09/08; [2008] VSC 26

SUPREME COURT OF VICTORIA

BDM MARKETING PTY LTD v ADLINX PTY LTD

Kaye J

12, 14 February 2008

CIVIL PROCEEDINGS – CONTRACT – SALE OF BUSINESS – TIME OF THE ESSENCE – AMOUNT PAID BY WAY OF DEPOSIT – RESCISSION RIGHTS GAINED ON COMPLETION OF CONTRACT – SUBSEQUENT FAILURE BY ONE PARTY TO COMPLY WITH THE TERMS OF THE CONTRACT – NOTICE OF RESCISSION SERVED ON THAT PARTY – CLAIM FOR RETURN OF DEPOSIT – FINDING BY MAGISTRATE THAT NOTICE OF RESCISSION LAWFULLY TERMINATED THE CONTRACT – FINDING THAT PARTY DID NOT PROCEED WITH THE CONTRACT THEREBY ELECTING NOT TO RESCIND IT – CLAIM FOR RETURN OF DEPOSIT UPHELD – WHETHER MAGISTRATE IN ERROR.

1. Where a party elects between two inconsistent rights under a contract, such a party may be bound by that election, so that having chosen to assert one right, the party may not subsequently invoke an inconsistent right. In particular, if a party to a contract, faced with the choice of terminating the contract or keeping it on foot, terminates the contract, that party will ordinarily have acted in a manner which binds him to that choice, so that the party may not later maintain that the contract is still on foot. The election by the party must be unequivocal, and must be made with knowledge of the facts. Further, a party, confronted with a choice between the exercise of alternative and inconsistent rights, is not obliged to make the election at once. That party is entitled to keep the question open, so long as it does not affirm the contract and so long as the delay does not cause prejudice to the other party.

***Craine v Colonial Mutual Fire Insurance Co* [1920] HCA 64; (1920) 28 CLR 305, applied.**

2. Where a party to a contract gained no rights under it until the contract was concluded, the party made no election to keep the contract on foot by not terminating the contract before or on that date. A party cannot, merely by entering into the contract, and without more, thereby elect not to rely on a clause under that contract. Accordingly, a magistrate was not in error in finding that a party did not breach the contract and was entitled to return of the deposit paid notwithstanding that the party elected not to rescind the contract.

KAYE J:

1. This is an appeal by BDM Marketing Pty Ltd ("BDM") from an order of the Magistrates' Court at Melbourne dated 12 February 2007, by which the Court upheld a claim by the respondent, Adlinx Pty Ltd ("Adlinx"), for the repayment of a deposit of $53,773 paid by it for the purchase of a business from BDM.

2. In 2004 BDM conducted a business of placing advertisements on behalf of customers in light boxes in shopping centres throughout Victoria and South Australia. In order to be permitted to place those light boxes at the shopping centres, it was necessary for BDM to obtain the consent of the various shopping centres involved. For that purpose it entered into a number of licence agreements with the shopping centres entitling it to erect and maintain the signs at the shopping centres.

3. On 14 August 2004, BDM entered into a preliminary agreement with Adlinx to sell the business to Adlinx. The agreement specified a purchase price of $537,732, payable by a deposit of $53,773, and the balance by the "completion date", 15 September 2004. The deposit was duly paid by Adlinx. The preliminary agreement was also expressed to be subject to the transfer, or the legal agreement to transfer, to the purchaser of all shopping centre and advertising contracts at the final completion date. For that purpose, on or about 8 September 2004, the solicitor for Adlinx prepared, and provided to BDM, some 26 agreements for the assignment of licences, to be executed by BDM and the shopping centres from which it then held licences.

4. Subsequently, BDM and Adlinx signed and executed parts of a formal contract of sale of

business. Adlinx executed and forwarded to BDM its part on or about 27 September 2004. BDM executed its part on 28 September 2004, and at 7.00 pm on the same date sent a copy of that agreement by facsimile to Adlinx.

5. The contract provided for a purchase price of $569,375, payable by a deposit of $53,773 already paid, and by payment of the residue, $515,602, on the "settlement date". The particulars of sale stated that the "settlement date" was to be 27 September 2004.

6. Special conditions 5.1 to 5.3 of the agreement are at the heart of the dispute between the parties. They provide:

> "5.1 This Contract is subject to and conditional upon all shopping centre Licences from shopping centres and shopping centre Licence Agreements with such shopping centres set out in Microsoft Excel spreadsheets titled schedule A and B hereto being assigned by the Vendor to the Purchaser with the consent of the Licensors on the Settlement Date.
>
> 5.2 In the event that any shopping centre Licence and Licence Agreement is not assigned to the Purchaser on the Settlement Date the Purchaser shall be entitled to withhold payment of 105 percent of the total annual value (as defined in Special Condition 2.3) of all advertising sales contracts entered into by the Vendor or Scroll Ads Pty Ltd (ACN 106 877 418) pursuant to such Licence and Licence Agreement.
>
> 5.3 Any payment withheld by the Purchaser pursuant to the preceding sub-clause shall be deposited by the Purchaser into the Trust Account of the Purchaser's Solicitor and paid to the Vendor upon receipt by the Purchaser of the assignment of the Licence and the Licence Agreement consented to by the Licensor therein in relation to which the payment shall have been withheld."

7. In this context, clauses 11.1, 11.4, 11.6 and 11.8 of the general conditions of the contract are also relevant. They state:

> "11.1 Time is of the essence of this contract.
>
> 11.4 If either party defaults, the other party may serve a notice which –
> (a) specifies the default, the expenses attributable to the default and the rate of any interest payable, and
> (b) allows no less than seven days for the remedy of the default and payment, and
> (c) states that the rights under GC 11.5 and 11.6 which the party serving the notice intends to exercise if the default is not remedied.
>
> 11.6 The party giving the notice may state in it that unless the notice is complied with this contract is ended. If the notice is not complied with this contract is ended and no further notice is necessary.
>
> 11.8 If the purchaser ends this contract, the vendor must repay any money paid by the purchaser, and pay the expenses attributable to the default."

8. On 2 October 2004 Mr Mitch Brajdic, a director of Adlinx, sent an email to Mr Brian Murray, a director of BDM, expressing concern that only 10 out of 25 shopping centres had confirmed that they would assign, or had assigned, their licence contracts to Adlinx. In the email Mr Brajdic also noted that as of the "settlement date" Adlinx had not received all the written assignment confirmations from the shopping centres as agreed. The email went on to state:

> "The magnitude of the shortfall as of 1 October 2004 is materiall (sic) and to substantiall (sic) and falls short of what we have tried to contract to purchase. We hereby provide you with notice that you provide all the shopping centre confirmation of assignments within seven days of this advice. … If by 8th of October 2004 we have not received all said confirmations of assignments we shall deem our contract to be null and void due to material under performance on your part."

9. Mr Murray responded to that email with an email on the same date.

10. On 8 October 2004, Mr Brajdic and his brother, as co-directors of Adlinx, signed a document entitled "Notice of Rescission" and forwarded that document to BDM. The Notice purported to specify as "particulars of default" four different alleged breaches by BDM of the agreement. At the hearing before the Magistrate, only one such breach was relied upon, namely that, in breach of special condition 5.1, BMD had failed to assign all shopping centre licences from shopping centres, and shopping centre licence agreements with such shopping centres, to Adlinx with the

consent of the licensors "on the settlement date". The Notice stated that Adlinx required BDM to remedy the defaults within seven days of the date of service of the Notice, and gave further notice, pursuant to general condition 11.4 of the contract, that unless BDM complied with the Notice, the contract would be at an end in accordance with general condition 11.6 of the contract at the expiration of seven days of the service of the Notice, in which event all monies paid by the purchaser must be repaid in accordance with the general condition 11.8.

11. In the statement of claim attached to its complaint in the Magistrates' Court, Adlinx claimed that it had validly rescinded the contract by reason of the default of BDM under (*inter alia*) clause 5.1, and that, accordingly, it was entitled to repayment of the deposit of $53,773 paid by it to BDM. In its notice of defence, BDM admitted the payment to it of the deposit, but denied that Adlinx was entitled to rescind the contract as alleged. By its counterclaim, BDM relied on the allegations made by it in its defence, and sought a declaration that it was entitled to retain the deposit as its own.

12. At the hearing before the Magistrate, Mr Brajdic gave evidence that none of the assignments of licence prepared by him, and sent by him to BDM on 8 September, had been returned to him. After service of the Notice of Rescission, BDM did not make any communication to Adlinx to the effect that BDM had procured all assignments of all the shopping centre licences. As a consequence, Adlinx maintained that it had been entitled to bring the contract to an end, and was thereby entitled to repayment of its deposit.

13. At the Magistrates' Court, counsel for BDM submitted that, when clauses 5.1, 5.2 and 5.3 are read together, clause 5.1 does not contemplate that, if all the shopping centre licences are not transferred as of the settlement date, the contract is at an end. As a matter of construction, he submitted that clauses 5.2 and 5.3 govern the rights of the parties, if, under clause 5.1, all shopping centre licences have not been assigned as of the settlement date. In response, counsel for Adlinx submitted that clause 5.1 should be given its ordinary literal meaning. He drew the magistrate's attention to the decision of Brooking J in *McTier v Haupt*[1], as support for the proposition that where a sale is expressed to be "subject to" the occurrence of a particular event, then the sale is conditional upon the occurrence of that event. Counsel submitted that the assignment of the licences was critical to the value of the business which was to be purchased by Adlinx. Accordingly, he submitted that clause 5.1 should be given its ordinary meaning, and that, consequently, Adlinx had been entitled to rescind the agreement, and to obtain repayment of the deposit.

14. After hearing oral submissions the magistrate reserved her decision. She delivered written reasons for her decision on 12 September 2007. Her Honour found that clause 5.1 was clear and unambiguous, and accordingly there was no reason not to give that clause its ordinary literal construction. Her Honour noted that the assignments of the licences were critical to the business to be acquired by Adlinx. Her Honour considered that clause 5.2 does not operate to qualify the operation of clause 5.1. Accordingly, she concluded that the Notice of Rescission served by Adlinx on 8 October 2004 lawfully brought about the termination of the contract seven days thereafter. Consequently, her Honour upheld the claim of Adlinx for repayment of the deposit.

15. The Notice of Appeal asserts one ground of appeal, as follows:

> "The magistrate erred in law in finding that the respondent did not breach the contract and was entitled to the deposit monies paid under the contract together with any accrued interest for the following reasons:
> 1. That the Respondent elected to proceed with the contract knowing that the assignments of the shopping centre leases had not been obtained at either the settlement date of 27 September 2004 or when the appellant executed the contract on 28 September 2004."

16. Before turning to the submissions made in respect of that ground of appeal, it is important to identify what the appeal was not about. First, it was not argued on behalf of BDM, before the Magistrates' Court or on appeal, that, as the settlement date (27 September 2004) was earlier than the date on which the contract was made between the parties (28 September 2004), it was impossible for the parties to perform the obligations specified by the contract as being required to be performed by 27 September, including those under clause 5.1.[2] Secondly, no point was taken before the magistrate, or on appeal, as to whether time had ceased to be of the essence

when Adlinx sent the Notice of Rescission to BDM on 8 October. Thirdly, on appeal, BDM did not seek to impugn the reasoning of the magistrate in relation to her construction of clauses 5.1, 5.2 and 5.3. In making the above observations, I do not indicate whether or not any of those points were of any merit. Rather, I have done so in order to identify clearly what the appeal was about.

17. On hearing of the appeal before me, the sole point contended on behalf of BDM was that, as at 28 September 2004, Adlinx knew that not all shopping centre licences from shopping centres, and shopping centre licence agreements with those shopping centres, had been assigned by BDM to Adlinx with the consent of the licensors on 27 September 2004, yet nonetheless Adlinx "proceeded" with the contract on that date. Thus, it was submitted that Adlinx, by "proceeding" with the contract on 28 September, thereby elected not to rescind the contract under clause 5.1.

18. The submission made by Mr Settle of counsel on behalf of the appellant, BDM, was substantially based on an email which it was alleged Adlinx had sent to BDM at 1.16am on 28 September 2004, and before BDM had forwarded its executed counterpart of the contract to Adlinx. However, it transpired that that email had not been tendered in evidence, or otherwise been proven, before the magistrate, and therefore could not be relied upon by BDM on the appeal. Therefore BDM was not able to draw whatever assistance it otherwise might have derived from that email. In passing, I should observe that it was not apparent to me how it might have assisted the appellant's submission even if it had been admitted into evidence before the magistrate.

19. Ultimately, BDM's submission on the appeal was reduced to one simple proposition. Mr Settle submitted that the evidence established that on 28 September 2004, at the time which BDM sent its executed counterpart of the contract to Adlinx, Adlinx knew that all shopping centre licences from shopping centres, and shopping centre licence agreements with those shopping centres, had not been assigned by BDM to Adlinx with the consent of the licensors on 27 September 2004. Thus Adlinx knew all the facts necessary for it to elect whether or not to rescind the contract. It was submitted that by accepting the contract of sale from BDM, and thereby "proceeding with" the contract, Adlinx elected not to rely on its rights to rescind the contract under clause 5.1.

20. Thus stated, in my view, the argument advanced on behalf of BDM is patently flawed. Although Mr Settle did at one stage in his submission suggest that he was not relying on the concept of election in its "legal sense", it is clear that he was relying on the principle of an election by one party between inconsistent rights of that party under a contract. That principle has been clearly defined and stated by the High Court in a series of cases commencing with *Craine v Colonial Mutual Fire Insurance Co Ltd*[3] and including decisions such as *Tropical Traders Limited v Goonan*[4], *Sargent v ASL Developments Limited*[5], *The Commonwealth of Australia v Verwayen*[6] and *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*[7]. For present purposes, it is sufficient to state that where a party elects between two inconsistent rights under a contract, such a party may be bound by that election, so that having chosen to assert one right, the party may not subsequently invoke an inconsistent right. In particular, if a party to a contract, faced with the choice of terminating the contract or keeping it on foot, terminates the contract, that party will ordinarily have acted in a manner which binds him to that choice, so that the party may not later maintain that the contract is still on foot. The authorities have emphasised that the election by the party must be unequivocal, and must be made with knowledge of the facts.

21. For present purposes, it is sufficient to identify one important component of the concept of election, namely the choice by a party between two inconsistent rights. In this case Mr Settle on behalf of the appellant, BDM, contended that Adlinx had elected not to invoke its rights under clause 5.1 of the contract. He submitted that the act of election of Adlinx was the entry by it into the contract. In my view, the flaw in that line of reasoning is self evident. Adlinx had no right to rescind the contract under clause 5.1 until the contract was concluded between itself and BDM. Until BDM forwarded to Adlinx its executed part of the contract at 7.00 pm on 28 September 2004, there was no contract between the parties, and thus Adlinx had no right under clause 5.1 of that contract. It was only when the contract was concluded at 7.00 pm on 28 September 2004 that Adlinx acquired its right to rescind the contract under clause 5.1. Yet Mr Settle contended that it was that very circumstance – the entry into the contract – which was the act of election by Adlinx. *A fortiori*, a party cannot, merely by entering into the contract, and without more, thereby elect not to rely on a clause under that contract. Mr Settle advanced no authority for the proposition that a party can elect between inconsistent rights under a contract by the mere act of entering

into that contract. That is not surprising, since the proposition relied upon by the appellant is, with respect, a contradiction in terms.

22. It is true that this is an unusual case. Under the contract the settlement date was specified as 27 September 2004. Yet the contract was entered into one day later, on 28 September 2004. However, the important point is that, until the contract was concluded, Adlinx gained no rights under it. It was only upon conclusion of the contract that Adlinx acquired the right to rescind it under clause 5.1. Thus, by receiving the executed part of the contract, Adlinx could not, in my view, have thereby, and without more, elected not to invoke its rights under clause 5.1.

23. Thus, the submission made on behalf of the appellant BDM must be rejected. There was no election by Adlinx as alleged by BDM. In passing, I note that no point was made of the circumstance that Adlinx did not serve a notice under clause 5.1 until 8 October. In my view, BDM was correct in not making that point. It is well established that a party, confronted with a choice between the exercise of alternative and inconsistent rights, is not obliged to make the election at once. That party is entitled to keep the question open, so long as it does not affirm the contract, and so long as the delay does not cause prejudice to the other side.[8]

24. It follows from the foregoing that the appellant has failed to make out its ground of appeal contained in the Notice of Appeal, and that accordingly the appeal by BDM against the decision of the magistrate dated 12 February 2007 must be dismissed.

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[1] [1992] VicRp 46; [1992] 1 VR 653; [1992] ANZ Conv R 295; [1991] Aust Contract Reports 90-006; [1991] V Conv R 54-420.
[2] Compare *Campbell v Bent* (1879) 5 VLR 337 (L) esp. at 342.
[3] [1920] HCA 64; (1920) 28 CLR 305, esp. 325-6 (Isaacs J).
[4] [1964] HCA 20; (1964) 111 CLR 41, esp. 53-56 (Kitto J); [1964] ALR 585; 37 ALJR 497.
[5] [1974] HCA 40; (1974) 131 CLR 634, 641 and following (Stephen J), 55-6 (Mason J); 4 ALR 257; 48 ALJR 410.
[6] [1990] HCA 39; (1990) 170 CLR 394, 472 (Toohey J).
[7] [1993] HCA 27; (1993) 182 CLR 26, esp. 41; 112 ALR 609; 67 ALJR 537.
[8] *Sargent v ASL Developments Limited* (above), 656 (Mason J); *Tropical Traders Limited v Goonan & Anor* (above), 55 (Kitto J); *Scarf v Jardine* (1882) 7 AC 345, 360 (Lord Blackburn), 364 (Lord Bramwell).

APPEARANCES: For the appellant BDM Marketing Pty Ltd. Mr M Settle, counsel. Robert James Lawyers. For the respondent Adlinx Pty Ltd: Mr K Howden, counsel. Millars Lawyers.
