26/04; [2004] VSC 454

SUPREME COURT OF VICTORIA

EQUUSCORP PTY LTD v OLSEN

Balmford J

25 October, 10 November 2004 — [2005] ASC 155-072

CIVIL PROCEEDINGS – CREDIT ACT – DEBTOR IN DEFAULT UNDER THE CONTRACT – NOTICE OF DEFAULT GIVEN TO DEBTOR – INCORRECT AMOUNT CLAIMED IN NOTICE – ACCOUNT NOT TAKEN OF SOME PAYMENTS MADE BY DEBTOR – EFFECT OF OVERSTATING AMOUNT CLAIMED IN NOTICE – WHETHER NOTICE DEFECTIVE – CLAIM FOR MONEY OWING UNDER CONTRACT DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CREDIT ACT* 1984, S107.

It is a requirement of the *Credit Act* 1984 s107 ('Act') that any notice of demand must specify the amount in default. Where a notice specified a sum in respect of which the debtor was not in default it did not comply with s107 of the Act. Accordingly, it was open to a magistrate to dismiss a claim for money owing where the required notice overstated the amount claimed to be owing by the debtor as at the date of the notice.

***Equuscorp v Rigert* [2003] VSC 343; [2003] ASC 155-061, followed.**

***Bunbury Foods Pty Ltd v National Bank of Australasia Ltd* [1984] HCA 10; (1984) 153 CLR 491; 51 ALR 609; (1984) 58 ALJR 199; 2 ACLC 188, distinguished.**

BALMFORD J:

1. This is an appeal pursuant to section 109 of the *Magistrates' Court Act* 1989 against the decision of the Magistrates' Court at Melbourne constituted by Mr Lauritsen, Magistrate, on 18 December 2003 whereby the claim of the appellant was dismissed.

2. On 3 March 2004 Master Wheeler ordered that the question of law to be decided was:

> Did the learned Magistrate err in holding that a credit provider (the appellant) could not pursue its claim for money owing as a result of the relevant required notice pursuant to section 107 of the *Credit Act* 1984 ("the Act") being defective in that it overstated the amount claimed to be owing by the respondents to the appellant at the date of the notice?

3. It is not in issue that the chronology of events is such that the matter is still governed by the Act, despite the coming into operation of the *Consumer Credit (Victoria) Act* 1995 over several dates between June 1995 and November 1996.

4. The relevant portions of section 107 of the Act read as follows:

> **107. Notice required before rights exercised**
> (1) A credit provider shall not—
> (a) institute proceedings against a debtor ... in respect of a matter arising under a regulated contract by reason of—
> (i) a default by the debtor;
> ... ; or
> (b) exercise, or purport to exercise, a right under a regulated contract arising by reason of—
> (i) a default by the debtor;
> ...
> by reason of which the whole or a part of the outstanding balance of the amount financed or of the amount owed has become due on a date earlier than the date on which it would have become due if the default ... had not occurred ...—
> unless—
> (c) the debtor is in default under the contract;
> (d) the credit provider has served on the debtor ... a notice in accordance with sub-section (3); and
> (e) the notice referred to in paragraph (d) has not been complied with in accordance with sub-section (4).

(2) ...

(3) A notice referred to in paragraph (d) of sub-section (1) ... is a notice—
(a) specifying the default ...—-
(i) of the debtor under the regulated contract;
...
(b) stating the intention of the credit provider ... to exercise rights and remedies under the regulated contract ... unless, within a period of one month after service of the notice (or where a longer period is specified in the notice, that longer period)—
(i) the default is remedied (except insofar as the default relates to a requirement to do a thing at or before a certain time, or within a certain period, or is a default in payment of an amount that became payable earlier than would have been the case if there had been no other default);
(ii) the amounts that would be due to the credit provider under the contract if the default ... had not occurred ... are paid; and
(iii) the enforcement expenses (if any) in relation to the exercise by the credit provider ... of any rights arising from the default of the debtor are paid;
(c) stating, if the notice refers to payment of amounts due under the contract that increase until paid, that the amounts so increase; and
(d) containing the prescribed information.

(4) The notice referred to in paragraph (d) of sub-section (1) ... is complied with if within the period of one month after service of the notice (or where a longer period is specified in the notice, that longer period) the default is remedied (except as referred to in sub-paragraph (i) of paragraph (b) of sub-section (3)), the amounts referred to in sub-paragraph (ii) of paragraph (b) of sub-section (3) have been paid or tendered and the enforcement expenses referred to in sub-paragraph (iii) of paragraph (b) of sub-section (3) (if any) have been paid.
...

(8) Where a credit provider ... fails to comply with sub-section (1) ... a court may, on the application of the debtor ..., order the credit provider ... to compensate the debtor ... for any loss suffered by him as a result of that failure.

5. It is not in issue that, in terms of the definitions in section 5 of the Act, the appellant is a credit provider, and the contract between the parties is a regulated contract.

6. In July 1990 the respondents entered into an agreement to borrow $9,450 from the appellant to finance the purchase for $9,500 of what may be loosely referred to as a timeshare unit. They experienced difficulty in meeting the repayments provided for in the agreement and made their last repayment on 4 October 1993.

7. On 16 July 1993 notices pursuant to section 107 were sent to each of the respondents, the notices being effectively in identical terms. The notices included the material required by paragraphs (3)(b), (c) and (d) of that section. The issue in this appeal is whether the notices complied with paragraph (3)(a)(i).

8. The operative part of the notice read as follows, so far as relevant for present purposes:
Take notice that the Debtor ... is in default under the Loan Contract ... in the manner set out at Item 3 of the attached schedule and the Credit Provider intends to exercise its rights under the Loan Contract ... unless within a period of one (1) month after service of this Notice the default is remedied (details of remedial action required being set out in Item 3 in the attached schedule) ...

9. The schedule to the notices read, so far as relevant:

3. Particulars of Default(s).
(i) Arrears in the payment of instalments -
Date Amount
5.11.92 $215.62
5.12.92 $277.14
5.01.93 $277.14
5.02.93 $277.14
5.03.93 $277.14
5.04.93 $277.14
5.05.93 $277.14
5.06.93 $277.14
Remedial Action required - Payment $2155.60

(ii) Extra interest incurred by the Debtor upon the amount financed by reason of the defaults in payment of instalments referred to in Item 1.
To the date of this Notice $189.15
4. Instalments falling due during period of this Notice:
Date Amount
5. 7. 93 $277.14
$277.14

10. It is not clear to me why the amount of $277.14 which fell due on 5 July 1993, the day before the sending of the notice, was included in paragraph 4 rather than paragraph 3, and not included under the heading "Remedial Action required - Payment", but it would appear that nothing turns on this.

11. The Magistrate found that the notices overstated the amount of the arrears, in that in calculating the arrears (and presumably the additional interest) the appellant had failed to take into account three payments made by the respondents:

(a) $35 on 5 December 1992;
(b) $120 on 25 May 1993;
(c) $120 on 23 June 1993.

There was also a further payment made of $120, which was received by the appellant on 22 July 1993, that is after the notice had been sent, and thus is not relevant to this appeal.

12. The Magistrate relied on the decision of Osborn J in *Equuscorp v Rigert*[1], where the facts were similar to those in the present appeal. He cited the following passage from His Honour's judgment:[2]

> The first difficulty, from the appellant's point of view, is that the notice did not accurately specify the default under the contract. It misstated the actual outstanding balance by inserting the balance which would become due as at 12 September 1997 (but which was not due as at the date of the notice) and claiming the further instalment due as at 12 September 1997 in addition to the moneys claimed as presently due and payable. In my view such a notice cannot be said to have given notice of default in accordance with s107. Section 107(3) requires the notice to 'specify' the default. The notice in the present case did not specify the default. It specified a sum in respect of which the borrowers were not in default. As such it did not comply with s107 and it did not give effect to the purpose of s107.

13. The Magistrate found that it was clear that Osborn J considered the overstatement of the amount in default to be fatal to the claim in that case. On that basis, he found that the appellant's claim before him must fail.

14. Mr Nixon, for the appellant, submitted that the issue in the present case was not the same as the issue in *Rigert*. The facts in the two cases were totally different. Rigert did not stand for an all-encompassing proposition that overstatement of the amount in default was fatal to the claim. If, on the other hand, *Rigert* did stand for such a proposition, then it was wrongly decided and contrary to the decision of the High Court in *Bunbury Foods Pty Ltd v National Bank of Australasia* Ltd.[3]

15. He sought to distinguish *Rigert* on several grounds. In *Rigert*, proceedings had been issued during the period of the notice, which is not the case here. That is a separate issue and not relevant to the matter before me. It is clear that Osborn J found that both the overstatement of the amount in default and the issuing of proceedings within the notice period were equally fatal to the plaintiff's claim.

16. He submitted that in the present case the effect of the three payments (a), (b) and (c) set out in [10] above was that, if each was taken into account in the context of the claimed default nearest to it in date, that still left the separate defaults on 5 November 1992, 5 January 1993, 5 February 1993, 5 March 1993, 5 April 1993 and 5 May 1993. The first two payments had an effect on the defaults claimed to have occurred on 5 December 1992 and 5 June 1993, and the third payment would have affected the amount falling due in July, which was not claimed as a default. Thus, he submitted, only two of the amounts claimed were overstated, the amount due on 5 December being overstated by $35 and the amount due on 5 June being overstated by $120.

17. The requirement of the section that the credit provider serve "a notice specifying the default" could have been met, in Mr Nixon's submission, by including in the notice only one of the eight defaults which were in fact specified. By specifying eight defaults the appellant had done more than it needed to do, and six of those defaults remained accurately specified. In *Rigert*, on the other hand, the notice had specified a lump sum, being the total of amounts claimed as in default, and that lump sum included an amount which was not yet due. It was the inclusion of that amount in the lump sum claimed to be in default which meant that the default was not correctly specified.

18. Nevertheless, it is clear that in the present case the effect of the overstatement of the amounts in default by ignoring the three payments of $35, $120 and $120, totalling $275, was that the figure shown as "Remedial action required - Payment" was also overstated; that figure is the total of the eight instalments claimed. Section 107(3)(b)(i) relevantly provides that the notice required is a notice "stating the intention of the credit provider . . . to exercise rights and remedies under the regulated contract ... unless ... the default is remedied." However, the notice which the appellant gave to the respondents, while it uses those words, then in effect states that the "remedial action" required to remedy the default is the payment of an amount of money calculated to include the sum of $275 which is not, in fact, in default. Thus in this respect and as a result of the overstatements of several of the separate amounts in default, the notice does not comply with the requirement of the Act. It expresses in effect the appellant's intention to exercise its rights and remedies unless payment is made of an overstated total amount.

19. Mr Nixon submitted that another ground of distinction was that in *Rigert* the inaccuracy of the notice derived from the inclusion of amounts which were not due at the date of the notice, while in the present case each of the eight instalments claimed had fallen due before the date of the notice. However, it seems to me that to distinguish between a misstatement of the amount in default by including sums not yet due (as in *Rigert*) and a misstatement of the amount required to remedy the default by including sums which have been paid (as in the present case) is to raise a distinction without a difference. In each case the notice specified an amount as to which the respondents were not in default.

20. Mr Nixon relied also on the decision of the High Court (Mason, Murphy, Wilson, Brennan and Dawson JJ) in *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd*[4] where their Honours held,[5] in the context of a notice requiring payment of moneys due under a debenture, that it was not essential to the validity of a notice calling up a debt that it correctly states the amount of the debt. However, they continued, after referring to authorities and to various practical considerations:[6]

> The foregoing examination supports the view that the interests of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than by the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. (Emphasis added.)

21. That passage enunciates the distinction between *Bunbury Foods* and the present case, which arises under the provisions of the Act. It is here not a "suggested proposition" that the notice of demand must specify the amount in default; it is a requirement of the Act. *Bunbury Foods*, accordingly, has no application to this matter.

22. I have said that I do not accept the submissions by which Mr Nixon sought to distinguish the decision of Osborn J in *Rigert*. I was referred by counsel to other authorities, none of which arose under the Act or under legislation containing similar provisions and none of which was decided in this Court. As a judge of this Court, I should follow a decision of another judge of the Court unless there is a clear reason for not following that decision.[7] In this case I find no clear reason not to follow Osborn J.

23. For the reasons given, I find the answer to the question posed in the Master's Order to be No. I invite submissions from counsel as to the form of the orders to be made and as to costs.

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[1] [2003] VSC 343; [2003] ASC 155-061.
[2] at [44].
[3] [1984] HCA 10; (1984) 153 CLR 491; 51 ALR 609; (1984) 58 ALJR 199; 2 ACLC 188.

[4] [14] *supra.*
[5] at 503-4.
[6] at 504.
[7] See the judgment of Blackburn CJ in *Zotovic v Dobel Boat Hire Pty Ltd* (1985) 62 ACTR 29 at 32.

APPEARANCES: For the appellant Equuscorp Pty Ltd: Mr J Nixon, counsel. Kelly & Chapman, solicitors. For the respondent Olsen: Mr G Grabau, counsel. Brett RE Ryan, solicitors.
