32/00; [2000] VSC 455

SUPREME COURT OF VICTORIA

PASCOE WHITAKER & CROWE v KR & D JENNINGS PTY LTD & Anor

Hedigan J

23 October 2000

CIVIL PROCEEDINGS – PROCEDURE – SUBMISSION OF 'NO CASE' TO ANSWER – DEFENDANT PUT TO ELECTION – PLAINTIFF PERMITTED TO RE-OPEN ITS CASE AND CALL FURTHER EVIDENCE – DEFENDANT PREVENTED FROM CALLING EVIDENCE – WHETHER MAGISTRATE IN ERROR.

KR & DJ P/L ("company") sued PW & C in the Magistrates' Court to recover costs associated with the liquidation of the company. At the end of the company's case, PW & C submitted there was no case to answer. PW & C elected to call no evidence and then made the 'no case' submission. The magistrate indicated that the third ground of the submission had substance to it. Counsel for the company indicated that a misunderstanding had occurred about an agreement as to quantum. The magistrate permitted the company to re-open its case and further evidence was led. Without PW & C making another 'no case' submission or being put to its election, the magistrate ruled against the original 'no case' submission and ruled that PW & C could only call evidence in relation to the third ground. The magistrate made an order in favour of the company on its claim together with costs and interest. Upon appeal—

HELD: Appeal allowed. Order set aside.
(1) It is a settled rule of practice, that at the close of the plaintiff's case where a defendant wishes to submit there should be judgment for the defendant, the defendant is put to his election. That is, the defendant does not have the benefit of having his final argument heard with a right to call evidence if it is rejected.
***Protean (Holdings) Ltd v American Home Assurance Co* [1985] VicRp 18; (1985) VR 187, referred to.**

(2) When the magistrate permitted the plaintiff to re-open its case, the magistrate had no right to hold the defence to its earlier election. Once the evidence was given, no election was called for and the defendant should not have been prevented from calling all of its evidence.

HEDIGAN J:

1. I do not think it is necessary for me to go into too much detail about this unhappy matter. There have been a number of affidavits filed by both appellant and the respondents to the appeal (I already having made some corrections that appeared on some of the material to make it clear that there are two respondents to this appeal.). The appellant was defendant in the Magistrates' Court on the hearing of the matter which has come to me on what is really a technically legal ground of appeal.

2. KR & D Jennings Pty Ltd, was a company of which the second respondent, Mr Kenneth Ross Jennings, was a director, and which had been, as I apprehend, acted for by their accountants, Pascoe Whitaker & Crowe, who are the appellants in this appeal. In the Magistrates' Court, the Jennings Company and Mr Jennings (although it is difficult to see how Mr Jennings had any personal claim having regard to the background) sued the appellant, Pascoe Whitaker & Crowe.

3. The claim arose in this way. It was apparently alleged, and I think was probably the case, that the Australian Taxation Office had claims against the Jennings Company, with respect to the failure to remit prescribed taxation payments.

4. It should be said, I think, this is a matter which (unless there was some other arrangement) would ordinarily fall to be dealt with by the corporation's accountants.

5. I am not able to say, and express no opinion, as to the facts in relation to that, but the claim of the plaintiffs in the Magistrates' Court, was that a notice of motion, apparently of 12 February 1999, on behalf of the Australian Taxation Office, was made seeking to wind up the plaintiff company for failing to pay that tax.

6. That step would ordinarily only be taken after non-compliance with less formal notices being delivered.

7. This aspect does not, at least in the plaintiff's claim in the Magistrates' Court, appear to have been dealt with, although I have heard no evidence about that, nor indeed, did the Magistrate. But the plaintiff's claim was that it really only first heard about the problem when the liquidator had been put in place, and Pannell Kerr Forster was taking steps, the company having been put in liquidation, to carry out the necessary task of liquidation.

8. The plaintiff's case essentially was that it was always in a position to pay the outstanding claimed tax, but because it was not acted for appropriately, it incurred professional costs both legal and accounting, in unscrambling the mess, one might say, created by the liquidation; and it sued to recover those costs.

9. It appears also that a third claim which does not appear to be necessary for me to even touch upon here, was a claim for damages for lost reputation as a consequence of the company briefly being in liquidation.

10. The hearing was heard in the Melbourne Magistrates' Court. It was spread over some time. It commenced on 14 April and judgment was given for the plaintiffs on their claims in respect of the lost professional costs in the sum of $23,419; and interest of some $2,000 on the 17th April.

11. The defendants have appealed that order, and the appeal was essentially founded on the alleged breakdown of the appropriate procedural steps that should have been followed to enable the defendant to put its case fully to the court.

12. The question of law identified by the Master is as follows:

> "Where a defendant following a no case submission has been 'put to his election', and elected not to call evidence, and the Magistrate has then allowed the plaintiff to reopen its case and call further evidence, did the Magistrate in doing that err in failing to allow the defendant to call further evidence?"

13. There are a number of affidavits sworn on the appeal. A number of them are from counsel who appeared for the appellant in the Magistrates' Court, and an exhibit to one of them is a partial transcript purporting to reproduce the recorded part of the evidence and submissions which took place.

14. Unfortunately, it is not complete, although it appears to record what happened in the course of the morning before the Magistrate, but not what happened in the events of the afternoon. This is unfortunate, but not in any way, fatal, because what happened (if one might use the cricketing term) in the after-lunch session, the affidavits of counsel record what did occur.

15. It is not explained in the material as to how the afternoon events were not recorded. And it was particularly unfortunate because they would have necessarily included in a recorded form, what the Magistrate said.

16. It does appear, however, that the plaintiffs called evidence. At the end of that, counsel for the defendant indicated to the Magistrate, on behalf of his client, that he wished to make a submission that there was no case to answer.

17. It appears that that was founded upon a number of grounds; some of them – the first of which was concerned with whether or not the company had actually received a notice of motion or not, and what the state of the evidence was about that. The second was that what, in any event, would have been the situation, as to what steps the plaintiff would have taken or could have taken, had they been aware of the notice of motion.

18. And the third was that in connection with the solicitors and accountants fees, as to whether the incurring of them had been caused by the other events. It would appear that there had been agreement prior to the commencement of the case, that the quantum of the amounts was not required to be proved by evidence. That is, the make up of the $23,500 approximately,

but no other agreement had been made as to liability to meet those amounts. There was, it was said, a question whether the incurring of them was caused in the manner which the plaintiff has asserted.

19. On counsel indicating he wished to make 'no case' submissions, he was put to his election, in accordance with the usual practice as to whether or not he would call evidence. Counsel, Mr Thompson, who is the deponent in three affidavits, elected to call no evidence and he then put his 'no case' submission essentially relying upon the three submissions to which I have referred.

20. The Magistrate heard them, apparently expressed some doubts about the effectiveness and persuasiveness of the first two although I think perhaps had not finally made any decision. But he was of a different view about the third because he used language to indicate that he thought it probably had substance to it.

21. He was, however, concerned that there had been a misunderstanding about the agreement as to quantum, counsel for the plaintiff apparently asserting that it had been agreed, or his understanding was, that the agreement was not confined merely to the question of the "nuts and bolts" of the amount, but also that there was a causal connection with respect to it.

22. In those circumstances, the Magistrate indicated that, notwithstanding that he had put the defence to its election, he was going to allow the plaintiffs to reopen the case. That was objected to by counsel for the defendant. The Magistrate asked him whether he wished to withdraw his election since the plaintiffs were going to be allowed to reopen the case; and counsel for the defendant refused to withdraw his election, relying upon all of the arguments he had advanced, without the plaintiff being permitted to reopen.

23. All of that took place in the morning. After the luncheon adjournment the Magistrate permitted the plaintiffs to reopen. They led evidence which related to the issue of causation of the loss, the amounts having been agreed. There was some cross-examination.

24. The Magistrate then apparently ruled against the defendant on the no case submission. It is apparent to me, on reading a combination of the affidavits and the transcript, that counsel for the defendant, made a no case submission again in the afternoon. He was not put to his election.

25. The Magistrate ruled against the defendant on the no case submission, but denied the defendant the right to call any evidence other than evidence that went to the issue of causation i.e., the third argument.

26. That is, the defendant was denied the right to call evidence in support of the first two submissions, if he had any, and was sought to be confined to the evidence on the third submission.

27. It is hard to gauge what evidence there might have been in relation to the first two submissions, since they appear to have been founded upon the absence of evidence called by the plaintiff, but it is not possible to be sure about that at all.

28. What happened, in effect, was that the Magistrate held counsel for the defendant to a qualified election. Moreover, he appears to have treated the election made in the "first round", as having been divisible.

29. Counsel was not going to be permitted to call evidence as to the first two of the arguments that had been suitable to him, but only the third.

30. Counsel for the appellant here, Mr Cawthorn, in effect, said that the Magistrate had acted on the basis that the election made before the further evidence was led was binding, in effect, and unconditional, except for the third and limited aspect.

31. The argument put to me was that the Magistrate, before he could have prevented the plaintiff from calling all of its relevant evidence in relation to its defence, must have insisted upon a fresh election, otherwise he was not in a position to deny the right to adduce evidence. The original election was spent, because the Magistrate revised it.

32. Accordingly, it was submitted, in failing to permit the defendant to call further evidence, he denied the defendant procedural fairness.

33. Counsel relied upon well known authorities, *Union Bank v Puddy*[1]; *Protean (Holdings) Ltd v American Home Assurance Co*[2]; and *Compaq Computer Australia Pty Ltd v Merry*[3].

34. However, there is no doubt that it is a settled rule of practice, that if counsel with the plaintiff closes the case, and the defendant wishes to submit at that point of time, that there should be judgment for the defendant, (that is, that the plaintiff has not made out its case, so that the defendant can have judgment entered) the general rule is that the defendant is put to his election. That is, he does not have the benefit of having his final argument heard, with a right to call evidence reserved if it is rejected.

35. There are some exceptions to that rule which are dealt with in the cases to which I have referred. But this case does not fall into that category. The main reason of course for requiring an election is that it avoids the inconvenience of a new hearing if the decision of the trial judge of the defendant had no case to answer, was reversed on appeal, and it avoids the necessity of the court assessing the plaintiff's evidence twice.

36. Mr Thompson's affidavit, including the affidavit of 24 September, sets out in detail what happened after lunch. In my view, the Magistrate had no right to hold the defence to the earlier election, which in effect, had been overtaken by the events of permitting the plaintiff to reopen the case. Thereafter no election was called for, and the defendant should not have been prevented from calling all of its evidence.

37. Accordingly, in my view, the Magistrate fell into error, and the order made by the Magistrate must be set aside.

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[1] [1949] VicLawRp 46; [1949] VLR 242; [1949] ALR 979.
[2] [1985] VicRp 18; (1985) VR 187 at 237.
[3] [1998] FCA 968; (1998) 157 ALR 1.

APPEARANCES: For the appellant/defendant Pascoe Whitaker & Crowe: Mr PG Cawthorn, counsel. Herbert Geer Rundle, solicitors. The first respondent was not represented. The second respondent appeared in person.
