02/04; [2004] VSC 41

SUPREME COURT OF VICTORIA

WOODARDS (CENTRAL) v LUNTZ

Balmford J

10, 11, 19 February 2004

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR BREACH OF CONTRACT – ACCOUNTANTS ASKED TO PROCURE LOAN FOR ESTATE AGENTS TO BUY A BUSINESS – AGENTS REQUIRED TO COMPLETE TRANSACTION BY 28 JUNE – LOAN FACILITY APPROVED BY 19 JUNE – NO PROVISION IN AGREEMENT AS TO DATE BY WHICH FUNDING TO BE ARRANGED – ESTATE AGENTS OBTAINED LOAN FROM ANOTHER FINANCIAL INSTITUTION – CLAIM BY ACCOUNTANTS FOR FEE PAYABLE UNDER PROCURATION AGREEMENT – CLAIM UPHELD BY MAGISTRATE – FINDING BY MAGISTRATE THAT ACCOUNTANTS' OBLIGATION WAS CARRIED OUT WITHIN A REASONABLE TIME – WHETHER MAGISTRATE IN ERROR.

L., a firm of accountants, entered into an agreement on 23 May with W., real estate agents, whereby L. would procure the necessary finance for W. to purchase a certain business. W. was required as part of the agreement with the company vendors to submit satisfactory evidence of its ability to finance the purchase and that completion would occur on 28 June. The bank made an indicative offer to W., however, W. negotiated a loan with another bank and notified L. on 15 June to that effect. On 19 June, L. notified W. that the loan sought by him on W.'s behalf had been approved and that his fee for procuring the loan was due and payable. W. accepted the offer from the second bank. L. claimed from W. the procuration fee plus interest and costs. In upholding the claim, the magistrate found that L. had raised funding of the loan within a reasonable time and accordingly, L. was entitled to its fee under the procuration agreement. Upon appeal—

HELD: Appeal dismissed.
In the absence of a provision in the procuration agreement as to a date by which L. should carry out its obligation to arrange funding for W., the law implied a provision that that obligation be performed within a reasonable time. As settlement was effected in time to enable settlement on 28 June, the reasonable time for the performance of L.'s obligation had not expired and L. was not in breach before that date. Accordingly, it was open to the magistrate to find that L. had procured the loan within a reasonable time, had complied with the obligation under the procuration agreement and was therefore entitled to its fee.

BALMFORD J:

Introduction

1. This is an appeal on a question of law under section 109 of the *Magistrates' Court Act* 1989 from a final order made on 15 May 2003 by the Magistrates' Court at Melbourne constituted by Mr Lauritsen, Magistrate, whereby the appellant ("Woodards") was ordered to pay the claim of the respondent ("Luntz") in the sum of $29,612.50 being a procuration fee for obtaining finance, together with interest of $1,925.50 and costs of $9,485.

2. On 29 July 2003 Master Wheeler found the following questions of law to be shown by Woodards to be raised on the appeal:

> (a) whether the magistrate erred in finding that the St. George indicative offer (document 13 of exhibit TLC 2 to the affidavit of Tania Louise Cincotta dated 12 June 2003) was sufficient to satisfy Luntz's obligation under clause 26 of the Heads of Agreement dated 16 May 2002 (document 7 of exhibit TLC-2);
>
> (b) whether the magistrate erred in not finding that Woodards was at liberty to and did terminate the agreement between Woodards and Luntz (document 12 of exhibit TLC-2) on:
> (i) the evening of 15 June 2002; alternatively
> (ii) by letter from the solicitors for Woodards to Luntz dated 18 June 2002 (document 28 of exhibit TLC-2).

3. Counsel for Woodards effectively abandoned question (a) by making no submissions as to that question, and the matter proceeded on the basis of question (b) alone.

The facts

4. Luntz is a firm of accountants, of which the senior partner is Mr Luntz. Woodards is a real estate agent, and the magistrate found the driving force behind Woodards to be Mr Piccolo, whose wife was a director of Woodards. Woodards executed Heads of Agreement on 16 May 2002 providing for the purchase by it of the assets ("the business") of two companies to which receivers and managers ("the vendors") had been appointed. The Heads of Agreement provided:

> (a) by clause 26, that Woodards was required to submit to the vendors by 6 June 2002 satisfactory evidence of its ability to finance the purchase; and
> (b) by clause 34, that completion would occur on 28 June 2002, which was the last working day of the financial year.

5. Woodards had to borrow most of the purchase money. On 14 May, Luntz wrote to St George Bank ("St George") seeking the necessary finance on behalf of the defendant. On 22 May Mr Luntz advised Mr Piccolo that St George would provide an "indicative offer" on 23 May. As the magistrate found, an "indicative offer" is not an offer capable of acceptance. It is an indication that the financier will make the offer on terms if certain requests are met.

6. On 23 May 2002, following some days of negotiations, Woodards entered into an agreement with Luntz ("the procuration agreement") for Luntz to procure the necessary finance for Woodards to purchase the business. This is the agreement referred to in question (b), which reads, so far as relevant:

> **Item 1** [Woodards] hereby authorizes [Luntz] to arrange funding for the acquisition of [the business] from [the vendors] and agrees subject to item 2 to remuneration of ½% of the amount of funding raised payable on approval of the facility. [Woodards] further agree that if this remuneration has not been paid by the time of settlement, we authorize this amount to be deducted from the proceeds of any draw down at the time of settlement and be paid directly to [Luntz].
>
> **Item 2** Notwithstanding item 1, remuneration shall only be payable provided that the approval is on commercially acceptable terms.

7. The indicative offer was sent by St George to Mrs Piccolo, care of Luntz, on 24 May 2002. It proposed a loan of $5.1 million and included the following paragraph:

> Subject to your confirmation that the structure of the facilities is acceptable to you, and upon receiving the information listed below, we will prepare an application to obtain formal credit approval. I anticipate that this process will take approximately fourteen working days following receipt of all the information requested.

The information sought consisted of financial statements, valuations and a description of "the Piccolo Group". It is not in issue that that offer was "on commercially acceptable terms" as required by item 2 of the procuration agreement.

8. Woodards did not notify the vendors of the indicative offer from St George, despite the provisions of clause 26 of the Heads of Agreement. The vendors arranged for Mr Piccolo to attend their office on 13 June to satisfy them that Woodards was able to finance the purchase. However, Mr Piccolo had been negotiating with Macquarie Bank ("Macquarie") and on 12 June Macquarie wrote to him advising that approval had been obtained for a loan, subject to ten "conditions precedent". The magistrate found that in many respects the Macquarie offer was similar to the St George "indicative offer". Mr Piccolo produced the Macquarie letter to the vendors on 13 June and this satisfied them as to the ability of Woodards to finance the purchase.

9. The magistrate found that:

> owing to the perceived slowness of St George, Mr Piccolo became nervous. He was conscious of the impending settlement date. He believed that the Macquarie letter of 12 June contained an offer rather than something less such as an "indicative offer". In effect, he decided to terminate the procuration agreement with the plaintiff.

His Worship found that it was incorrect to say that Macquarie had made an offer of finance in its letter of 12 June, but that Mr Piccolo had believed that it had done so.

10. Mr Piccolo sent a fax to Mr Luntz on 15 June reading:

> In the absence of any approval from your intended financier and given that the period allowed under clause 26 of the Heads of Agreement dated 16 May 2002 has expired, we have decided to accept an offer of finance from Macquarie Bank Limited.
>
> We thank you for your efforts in trying to raise a letter of approval from St George Bank.
>
> Could you please arrange for the $5,600 paid to St George as a commitment fee to be refunded to us as stated in point (b) of their indicative letter of offer.

11. Mr Luntz contacted Mr Piccolo on 16 June. The magistrate found that their evidence diverged as to what was discussed and resolved. However, he did not find it necessary to resolve that issue, because a letter was written to Luntz by the solicitors for Woodards on 18 June, reading:

> I refer to your conversation with John Piccolo on Saturday and confirm that John has accepted the offer from [Macquarie].
> As you are aware, he was under a deadline pursuant to the Heads of Agreement and he could wait no longer to consider any alternative offers of finance.
>
> Accordingly, if you are still talking to your financiers, there is no need to continue those discussions given John's acceptance of the [Macquarie] offer.

The magistrate described that letter as:

> really a polite way of [Woodards] saying that their agreement is terminated owing to [Luntz's] breach of an obligation, being an obligation of sufficient importance that its breach enables the innocent party to terminate.

12. On 19 June Macquarie made a formal offer of finance. On the same day Mr Luntz wrote to Woodards advising that he had received written notification from St George that St George had approved a facility of $5.4 million, that it would be able to settle by 28 June, and that a formal letter to that effect would arrive the next day. He recommended that Woodards should reconsider the decision to proceed with Macquarie, for reasons which he set out. He stated that his procuration fee was now due, asked for confirmation that it would be paid at settlement in accordance with the procuration agreement, and indicated that if he did not receive that confirmation by 21 June he would instruct his solicitors to take action.

13. Woodards accepted the Macquarie offer and the purchase of the business was settled with the Macquarie finance on 28 June, the date provided in the Heads of Agreement.

14. The magistrate found that in the absence of a provision in the procuration agreement as to a date by which Luntz should carry out its obligation to arrange funding for Woodards, the law would imply a provision that that obligation be performed within a reasonable time. What was a reasonable time was a question of fact, to be determined from the circumstances of the particular case. He relied on *Perri v Coolangatta Investments Pty Ltd* [1982] HCA 29; (1982) 149 CLR 537; (1982) 41 ALR 441 at 444; (1982) 56 ALJR 445 per Gibbs CJ, *Hick v Raymond & Reid* [1893] AC 22 and *Carlton Steamship Co v Castle Mail Packets Co* [1898] AC 486 at 491 per Lord Herschell.

15. His Worship posed the question as to whether, in all the circumstances, by obtaining the offer from St George on 20 June, Luntz had raised funding of $5.4 million within a reasonable time, so as to satisfy that implied condition. For the reasons he set out, he found the answer to that question to be yes. It is clear from those reasons that he regarded the reasonable time for satisfying that condition as being a time which would enable Woodards to comply with the obligation under clause 26 of the Heads of Agreement and would enable the finance raised to be used in the settlement of the purchase on 28 June in accordance with clause 34. He found that the St George indicative offer of 24 May would have satisfied the obligation of Woodards under clause 26, and the final offer of 20 June would have satisfied the obligation of Woodards under clause 34. Accordingly, he found that Luntz was entitled to its fee under the procuration agreement.

The present proceeding

16. His Worship made no express finding as to the effect of the correspondence described in [10] and [11] above. However, implicit in his findings set out in the previous paragraph is a finding that that correspondence was ineffective to terminate the procuration agreement. Had he considered that that agreement had been terminated by that correspondence, he could not have made the final order which he did make. It is his implicit finding that the procuration agreement had not been terminated by that correspondence which is challenged by Woodards in the present proceeding.[1]

17. Mr Rodbard-Bean, for Woodards, submitted that by 15 or alternatively 18 June it was too late for Luntz to comply with its obligation under the procuration agreement. Both parties were aware of the need to settle the purchase by 28 June, particularly because there were significant GST implications to settling within the financial year. He submitted that a reasonable time to obtain the finance so as to be able to settle by that date had expired by 15 or 18 June, and accordingly by then Luntz was in breach of its obligation. He relied on various statements of Mr Luntz as indicating, if I understood him correctly, that Mr Luntz accepted on the basis of the letters of those dates, that the contract had been terminated. I do not read those statements as carrying that meaning. In any case, the question of what was a reasonable time for the performance of Luntz's obligation under the procuration agreement is a question of fact for the magistrate, not reviewable on this appeal.

18. Although the formal offer from Macquarie was not made until 20 June, settlement was effected with the Macquarie funds on 28 June. Thus the Macquarie offer of 20 June was in time to enable the settlement on 28 June as required. The reasonable time for performance of Luntz's obligation thus could not have expired, and Luntz could not have been in breach, before that date. The magistrate found that it was reasonable to infer that St George would have been able to provide its funds by 28 June. I note that Mr Luntz had been notified, and had informed Mr Piccolo, that that was the case[2]. While that notification, for present purposes, is hearsay, it would have been present to the mind of Mr Piccolo. It would seem unlikely that St George, having put time and effort into the assessment of a reasonably complicated transaction, would have allowed that time and effort to be wasted by failing to settle in time. I find that the St George formal offer made on 20 June, which was procured by Luntz, was received in time to enable settlement, that is, within what the magistrate had found to be a reasonable time; and accordingly, that Luntz at that date had complied with its obligation under the procuration agreement and was therefore, as the magistrate found, entitled to its fee.

19. However, should I be wrong in that finding, I turn to consider the position if Luntz had actually been, by 15 or 18 June, in breach of its obligation under the procuration agreement.

20. In *Carr v JA Berriman Pty Ltd*[3] Fullagar J said:

> Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time *is* of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise this right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is *not* of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day. If either (a) time is not originally of the essence, or (b) time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, only rescind after he has given a notice requiring performance within a specified reasonable time and after non-compliance with that notice. (Emphasis in the original)

In *National Engineering Pty Ltd v Chilco Enterprises Pty Ltd*[4] the New South Wales Court of Appeal (Heydon and Hodgson JJA and Ipp AJA) said:

> The general rule is that where a contract is silent as to the time for performance, so that a reasonable time is implied, the obligation to perform is not likely to be an essential term.

21. The magistrate made no finding that time was of the essence of any provision of the procuration agreement. Mr Rodbard-Bean referred to the agreement by Mr Luntz in cross-examination that "time was of the essence". However, that is an expression often used by lay persons to mean no more than "time is important", and it is not apparent from the transcript

that Mr Luntz was aware of its technical legal meaning. I cannot rely on that statement as an indication that the parties, having that technical legal meaning in mind, believed time to be of the essence of the implied term of the procuration agreement that the finance be obtained within a reasonable time. Mr Rodbard-Bean did not submit that there was any other evidence suggesting that time was agreed to be of the essence.

22. No notice was given by Woodards to Luntz requiring compliance with the procuration agreement within a reasonable time so as to enable Woodards to terminate that agreement on non-compliance with the notice. Thus Woodards was not entitled to terminate the procuration agreement on 15 or 18 June 2002, and accordingly the magistrate did not err in not finding that it was at liberty to do so and did do so.

23. For the reasons given, the appeal will be dismissed. Counsel may wish to make submissions as to costs.

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[1] I refer only to the correspondence; for obvious reasons, this being an appeal on a question of law under section 109 of the *Magistrates' Court Act* 1989, I am not concerned with the conflict of evidence as to what was said on 16 June, referred to in [11] above.
[2] See [12] above.
[3] [1953] HCA 31; (1953) 89 CLR 327 at 348-9.
[4] [2001] NSWCA 291 at [42] and [43].

APPEARANCES: For the appellant Woodards: Mr A Rodbard-Bean, counsel. Best Hooper, solicitors. For the respondent Luntz: Mr GP Harris, counsel. Piper Alderman, solicitors.
