution of Process Act*. There was a nexus with Victoria. Clause 2.2 of the loan contract required that payments under the loan contract "shall be made at the postal address" of the plaintiff in Victoria. That address was set out in the contract.

8. At this point the Magistrate observed that counsel for the defendants had said that repayments were made in Queensland. Counsel for the plaintiff responded by saying "That's what he contends, Your Worship". He did not deny that payments were made in Queensland and he referred to "administrative expediency" and said that monies were ultimately received in Victoria. But, he pointed out, the address for payment in the contract was in Victoria. The Magistrate then asked counsel if the plaintiff agreed that the payments were made to some establishment in Queensland and counsel replied that "We agree that there was a post office box to which initially payments were made and then from there made to Victoria. That is what the evidence will disclose". That was a post office box of the plaintiff. The Magistrate queried how the plaintiff's course of dealing with payments (meaning, after being received at a post office box in Queensland) could affect jurisdiction in Victoria. Counsel replied that it did not and returned to his earlier submission as to an objection to venue under the *Service and Execution of Process Act*. He also said, in relation to the defendants' point that the court lacked jurisdiction, that the jurisdiction was not excluded.

9. At this point the Magistrate asked counsel if he had a copy of the *Magistrates' Court Act* and counsel said that s100 was the general provision concerning civil jurisdiction. Counsel said that the plaintiff had standing on two bases: first, it was resident in Victoria; secondly, non-receipt of payments in Victoria constituted a breach of the loan contract. The Magistrate then referred to s100 of the *Magistrates' Court Act* 1989 (Vic), which provides in sub-s(4) that:

> "The Court does not cease to have jurisdiction in respect of a cause of action because —
> (a) part of the cause of action arose outside Victoria —
> if a material part of it arose in Victoria.

> (b) the whole cause of action arose outside Victoria —
> if the defendant resided within Victoria at the time of being served with the complaint."

Counsel stated that the defendants did not live in Victoria. Hence para (b) was not applicable. He then said that the contract obliged payment to be made in Victoria and it was not so made. This was a reference to Clause 2.2. It was also a submission that in the circumstances a material part of the cause of action had arisen in Victoria within the meaning of para (a). The Magistrate so understood the submission as he immediately observed that that conclusion would require a finding that a material part of the cause of action had arisen in Victoria. He further observed that "the outline of what I have been told is that it in fact wasn't" a mandatory requirement that the defendants' payments be made as stipulated in Clause 2.2. In this respect the Magistrate had in mind, as he then mentioned, that payments were made to a post office box in Queensland and transferred by internal means to Melbourne. He referred to that transmission as "an internal matter for the plaintiff". Counsel agreed with that but submitted that there was a breach unless payment was received in Melbourne. In response the Magistrate said:

> "What does it really mean? Do we have to have a *voir dire* on these aspects of evidence? Otherwise how am I to know?"

10. Shortly after that the learned Magistrate adjourned to consider the matter. Let us recapitulate on the situation at that stage. No evidence had been called. Counsel for the defendants had raised a point as to a lack of jurisdiction, namely, that the Queensland *Credit Act* applied and Queensland was the appropriate jurisdiction. He had not referred to s100(4) of the *Magistrates' Court Act*. Further, the defence had not alleged that any payments under the contract or any other circumstances constituted a variation of the defendants' obligation to make payments as stated in Clause 2 of the loan contract. In that respect Clause 3 of the loan contract provided that the defendants would be in default if they failed to make payment of any amount due or if they breached any of the terms and conditions of the contract.

11. On resuming the hearing, the Magistrate gave reasons for concluding that the court did not have jurisdiction to hear the case because, as he put it, the cause of action was debt or moneys owed which had arisen in Queensland.

12. Specifically, after referring to the submission of counsel for the plaintiff that a material part of the cause of action arose in Victoria because Clause 2.2 required that payments be made at the postal address of the plaintiff in Victoria, he said:

> "As I understand the way Mr Holzer puts it, payment is required at the Melbourne address and therefore is a material part of the cause of action. It is obviously in Victoria and therefore the court is impressed with it. In my view the jurisdiction is based in sub-s(4) on cause of action. Here, the cause of action is a claim in respect of debt, moneys owed, if you like. What Clause 2.2 does is provide a mechanism for address of that payment. The material provided to the court in submissions is that in fact what has happened. Certainly, to some extent payment was made to a box, post office box I assume, in Queensland and forwarded by internal means by the plaintiff to its Melbourne address. The cause of action is debt that has arisen in Queensland, the mechanism of transfer of the payments or non-payments received is not the cause of action and in my view that does not create jurisdiction in this court. I think that there is no other provision that I can see or note, certainly in Nash, which entitles or enables this court to assume jurisdiction."

13. In the course of further discussion the plaintiff's counsel stated that his client was concerned because the Magistrate had reached his conclusion on submissions without evidence, that he had not heard the full story about the precise place and manner of payments made, and the application of s100(4) was at issue. The Magistrate stated that he assumed that the plaintiff's counsel would have told him if payments had been made in a way other than that mentioned earlier. It is apparent that the Magistrate had accepted as established fact that all payments made by the defendants had been made to a post office box in Queensland nominated by the plaintiff and remitted "internally" by the plaintiff to its office in Victoria. It is also apparent that he concluded from that, notwithstanding the provisions of Clauses 2.2 and 3.0 of the contract, that the contractual provisions were "mechanism" and that the failure to make payment in accordance with them did not constitute a material part of the plaintiff's cause of action. Inherent in this must have been the conclusion, on unproven facts, that the parties by their conduct, constituted by the matters stated in the course of submissions, had agreed to vary those contractual provisions.

No such point was taken in the defence and he had no evidence of any relevant conversation or document that might properly be relied upon if such a point was sought to be made. I do not understand counsel for the defendant to have taken the point, let alone advanced the reasoning, upon which the Magistrate ultimately ruled.

14. The danger inherent in the course which the Magistrate took was made evident by the next submission of counsel for the plaintiff. He informed the Magistrate that inquiries had been made (obviously, while the Magistrate had adjourned to consider his ruling) and he was now able to state that after a certain date payments were made directly to the plaintiff in Melbourne and that evidence was capable of being led of that fact. If this was correct, and the Magistrate, having heard no evidence, had no basis for concluding that it was not, and the defendant's counsel did not challenge the correctness of the contention, he should have considered whether to recall his ruling. He said to the plaintiff's counsel that he heard what he had said. But he did not seek a submission from the defendant's counsel and he did not recall his ruling. He adhered to his ruling and disposed of the proceeding on the basis mentioned.

15. According to the register, the relevant extract of which is exhibited to an affidavit in support of the present appeal, the Magistrate entered the following remarks, namely:

> "The action relates to agreements and property in Queensland. Finding Magistrates' Court has no jurisdiction."

I understood from counsel that in fact the Magistrate ordered that the proceeding be struck out and that the plaintiff pay the defendants' costs which were agreed at $3,290. Although these orders are not recorded in the extract it was common ground between counsel before me that they were made. They are the type of orders that are authorised by s101(1)(c) of the *Magistrates' Court Act*.

16. The question of law stated in the order of Master Wheeler, made on 27 March 2000, is whether the Magistrates' Court had jurisdiction to hear and determine the claim. That question was followed by a reference (in brackets) to Clause 2.2 of the loan contract.

17. It is clear enough that the question thus raised is whether, having regard to Clause 2.2, it was open to the Magistrate to conclude that no material part of the cause of action arose in Victoria.

18. In the way in which the case was conducted, that is to say with no evidence having been given, it could not be taken against the appellant that Clause 2.2 as it stands in the loan contract did not remain applicable to the parties in their mutual relations. In that respect it is to be noted that there was no point taken in the defence to the effect that Clause 2.2 had been varied by any particular fact or circumstance, so that it had ceased to be applicable to the parties in their dealings and in particular by the time of the alleged breach.

19. One has to make these comments because of the unusual way in which the matter proceeded before the Magistrate. He has dealt with a question as to a lack of jurisdiction without any evidentiary basis agreed by the parties, merely on the basis of statements from the Bar table and the question thus arises, and it is the point which I have just addressed, as to what the factual basis was upon which the question of law arises.

20. Let us then consider what the learned Magistrate said: he correctly identified the claim as one for moneys owed and he correctly referred to Clause 2.2. At this point however the reasoning misapprehended the relevant terms of the loan contract and the relevance of what counsel had said. It may be one thing to say, as the Magistrate did, that Clause 2.2 provided a mechanism for payment in that it provided an address for payment – but that does not permit one to overlook that Clause 2.2 states that repayments under the loan contract "shall be made at the postal address of" the plaintiff specified in the contract. Further, under Clause 3.1(a)and(b) the "Debtor shall be in default in the event" of a failure to pay any amount due or a breach of any of the terms and conditions.

21. When the Magistrate referred to Clause 2.2 as providing a mechanism for the transfer of payments he overlooked the nature and effect of the term together with Clause 3 in the contract. He read them down as not meaning what they stated on their plain terms.

22. I do not understand what the learned Magistrate meant by referring to "the mechanism of transfer of the payments" and the statement that such mechanism "is not the cause of action" and as something that did not create jurisdiction in the court. The issue which the Magistrate should have addressed was whether a material part of the cause of action arose in Victoria.

23. The case for the plaintiff, correctly or not, was that there had been a failure by the defendants to make payment of the amount claimed and that Clause 2.2 required that the payment be made at the postal address of the plaintiff in Victoria. The failure of the plaintiff to receive payment at that address constituted a breach of contract, or at least the occurrence of a material part of the cause of action in Victoria.

24. The question that was outlined to the Magistrate in the course of the debate upon which he ruled was whether a breach of the obligation in Clause 2.2 constituted a material part of the cause of action in Victoria. In rejecting this submission the Magistrate concluded:

> (a) the cause of action was debt or monies owed which arose in Queensland;
>
> (b) Clause 2.2 was a mechanism for payment;
>
> (c) payments were made to a post office box in Queensland and forwarded by internal means to Melbourne;
>
> (d) the mechanism of transfer was not the cause of action and did not create jurisdiction.

25. The identification of the nature of the claim as one for debt or monies owed did not resolve the issue. The issue which the Magistrate had taken upon himself to consider at that stage was whether a material part of the cause of action had arisen in Victoria. It is self evident that the relevant breach was a failure to make payment of the sum claimed and that Clause 2.2 required payment to be made at the plaintiff's address in Victoria. On the face of things, that was sufficient to establish that a material part of the cause of action had arisen in Victoria. If the defendants wished to contend otherwise they could have raised the point which they wished to make in their defence, such as a defence that in a relevant respect the obligation in Clause 2.2 had been varied by agreement or that the plaintiff had by reason of some fact or circumstance waived compliance with the provision, or some other point to like effect, and adduced such evidence in support as they might be advised. But that was not done. The course that the Magistrate took, and which resulted in his ruling, had the implicit danger of error and injustice. It was a course that short circuited the normal procedure of a trial. It was not consented to. There was not an agreed statement of facts. The point on which the ruling was made was not raised and argued by the defendants' counsel. It was all done on the hop and when the plaintiff's counsel corrected his instructions as to the place of payments the Magistrate was thus informed that he had proceeded on a false factual basis. But he adhered to his conclusion without seeking clarification from the defendants' counsel let alone recalling the ruling and letting the trial proceed to evidence. In the result the factual premise and conclusion upon which the Magistrate based his ruling was one which consistently with proper procedure was not open to make and which, having been made, should have been recalled. It also misapprehended the relevant provisions of the contract and made a conclusion as to their construction and application on the basis of statements from the Bar table which were not established by evidence and the correctness of which was put in issue immediately following the ruling.

26. For these reasons the orders appealed from cannot stand.

27. If a court is to proceed in the way in which the Magistrate did here it is important that it be clarified at the outset what he is being asked to do. If there is to be a preliminary point the point should be identified with clarity and certainty and if the Magistrate is to be asked to rule upon it without evidence from witnesses there must be an agreed statement of facts upon which he or she is asked to act. It seems to me that what has happened here is the sort of thing that can happen when informality rather than formality and an observing of proper procedure is permitted to occur.

28. I should mention a point made by counsel for the respondents before me. He submitted that it should be taken that what was said from the Bar table by counsel before the Magistrate

was accepted by both counsel as correct. That is to say that counsel on both sides accepted, as though it were evidence of the fact for the purpose of a preliminary ruling, the several facts and matters which each of them referred to.

29. In my view a fair reading of the transcript establishes that this would be an unreasonable and untenable conclusion to draw. The matter was not put to the Magistrate on that basis.

30. I was informed by counsel for the appellant, and this was not questioned by counsel for the respondents, that no warning was given by counsel who appeared for the respondents below of an intention to take a preliminary point before the giving of evidence that there was a lack of jurisdiction which should lead to the summary disposal of the proceeding. Rather, it seemed to me on reading the transcript, that counsel for the defendant at first indicated to the Magistrate a line of defence and that by a process of development of argument the Magistrate ended up making a ruling to the effect that I have indicated.

31. Counsel for the respondents before me submitted that in fact, as the Magistrate had been informed, the parties had acted in relation to the manner of payment in a way that differed from that specified in Clause 2.2 and he also said that it was not until after the ruling that counsel for the plaintiff informed the Magistrate that payments had been made direct to the plaintiff in Melbourne. It may well be that there were payments which had been made to the plaintiff in Queensland but it is another question altogether whether the facts concerning any such payment or payments produced a result in law that could have an effect on the claim desired to be made by the plaintiff. That is a question of evidence in light of the defences specified by the defendant. As I have said, at the moment no defence of a variation or waiver of Clause 2.2 had been taken. Then, as far as payments being made in Melbourne was concerned, it may be that counsel for the plaintiff had not informed the Magistrate prior to the ruling that payments had in fact been made to Melbourne but whether that was so or not does not, I think, affect the conclusions which I have expressed concerning the reasons of the learned Magistrate. What is really being said is that before the Magistrate counsel for the plaintiff, who was faced with an application of which he had no warning as to the applicability of the Queensland *Credit Act*, and then with a point which appealed to the Magistrate, namely, that no material part of the cause of action arose in Victoria, neither of which had been identified in the defence or by prior notice, is to be taken in effect as having waived any reliance on payments having been made direct in Melbourne, and is to be bound, in the way that one would be bound by an agreed statement of facts, to what was said in the verbal toing and froing before the Magistrate at the preliminary stage of the case. In my view that is an untenable proposition. The reason why a party is required to give notice of a claim or defence is in order that the opposite party have a reasonable opportunity to obtain instructions.

32. Then it was said by counsel who appeared for the respondents before me that there may in any event be a good point in the sense of being a complete answer to the case in that the Queensland and not the Victorian *Credit Act* is applicable. It is unnecessary for me to consider whether that may or may not be so. The point was not taken in the defence and it was not a basis of the Magistrate's ruling. The ruling was essentially based in the reasons which I have quoted above. If the point is to be raised then it should be raised in the defence in the proper way. See Rule 9.01(2)(c). In that way the plaintiff has a proper opportunity to consider its position.

33. For these reasons, I am of the view that the appeal should be allowed. I raised with counsel at the conclusion of argument the question whether, if the appeal were allowed, the matter should be remitted to be heard by the same Magistrate. I think myself, without basing my view solely on anything that either counsel said, that in the circumstances it is desirable that the matter be heard by a different Magistrate. That is not because I take a view that the Magistrate who dealt with the matter would not deal with the matter fairly and properly. But it is a relevant consideration, and one that plays on my mind, that the parties have had the experience they have had, and from their own perception as to the doing of justice I think it is wiser that the matter be heard and determined by a different Magistrate.

34. The orders that I will make, subject to anything that counsel may say, are these:

(1) the appeal be allowed.
(2) the orders made on 15 February 2000 be set aside.

(3) the proceeding be remitted to the Magistrates' Court for hearing and determination by a new Magistrate.

35. Costs I think have to follow the event, do they not? I will order the respondents pay the appellant's costs of the appeal including reserved costs and the costs of and incidental to the hearing before the Magistrates' Court on 15 February 2000 and I grant a certificate under the *Appeal Costs Act* 1998.

APPEARANCES: For the Appellant Equuscorp Pty Ltd: Mr FJ Holzer, counsel. Davies Moloney, solicitors. For the respondents Clark: Mr ID McDonald, counsel. Michael Sandor & Associates, solicitors.
