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SUPREME COURT OF VICTORIA

HAZAN v DAI and ANOR

Marks J

9 November 1992

CIVIL PROCEEDINGS – CLAIM FOR REFUND OF MONEYS PAID TO FINANCIAL ADVISER – FINANCE BROKER – MAY BE ORDERED TO REFUND MONEYS PAID – PRE-CONDITION FOR SUCH ORDER: *FINANCE BROKERS ACT* 1968, S18.

A finance broker is not liable to refund moneys charged as a broker unless and until the broker has been convicted of an offence under s18(2) of the *Finance Brokers Act* 1969 ('Act'). Accordingly, a magistrate was in error in making an order for a refund of fees charged where the person said to be a broker had not been charged or convicted for an offence against the Act.

MARKS J: [1] Maurice Hazan is an appellant against an order made by the Magistrates' Court at Heidelberg on January 15, 1992, that he pay to the first respondent $1,175 with $39.66 interest, and to the second respondent $585 together with $19.74 interest. The total mount involved is $1,819.40. The court granted a stay of 1 month. The extract of the orders before me does not include whether an order for costs was also made. The appellant appears in person and the respondents do not appear at all. The claim arose out of a consultation between the respondents and the appellant in response to an advertisement of 2 February 1991 inserted by the appellant in 'The Age' newspaper as follows:

> "Advice and assistance available on finance as from 11% local and 7.2% offshore. Phone 850 9492 any time."

The appellant has not been represented in the appeal, and composed his own documents when he first applied for leave to appeal. Leave was refused by a Master, but granted eventually by a Judge sitting in the Practice Court on two grounds:

> 1. That the Magistrate erred in law in concluding that the evidence supported the plaintiffs' claim in that the Magistrate failed to take into account the documentary evidence presented by the defendant.
>
> 2. The Magistrate erred in law in finding that there was evidence to support a conclusion that the defendant was liable in negligence.

The appeal has been conducted in a way which makes it unsatisfactory in many respects. I do not have from the **[2]** appellant an account of what he says took place at the court, but at the callover of this case in September, the respondents to the appeal were represented by a solicitor, and an affidavit on their behalf is on the court file. This affidavit purports to set out an account of the proceeding, and it is largely from it that I have been able to form a conclusion as to what occurred. Mr Hazan has now read a copy of this affidavit, and has expressed himself to be content that I should rely on it. I encouraged him to take that stance, as without it, I would be handicapped in any ability to be satisfied about what took place.

There are other problems about the case which appear from the particulars of the Complaint which was relied on in the Magistrates' Court. First, I mention that on the extract of the order, which the appellant has obtained and tendered, the Complaint is referred to as being for negligence and misrepresentation. There is attached to the Complaint what purports to be a statement of claim headed "Particulars of claim". In essence, the two respondents sought to recover from the appellant the money that he had asked of them in advance for the work he was to do for them in arranging loans from a finance institution. $1,175 was paid in advance by the first respondent, and $585 by the second respondent to the appellant. The nature of those payments is obscure.

It is far from clear that this money was sought to be obtained or in fact obtained as commission for the loans. One view with which I do not think he would disagree is that the appellant held himself out as a person who was in a position to give advice about obtaining the loans, and **[3]** who could introduce the respondents to finance institutions. Whatever is the true situation, the fact is that the appellant was never prosecuted as a finance broker who carried on business without a licence contrary to the *Finance Brokers Act* 1969, and he was not convicted pursuant to section 18 of the *Finance Brokers Act* 1969.

The Particulars of Claim sought recovery of the money on behalf of the respondents, "pursuant to section 18" of that Act. In my opinion, no such cause of action was available.

It is unnecessary to set out section 18(2). Its effect is that a person who commits a breach of that sub-section in one or more of its facets is liable to a fine and, in addition, may be ordered to refund moneys charged as a broker. In my opinion, on the proper construction of that Act, the appellant was not vulnerable to an order under section 18(2) unless and until he was convicted of having committed an offence under it. It is important to remember that the appellant denied with some force that he had ever acted as a finance broker within the meaning of the Act, because he contended that as an accountant, which he is, he is exempt by S2.

The Court below did not have before it any information for an offence. It appears from the affidavit of Mr Salvatore Dai, the first respondent, that the reasons given by the Magistrate were stated in the following form:

> "The Magistrate said that generally and even on the appellant's own evidence he found him to be a finance broker, that he took into account section 19 of the *Finance Brokers Act* 1969, he was not satisfied that the loans failed because of incorrect valuations as there was no evidence of this. He then ordered the appellant to pay myself and the second respondent the sum of $1,175 with interest of $39.66 and $585 with interest of $19.74 respectively, and costs of $815, with a stay of one month".

[4] The Magistrate purported to find that the appellant was a finance broker within the meaning of the Act. In my opinion, the Magistrate was in error in holding, as he appears to have done, that such a finding was sufficient to empower him under the *Finance Brokers Act* to order the payment of the money. As I have said, the power to make such an order was dependent on a conviction, and no such conviction was pronounced in this case, indeed, no such conviction could have been, as there was no information laying any charge. Accordingly, the Magistrate clearly was not entitled to make the order on that basis.

There is nothing in the affidavit material which indicates that the Magistrate made a finding of misrepresentation or negligence, although the entry, of which I have a certified extract, suggests perhaps that there was. In my opinion, there was no evidence of negligence or of misrepresentation on which the order can be said to have been properly founded. The particulars of claim alleged misrepresentation in the following way:

> "7. Further, and in the alternative of the first meeting, the defendant agreed to organise a loan for the first plaintiff for a commission of $1,200 - 'the said agreement'.
>
> 8. In order to induce the first plaintiff to enter into the said agreement, the defendant represented that there would be no difficulty in obtaining approval for the said loan - 'the said representation'.
>
> 9. Acting on the fact (sic) of the said representation and introduced thereby and not otherwise, the first plaintiff entered into the said agreement and paid the defendant $1,200.
>
> 10. In truth and in fact, the said representation was false, untrue, inaccurate and misleading in that the loan approval was not obtained."

Stopping there, it must be said that these were not proper particulars of a claim based on misrepresentation, **[5]** there being no allegation of a misrepresentation of an existing fact. The law does not recognise, except in certain kinds of promissory estoppel, a representation as to an event in the future. There is, in my opinion, no basis for holding that the evidence or the particulars would sustain a claim of some kind in promissory or equitable estoppel, which, in any event, was not relied on.

Accordingly, I am satisfied that the Magistrate was not entitled to base his order on misrepresentation. I merely add that the law as to misrepresentation requires a pleading to state whether it is said to be innocent or fraudulent, and that any claim in respect of it is identified as one sounding in damages or rescission. The particulars do not descend to identification of what kind of misrepresentation was relied on The particulars went on to allege that the defendant was under a duty to take care "in the making of the said representation" to the first plaintiff, and then there are particulars in the next paragraph of what are said to be "negligence", appended to a paragraph which says:

> "In breach of the said duty, the defendant was guilty of negligence in making the said representation".

Whilst it is difficult to make sense of this pleading, the appellant has satisfied me that the Magistrate did not have before him any evidence which entitled him to find that there was a breach of duty in the way contended for under the particulars of claim, or that the defendant was guilty of negligence in any relevant sense, having regard to the circumstances of this case. The material is not in a satisfactory form, as I have **[6]** observed, but the respondents have not seen fit to oppose the appeal. The matters to which I have referred persuade me that there were a number of errors revealed by the conclusion of the Magistrate. There were, I think, obvious obstacles in the way of the respondents recovering the money which they claimed. For one thing the circumstances were consistent with the respondents having paid fees for advice which they sought from the appellant. The advertisement is equally consistent with his offering to give advice rather than to act as a finance broker contrary to the Act.

In any event, I am persuaded that the orders made must be set aside. Although the extract or certificate from the Magistrates' Court makes no reference to costs, the affidavit of Salvatore Dai does, and in the event that an order for costs was made, I will include it being set aside in the orders that I make:-

1. The appeal is allowed.

2. The orders of the Magistrates' Court at Heidelberg, 15 January 1992, including any orders for costs, are set aside.

3. The complaint of the respondents against the appellant filed 17 September 1991 is dismissed with costs.

4. Order that the respondents pay the costs of the appellant of this appeal.

APPEARANCES: The appellant Hazan appeared on his own behalf. No appearance of the respondents.
