05/92

SUPREME COURT OF VICTORIA

DOCUMENT PROCESS PTY LTD (T/AS CREDIT INVESTIGATIONS) v ANDREW

Teague J

19, 20, 26 July 1990; 1 May 1991

CIVIL PROCEEDINGS – CONTRACT – UNCLAIMED MONEY – OWNERSHIP ASCERTAINED BY INVESTIGATOR – OWNER INVITED TO AUTHORISE COLLECTION OF MONEY UPON PAYMENT OF COMMISSION – AGREEMENT BETWEEN PARTIES – SOURCE OF MONEY DISCLOSED – AGREEMENT TERMINATED BY OWNER – MONEY RECOVERED – COMMISSION NOT PAID – WHETHER BREACH OF CONTRACT BY OWNER.

K., a director of DP Pty Ltd ascertained that after making certain enquiries, A. may have been entitled to unclaimed money as listed in the Government Gazette. As a result of negotiations, A. agreed to allow K. to obtain the money and hand it over less 33% by way of commission to K. However, after K. informed A of the location of the money, A. withdrew his offer, collected the money but refused to pay K. anything by way of commission. K. took proceedings to recover the commission payable, but the claim was dismissed on the basis that the only agreement between the parties was that K. would collect the money if A. signed the agreement and enclosed certain documents. Upon order nisi to review—

HELD: Order absolute.
In the light of the contents of the documents passing between the parties, the magistrate placed too narrow a construction on the terms of the contract. K. was not acting merely as a collection officer but was engaged in a joint enterprise to recover the money. It was agreed that commission would be payable if A. (and not K.) recovered the money. Also it was an implied term of the contract that there would be reasonable co-operation between the parties. Accordingly, A. was not entitled to terminate the contract and was in breach of its terms.

TEAGUE J: [1] This is the return of an order nisi to review the decision of a Magistrate sitting at Sandringham. The complainant/applicant is a company with operates under the business name of "Credit Investigations". Mr Kontos, a director of the applicant, was the sole representative of the applicant involved in the transaction with the respondent. The respondent is the nephew, and the executor of the Will, and the trustee of the estate, of Ellen Mary Andrew. Mr Kontos was accustomed to spending much time searching Government Gazettes and other advertisements which set out details of unclaimed money, then endeavouring to trace the persons entitled to those moneys, with a view to assisting those persons to obtain that money. He sought to be compensated for the time spent by charging commissions to those persons he assisted. Mr Kontos saw in a Government Gazette that $16,760 was included in a listing of unclaimed money in the name of a Mary E Andrew, that amount being held in an account at the Moonee Ponds branch of the Commonwealth Bank ("the bank").

Mr Kontos spent some time, and went to some trouble, before he was able to put together the information that "Mary E Andrew" was Ellen Mary Andrew, that she had died on 31 May 1984, that she had died intestate and that Letters of Administration of her estate had been granted on 2 August 1984 to the respondent. On 10 November 1988, Mr Kontos sent a letter to the respondent, inviting the respondent to telephone him. The respondent rang Mr Kontos, and on 16 November 1988, Mr Kontos sent a further letter to the respondent, enclosing a **[2]** partly completed form of authority and a partly completed form of agreement to be signed by the respondent. The letter referred to a commission charge. The agreement contained a reference to a charge of 33% of the amount collected. On the same day, Mr Kontos sent a letter to the bank putting it on notice that a claim would be made for the recovery of the moneys.

On 11 January 1989, the respondent signed and dated the partly completed form of authority and the partly completed form of agreement, and returned them to his solicitors, Messrs Boyle Boyle & Nicholson ("the solicitors"). On 12 January 1989, a Mr Redman from the bank

wrote to the applicant stating that the bank was "not able to release any information relating to our Banks Customers without written authorisation from that customer." On 3 February 1989, the solicitors sent a letter to the applicant enclosing the documents dated and signed by the respondent, and a certified copy of the Letters of Administration of the deceased. The final paragraph of the letter reads– "We look forward to receiving the monies (sic) due to the Estate at your earliest convenience."

After receiving that letter, Mr Kontos added in handwriting to the authority and agreement, the name of the bank and other details. On 6 February 1989, Mr Kontos sent a letter to the bank, enclosing the completed authority and the certified copy of the **[3]** Letters of Administration, and requested payment of the money due to the estate.

On 20 February 1989, Mr Redman prepared a letter from the bank addressed to the respondent indicating that because the bank needed to satisfactorily identify its depositor as the deceased, the bank required production of either passbooks or a copy of the handwriting of the deceased. Mr Redman did not send that letter to the applicant, from which source the bank had received correspondence, but sent the letter direct to the respondent, whereupon the respondent became aware of the location of the unclaimed moneys.

Shortly after receiving that letter, the respondent spoke by telephone to Mr Redman, and in that conversation the respondent asked Mr Redman to conduct all future dealings through the solicitors. On 2 March 1989, the solicitors sent a letter to the applicant, stating:-

> "We refer to an offer to enter an Agreement by Mr David Andrew dated the 11th January, 1989 and forwarded to you under cover of our letter of the 3rd February, 1989. Please note that the offer as contained in the Agreement is hereby withdrawn."

On 9 March 1989, the solicitors sent a letter to the bank enclosing a copy of the signature of the deceased registered with another bank. On 15 March 1989, Mr Redman sent a letter to the applicant notifying him that the respondent had instructed the bank to deal with the solicitors. On 16 March 1989, Mr Kontos sent a letter to the solicitors refusing to "accept the withdrawal of the authority".

[4] On 19 April 1989, Mr Redman sent a letter to the solicitors, noting that the signatures registered and recorded with the two banks appeared to be the same, stating that there were two accounts with the bank with balances of $16,760.27 and $6,246.38, requesting the signatures of the respondent on forms of the bank finalising the accounts, and requesting a statement from the respondent as to the passbooks for the accounts. The account for $6,246.38 has not been the subject of any claim by the applicant. On 2 May 1989, the balances in the two accounts totalling $23,006,65 were paid to the respondent.

On 20 October 1989, the proceeding in the Magistrates' Court, in which the applicant claimed $5,530.80 from the respondent, was initiated. On 1 March 1990, the hearing of the proceeding took place before the learned Magistrate, evidence was given by Mr Kontos and by Mr Redman, counsel appearing for the parties made their submissions, and the learned Magistrate said that he would deliver his decision in writing by sending copies thereof to the respective parties. On 22 March 1990, the learned Magistrate signed and dated his written reasons for judgment, but he did not, in open court, pronounce his decision, or hand it down, or make any order, but he gave directions as to the mailing of the reasons to the parties. The learned Magistrate dismissed the applicant's claim and ordered costs against the applicant.

[5] On 19 April 1990, the applicant sought an order nisi to review the decision of the learned Magistrate, and on 10 May 1990, Master Williams granted an order nisi. Put shortly, there were three bases upon which it was contended that the learned Magistrate had erred. The first was that he had erred in not deciding that under the express terms of the agreement between the parties, the respondent was required to pay the agreed commission if the respondent himself should recover the funds.

The second was that he erred in not deciding that the agreement contained an implied term neither (a) that the respondent would not prevent the applicant from collecting the money;

or (b) that the respondent would do all that was reasonably necessary to enable the applicant to collect the moneys.

The third was that he erred in deciding that the respondent was entitled to terminate the agreement for anticipatory breach.

On 19 July 1990, argument on the return of the order nisi commenced before me, but was not completed on that day. On 20 July 1990, Mr Swanwick, who appeared for the respondent, properly raised with me a concern as to the manner in which the learned Magistrate had delivered his reasons for judgment, in the light of the reasons for judgment delivered by Fullagar J on 12 June 1990 in proceeding No. 4482 of 1989, wherein Fullagar J had held that a Magistrate is bound to deliver a judgment in open court.

I was then asked to adjourn the hearing so that steps could be taken to consider what options might appropriately be **[6]** open to remedy the situation that had arisen through no fault of the parties, at minimum additional cost to the parties. I was later informed that the learned Magistrate, whose order was the subject of the application before me, having been told on 20 July 1990 of the consequence of not having handed down the reasons for, and making an order, in open court, on or about 22 March 1990, promptly on that same day, that is 20 July 1990, handed down the reasons for his decision and made the order in open court.

On 26 July 1990, counsel for both of the parties before me, indicating a commendable concern to minimize costs, stated that they had instructions to consent to the making of an order waiving any right to rely upon any non-compliance with the applicable provisions of the relevant statute and rules of court.

Accordingly, I propose to include that, as part of the order that I make in this proceeding, I propose to order by consent that the parties to this proceeding have waived any right which either party has or may have by reason of judgment not having been delivered in open court in the Magistrates' Court at Sandringham, and I propose to reserve liberty to apply in the event that any further order may be required to give effect to the waiver.

I turn to the matters which were the subject of the submissions to me with respect to the grounds of review. There was no dispute that there was a concluded contract between the parties. It was not submitted to the learned Magistrate or to me that there was any substance in the contention impliedly put in the letter from the solicitors to the applicant of 2 March 1989, **[7]** that there was no binding agreement because the respondent had earlier made an offer that was later withdrawn. But there was a dispute as to what were the terms of the contract, and as to how those terms were to be interpreted.

The learned Magistrate did not expressly set out what he found to have been the express terms of the contract, but he referred in the reasons for his decision to exhibits C and D before him in such a way as to indicate that he took those documents to be the source of the obligations of the parties.

It is clear to me that those two exhibits taken together are the repository of the express terms of the contract between the parties, and I now go to them. Exhibit C was the letter of 16 November 1988, and Exhibit D was the authority and agreement. The relevant parts of the letter from the applicant to the respondent of 16 November 1990 read:-

> "I (sic) am writing to you in relation to an amount of money owed to you. We are in the business of investigation and have come across a discrepancy of $16,760. These are unrecovered funds and rightfully belong to you. However, this goes back a few years and it may be that you don't know of it or had forgotten about it. We can recover this money on your behalf but we require your Authorisation (sic) to do so. You will appreciate the enormous amount of work involved in locating you, subsequently (sic) there is a commission charge. We would like to point out that if we had not contacted you this money should have passed into oblivion and be lost to you. Please sign the enclosed form, have dated and witnessed. (sic) **[8]** We will post to you a copy notifying you of the party owing the money, signed by us together with a cheque for the balance. Should you have any problems, please ring us between 9 a.m. - 1 p.m. N.B. Copies of Probate signed and dated by the executor must be attached to this application."

Exhibit D, which was enclosed with that letter, as signed by the respondent, was in two parts, first the authority, and then the agreement. I set out the main part of the authority, and almost all of the agreement, the words underlined being handwritten, the balance being the printed words of the standard form:-

> " ... The Creditor Mary Ellen Andrew (estate) c/of David A Andrew, 15 Head Ave, Plenty 3090 but formerly of 2/5 Grandview St, Moonee Ponds born the _____ (if applicable) do HEREBY AUTHORISE (sic) Credit Investigations of 223 Stud Road, Wantirna, Vic., Australia, to collect all money's (sic) owing to Mary E. Andrew [estate] by you as per the schedule and my signature which appears hereon shall be sufficient authority for you to release the said monies (sic) to Credit Investigations ..."
>
> "THIS AGREEMENT made the ELEVENTH day of JANUARY one thousand nine hundred and eighty NINE BETWEEN: Credit Investigations of 233 Stud Road, Wantirna, Vic., Australia, in the said state (sic) (hereinafter called "the first part") and the Creditor namely Mary Ellen Andrew (Estate) (hereinafter called "the second part")
>
> WHEREAS: (sic)
> A. The creditor Mary Ellen Andrew - Estate HEREBY AUTHORISE (sic) Credit Investigation of 223 Stud Road, Wantirna, Vic., Australia, to collect funds owing to me by _____
>
> B. IN consideration of the said Credit Investigations collecting such funds on my behalf, I HEREBY AGREE to pay to the said Credit Investigations the sum of THIRTY THREE PER CENTUM (33%) of the amount collected. This agreement is still binding if Creditor should claim or recover the funds.
>
> C. Costs will not exceed $100-
>
> **[9]** SIGNED by the said CREDIT INVESTIGATIONS the authorised (sic) party SIGNED by the said Creditor/Executor(s)"

An English teacher would make much use of red ink on the letter, authority and agreement. In *Watson v Phipps* (1985) 63 ALR 321; (1985) 60 ALJR 1 at 3, the Judicial Committee said:-

> "The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further."

It is not appropriate to prepare a complete litany of those respects where such modification is called for, although I note that "authorise" and its derivatives are consistently used instead of "authorize", that "subsequently" must have been intended to read "consequently", that, like many other words, "the first part" and "the second part" are patently superfluous, and that, ostensibly, the agreement has three preamble paragraphs, and none of substance.

The circumstance that the letter and the agreement are obviously very poorly framed can operate so as to affect the interpretation of the terms of the contract in at least two ways. First, the inappropriate use of words may create uncertainty and/or ambiguity. Secondly, the circumstance that the draftsman of the terms has difficulty with words may justify a court being less constrained in assessing meaning and/or in considering whether to imply terms than with words penned by a trained draftsman. **[10]** In that regard, I have in mind what was said by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337 at 346; (1982) 41 ALR 367; (1982) 56 ALJR 459:

> "The more detailed and comprehensive the contract the less ground there is for supposing that the parties failed to address their minds to the question at issue."

What construction is to be put on the express terms of the contract between the parties? Mr Swanwick contended that the contract imposed an obligation on the applicant to collect moneys from the bank and to pay those moneys to the respondent, and that, upon the applicant so doing, the contract imposed an obligation on the respondent to pay commission to the applicant. It seems to me, from the reasons of the learned Magistrate, that he concluded that there were limited obligations imposed on the respondent.

As to the respondent, the learned Magistrate wrote:-

> "When the agreement was examined with the letter (Ex.C). the obligations of the defendant were to sign exhibit D and forward copies of Probate (sic) signed and dated by the executor."

As to the applicant, he wrote of:
— ".... its part of the agreement, i.e. "to collect all money's (money's as appears in Ex.D) owing to Mary E. Andrew estate."

I am satisfied that, to so selectively define the obligations of the parties as the learned Magistrate has done is to place too narrow a construction upon the terms of the contract, in the light of the contents of all of the relevant documents read together. Although, by the words used in his reasons, the learned Magistrate has indicated that he accepted that the letter of 19 **[11]** November formed part of what made up the contract, he did not make any further reference to the terms of the letter. And, most significantly, he has not adverted at all to the provision in the agreement that: "This agreement is still binding if Creditor should claim or recover the funds."

I am satisfied that the learned Magistrate has erred in not construing the contract with regard to all of the provisions of the documents. When the whole of the terms of the letter, authority and agreement are read together, it seems plain to me that the parties were not just agreeing that the applicant would act as a collection officer, but that what they were engaged in was in the nature of a joint enterprise to recover money. My assessment of the words ".... if Creditor should recover the funds." is that they clearly indicate that the intention of the parties was that, if the applicant did not, but the respondent did, recover the money, the agreed commission would still be payable. I see no basis for distinguishing between "collect" and "recover". Collection by the applicant was intended, but collection by the respondent was a possibility contemplated by the parties and expressly provided for. And it seems clear to me from the words preceding those, namely "This agreement is still binding ...", that the time, as well as the mode, of collection did not displace the express obligations under the contract.

It was put on behalf of the respondent that the respondent had validly terminated the contract between the **[12]** parties, and that he was entitled to terminate because the applicant was entirely disabled from performing its obligation under contract to collect the money, except with the assistance of the respondent, and that the respondent was not obliged by any express or implied term of the contract to provide that assistance.

The learned Magistrate found that the applicant could not recover the money from the bank "without assistance or cooperation from the defendant". Was the respondent under any implied obligation to provide co-operation? The learned Magistrate dealt with the applicant's submission that there was an implied term as follows:

> "I am not satisfied it can be implied that he was obliged to provide further documentation, that he was privy to and the complainant was not, to facilitate the complainant completing its part of the agreement. I believe a court should be reluctant to imply, extend or read into an agreement conditions which would be beneficial to the party who drew and presented the agreement to facilitate that party being able to perform its part of the agreement, particularly where such action would be detrimental to the party which or who had performed its part of the agreement."

Although the learned Magistrate did not advert to any authorities, his comments seem to me to appropriately reflect the concerns as to the implication of terms which are spelt out clearly in *Codelfa*. However, it seems clear to me that this was a case of the kind of which Mason J was speaking in *Secured Income Real Estate (Australia) Ltd v St. Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596 at 607; 26 ALR 567; (1979) 53 ALJR 745, when, after quoting from *Mackay v Dick* (1881) AC 251, at p263 and from *Butt v Mcdonald* (1896) 7 QLJ 68 at pp70-71, he said:

> **[13]** "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract."

It does not appear that those authorities were presented to the learned Magistrate. I am of the opinion that a term ought to be implied in this contract that there would be reasonable co-operation between the parties.

Looking at the expectations of the parties objectively at the time that the respondent signed and returned the authority and agreement, it seems to me clear that the respondent, having elected to proceed with a contract that expressly provided that he would be bound even if he recovered the funds, was choosing to proceed in tandem with the applicant towards the realization of a common goal, namely the recovery of the money. I am satisfied that the learned Magistrate erred in not accepting that there was an implied term of the contract that the respondent would co-operate with the applicant, doing all that was reasonably necessary to enable the applicant to collect the money.

Mr Swanwick submitted that I was bound to accept findings of fact made by the learned Magistrate, and specifically the finding of impossibility of performance on the part of the applicant. However, that finding was made consequent upon the learned Magistrate having held incorrectly that there was no implied obligation on the part of the respondent to co-operate with the applicant.

It follows that, as the respondent was obliged to co-operate, he was not entitled to decline to co-operate, or to **[14]** terminate the contract relying on an anticipatory breach analysis that depended upon his establishing that he was not obliged to co-operate. The respondent was not entitled to terminate the contract, and was in breach of the express term of the contract that he would pay commission of 33% of the amount collected. I am satisfied that the learned Magistrate erred in the construction that he placed upon the express terms of the contract, in failing to conclude that there was an implied obligation to co-operate, and in concluding that the respondent was entitled to terminate. Upon the proper construction, the applicant was entitled to his commission of 33% of $16,760.27 upon the respondent recovering that amount from the bank.

The orders that I propose to make are as follows:

(1) by consent, that the parties to this proceeding have waived any right which either party has or may have by reason of judgment not having been delivered in open Court in the Magistrates' Court at Sandringham, and I reserve liberty to apply in the event that any further order may be required to give way to the waiver;

(2) that the order nisi to review be made absolute, and the order of the Magistrates' Court at Sandringham made on 20 July, 1990, dismissing the information of Document Process Pty Ltd, be set aside;

(3) that the respondent pay the applicant's costs of the proceeding in this Court save for the costs of 26 July, 1990, no order being made as to those costs;

(4) that there be a certificate under the *Appeal Costs Fund Act* s14 with respect to the costs payable by the respondent of the proceeding in this Court; and

(5) that the proceeding be referred back to the Magistrates' Court to be further dealt with according to law.

However, I also indicate to avoid the necessity for maybe just a token appearance before the Magistrates' Court, I would order in place of the fifth order that if both parties consented there would be judgment for the applicant against the respondent for the sum of $5,530.80 and that the respondent pay the applicant's costs of the proceeding in the Magistrates' Court but with respect of that matter that will be a matter that can be conveyed to my associate.

APPEARANCES: For the applicant Document Process: Mr J Isles, counsel. Arthur Del Monaco, solicitor. For the respondent Andrew: Mr A Swanwick, counsel. Holding Redlich, solicitors.
