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SUPREME COURT OF VICTORIA — FULL COURT

AMERICAN HOME ASSURANCE Co v PROTEAN (HOLDINGS) LTD

Young CJ, Fullagar and Tadgell JJ

13, 14, 17-19 October 1983; 24 May 1984

[1985] VicRp 18; [1985] VR 187; (1985) 4 ANZ Insurance Cases 60-683

PROCEDURE – CIVIL PROCEEDINGS – NO CASE SUBMISSION – PROCEDURAL OPTIONS OPEN TO COURT – GENERAL RULE WHEN NO CASE SUBMISSION MADE – EXCEPTIONS TO THE GENERAL RULE.

The Brooklyn Abattoirs – owned by PCo – were insured by AHA Co. In 1982, when the abattoirs were severely damaged by a deliberately-lit fire, AHA Co denied any liability under the policy of insurance. When PCo sued under the contract of insurance, the trial judge permitted PCo to split the manner in which it conducted its case, first, by calling evidence to prove the making of the contract of insurance and the occurrence of the fire, and secondly, by postponing the calling of further evidence until AHA Co had adduced evidence to support its defences. When AMA Co had closed its case, PCo's counsel submitted that there was no case to answer in respect of the particular defences. The judge upheld the submission and judgment was entered in favour of P Co. Upon appeal—

HELD: Appeal dismissed.
(1) When a submission of no case to answer is made (in civil proceedings) the three courses available to the Court are:
(a) to entertain no submission unless there is an election not to call evidence;
(b) to entertain the submission and rule on it without requiring an election to be made;
(c) to allow the submission to be made and answered without first requiring an election to be made, but leaving the decision to rule on it without requiring an election, until the submission has been heard.

(2) As a general rule, a party should not be allowed to make a submission of no case without being put to his election not to call evidence.
***Humphrey v Collier* [1946] VicLawRp 60; [1946] VLR 391; [1946] ALR 448, applied.**

(3) However, a departure from the general rule may in the discretion of the Court be justified if the answer depends mainly on a question of law or where fraud is alleged or where adherence to the rule would not serve the ends of justice or convenience.
***The Union Bank of Australia Ltd v Puddy* [1949] VicLawRp 46; [1949] VLR 242; [1949] ALR 979, applied.**

YOUNG CJ: (with whom Fullagar J agreed) *[briefly referred to the facts, and dealt with the procedural question as follows]:* … **[2]** In my opinion, there is no substance in the contention of the appellant that the learned judge erred **[3]** in ruling upon the submission that Protean had no case to answer in respect of the particular defences by finally deciding the issues. The appellant carried the burden of proving those defences and *ex hypothesi* all the evidence that the appellant could adduce had been given. When a trial judge has to consider an application to be allowed to submit that there is no case to answer, whether by a defendant or by a plaintiff, he must first decide whether he will allow such a submission to be made without requiring the party wishing to make the submission to elect to call no evidence. It will not often be right for a judge to allow that course to be followed except perhaps where the answer depends principally on a question of law. The weight of authority indicates that the practice is the same whether the trial be with or without a jury: see *The Union Bank of Australia Ltd v Puddy* [1949] VicLawRp 46; [1949] VLR 242 at p245; [1949] ALR 979. But at any rate where there is no jury it is a matter of discretion: *ibid.* Where fraud is alleged, however, the discretion may be the more readily exercised in favour of hearing the submission: *sc* at p246. And, further, before ruling whether the submission is to be entertained without election, it will generally be necessary for the trial judge to form some preliminary estimate of the evidence: *ibid.*

Where a trial judge entertains a submission that there is no case to answer without requiring an election, any one of three results may ensue. The judge may conclude that the evidence could sustain a finding against the party making the submission, in which case he would over-rule

the submission and allow the case to proceed. The second possible result is that **[4]** the case is so finely balanced that the judge is not satisfied that even if the evidence could sustain a finding against the party making the submission he would be prepared to make the necessary finding himself. Where the case is being tried without a jury, a trial judge in such a position would no doubt allow the case to proceed. It is unnecessary for present purposes to discuss the position where the case is tried with a jury but it may be noted that in two recent cases, *Attorney-General's Reference (No.1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410 and *R v Williams* [1983] VicRp 116; [1983] 2 VR 579; (1983) 9 A Crim R 99 this Court considered the nature of a no case submission in a criminal case and in the latter (at p584, per Gobbo J) reserved the question as to the precise power of a trial judge where there is some, albeit unsatisfactory, evidence sufficient to meet a no case submission.

The third possible result of a submission that there is no case to answer is that the judge is persuaded by it and decides to uphold it. In reaching such a conclusion a trial judge is entitled to draw all proper inferences from the evidence, but he cannot draw inferences against the party making the submission based upon the absence of evidence from that party. Theoretically he then concludes that the evidence could not sustain a finding against the party making the submission. In such a case he upholds the submission. The consequences must then be that judgment must be entered for the party making the submission. His opponent has simply not discharged the burden which rested on him of establishing his case. Where this result ensues there is no room for a distinction between whether the evidence could sustain a finding against the party making the submission and whether **[5]** the judge would make such a finding. Such a case is covered by the second possible result referred to above. This third possibility is where the proposition "no case to answer" means "would you, the Judge, on the evidence given, decide for the party against whom the submission is made": cf. *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at pp330-331; [1959] ALR 367; 32 ALJR 395 ...

FULLAGAR J: (with whom Young CJ and Tadgell J agreed) *[dealt mainly with the evidentiary question, and continued]:* ... **[42]** As to the two general arguments of Dr Pannam, the examination already undertaken of the issues raised and decided with respect to the three main defences show, in my opinion, that the two general arguments cannot be sustained. The two arguments are summarized at the beginning of these reasons but they may be briefly labelled as follows -

> (a) The learned trial Judge misconceived his function, and set about finally deciding the case: he asked himself "would I decide for the defendant on this evidence" instead of "could I decide for the defendant on this evidence."
>
> (b) The learned trial Judge, to use Dr. Pannam's chosen word, "compartmentalized" the three critical defences, and failed to consider the interaction of the facts relating to the three of them respectively.

There was no criticism of the fact that the learned Judge both entertained the no case submission, and decided it, without putting the plaintiffs to their election whether or not to call evidence. No such criticism could be sustained in the light of the allegations of gross fraud, in the light of the reasons for judgment of Fullagar J in **[43]** The *Union Bank of Australia Ltd v Puddy* [1949] VicLawRp 46; [1949] VLR 242; [1949] ALR 979, and in the light of established authorities relating to appeals from the exercise of a discretion. The present case was in my view one for the application of the following observation of Fullagar J in *Puddy's Case (supra)* [1949] VLR at p246 -

> "Where, as in the case before me, fraud is alleged, it may often be wrong to suggest that a party should submit himself to cross-examination before it is seen that there is really some evidence against him."

It is important to observe that Windeyer J twice used the expression "may mean", and not "means" or "must mean". The circumstances of the present case were such that, in my view, the propositions really did mean the latter question posed by Windeyer J. Moreover, I consider that the learned trial Judge in the present case really did address himself to the first question of Windeyer J – whether the evidence was capable of supporting the inferences sought by the defendant to be founded upon it – and actually held that it was not. At all events I am of opinion that it was not so capable in respect of all the critical defences except paragraph 25(d), and the defendant had actual knowledge of the facts there material.

[44] Since writing the above I have had the advantage of reading in draft form what has been

written by the Chief Justice and by Tadgell J on this aspect of the case, and I agree with what is said by them in their fuller treatment. The second general contention of Dr Pannam, also, cannot be sustained. It was impossible to deal coherently with the three critical defences all together, so his Honour dealt with them separately, but a fair reading of his reasons makes it clear, I think, that he well appreciated the potential interaction of the three defences *inter se*, and the potential interaction of the bodies of evidence sought to be relied on in respect of them respectively. He obviously recognized that an inference in favour of one defence might well support an inference in favour of another of them. Indeed, his Honour referred, on several occasions, to cross-inferences – for example the relevance of a failure of the insurer, to enquire further into certain incidents and alleged incidents, not only to the issue of its knowledge and to the question of waiver of further enquiry, but to the issue of materiality of the incidents and allegations themselves.

TADGELL J: (with whom Fullagar J agreed): **[1]** At the trial the first-named plaintiff (which I shall call "Protean") was allowed to split its case. As a result, after Protean had formally proved the policy of insurance and the loss, the appellant called its evidence in support of its several specific defences before Protean became obliged to call evidence in answer to them. At the end of the appellant's evidence counsel for Protean made a submission that there was no case to answer upon the defences, having obtained leave on the exercise of the judge's discretion to make it without himself electing not to call evidence in answer. The judge upheld the submission and accordingly gave judgment for Protean which is the subject of this appeal.

I agree that the appeal should be dismissed and with the reasons advanced by Fullagar J for that conclusion. I address my own remarks only to the submission for the **[2]** appellant in this Court that the learned trial judge misconceived his function in dealing with the submission of no case. The submission for the appellant was that the judge's function was not to reach a conclusion upon the validity of the appellant's defences but to decide whether they could be sustained on the most favourable view of the evidence as it stood. It was argued for the appellant that in particular the judge should not have attempted, as he did, to resolve any question whether the evidence adduced for the appellant "might not ultimately be accepted". Instead, it was submitted, the judge should have confined himself to considering whether the defences or any of them could have been made out if the appellant's evidence had been ultimately accepted.

The distinction which counsel for the appellant sought to draw is in my opinion illusory in the circumstances of this case. The ultimate question for the trial judge was, and for this Court is, whether the evidence adduced for the appellant was not sufficient to debar Protean from obtaining judgment without attempting to answer it. When, in the course of a trial by a judge sitting alone, a party indicates that he desires to submit that he has no case to answer upon a contested issue, he is really inviting the judge to rule that he should not have to adduce evidence, or further evidence, on that issue in order to have it finally decided in his favour.

Usually, but not inevitably, the invitation will be issued at the end of the evidence called against the party desiring to make the submission (whom I shall call "the moving party") and before **[3]** that party calls any evidence on the relevant issue in answer to that of the other party (whom I shall call "the respondent party"). It might be issued after the moving party has called some but not all of his evidence. The judge is entitled, for reasons that seem appropriate to him, to decline out and out to entertain such a submission at the stage at which he is asked to do so. Normally, however, the judge would not feel justified in refusing outright to hear a submission of no case if to hear it would carry the prospect of justly facilitating the disposition of the litigation. Usually there would be three courses open to him, short of refusing altogether to entertain the submission, namely -

1. he might decline to entertain the submission at that stage unless the moving party were to elect before making it not to call any evidence, either generally or on the issue on which the ruling was sought; or

2. he might allow the submission to be made without putting the moving party to any election at that stage but leaving, until he had heard it, the question whether or not he would rule on it without requiring an election to be made; and having heard the submission, and any answer to it by the respondent party, he could either rule on it or not, perhaps requiring an election to be made as a pre-requisite to his doing so; or

3. he might indicate that he would both entertain the submission and rule on it without requiring an election to be made by the moving party.

In the present case the judge adopted the third of these possible courses. Counsel for the appellant, **[4]** understandably enough, did not seek to argue that the judge had abused his discretion in doing so. It is a course apparently not much favoured in other jurisdictions: e.g. *Alexander v Rayson* [1936] 1 KB 169; [1935] All ER 185. It is, however, one sometimes taken in this State, in accordance with a well-established and relatively flexible practice, when the circumstances of the case render it useful: *Hannah v Stott* [1928] VicLawRp 26; [1928] VLR 168; 34 ALR 137; 49 ALT 186; *Union Bank of Australia Ltd v Puddy* [1949] VicLawRp 46; [1949] VLR 242; [1949] ALR 979. It was also taken by Branson J in *Muller v Ebbw Vale Steel Co* [1936] 2 All ER 1363, notwithstanding what the Court of Appeal had said in *Alexander v Rayson*, *supra*. Even so, to allow a party to make a submission of no case without putting him to his election not to call evidence is regarded as a departure from a general rule that an election should be required: *Humphrey v Collier* [1946] VicLawRp 60; [1946] VLR 391; [1946] ALR 448. Such a departure from the general rule can seldom be justified unless adherence to the rule would not serve the ends of justice or convenience: *Sampson v Edwards* [1949] VicLawRp 2; [1949] VLR 6; [1948] 1 ALR (CN) 214; *Jones v Peters* [1948] VicLawRp 56; [1948] VLR 331; [1948] 2 ALR 439.

In deciding which course to follow the judge will be guided by the nature of the case, the stage it has reached, the particular issues involved and the evidence that has been given. The imposition of a requirement that the moving party make an election before the judge entertains the submission, or before he rules on it, will depend on the just and convenient disposition of the litigation. The imposition of such a requirement is not a right of the respondent party, for the fate of the submission of the moving party, once made, is in no sense dependent on **[5]** election or no election. This is so because the question the judge will need to consider if he rules on the submission does not alter according as to whether or not an election is made. The question will be whether the respondent party, carrying the onus of proof of the issue the subject of the submission, has failed to discharge it. If the moving party succeeds the issue on which the ruling is made will ordinarily cease to be a live issue, for it will have been finally decided against the respondent party; and this whether or not the moving party has made an election. If the submission fails, the moving party having made an election, the issue will equally cease to be alive for it will have been decided that the respondent party has not at that stage failed to discharge his onus, and no further evidence will be capable of being called upon it. Only if the moving party fails in the submission, not having made an election, will the issue stay alive, for the moving party will then remain entitled to call evidence upon it. Hence, if the respondent party fails, he will fail whether or not the moving party makes an election; and if the moving party's submission fails the respondent party will in no event be worse off than he was before the submission was made.

In deciding whether or not the general rule should be followed the judge will sometimes be assisted to know the basis on which the moving party seeks to rest his submission of no case. To that end the judge might find it useful to allow the submission to be made and answered without first requiring an election to be made, before deciding whether he will rule on it - i.e. to take the second **[6]** course summarized above. That is what Fullagar J did in *Union Bank of Australia Limited v Puddy*, *supra*. When that course is followed the judge will know, before he commits himself to rule, whether the no case submission is -

(a) that there is no evidence at all in support of the respondent party's case - i.e. accepting all the evidence at face value, no case has been established in law: *Hannah v Stott*, *supra*, at p169; and as was submitted (unsuccessfully as it turned out) in *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152; or (b) that, although there is some evidence in support of the respondent party's case, the judge should not act on it because, for example, it is so unsatisfactory or inherently unreliable or equivocal that he should find that the burden of proof resting on the respondent party has not been discharged: *Hannah v Stott*, *supra*; *Yuill v Yuill* [1945] 1 All ER 183; [1945] P 15, 17; 61 TLR 176; [1945] 1 All ER 183; *Storey v Storey* [1961] P 63, 68: [1960] 3 All ER 279; or (c) a combination of (a) or (b).

Each of these submissions raises a question of law, but each with a different emphasis. The first does not concern the quality of evidence and so can scarcely involve the credit of witnesses. The second can concern the quality of evidence that has been led. Hence it might involve questions of credit. It is therefore, like the first, an inappropriate submission in a jury trial unless, perhaps, it goes so far as to contend that the evidence is such that no tribunal of fact, acting reasonably,

could act on it. Where the trial is one without a jury the second kind of submission will be equally inappropriate unless it is one that embraces the same **[7]** contention or a contention that such evidence as there is amounts in law to nought.

If a judge sitting alone receives a submission of the second kind and decides to rule on it (whether the moving party is put to or makes his election or not) he must be entitled in doing so to assess the quality of the evidence. Were it otherwise the judge, being the tribunal of fact, would be placed in an impossible position: he would have to assess the validity of the case for the respondent party without being able to assess the worth or weight of the evidence led in support of it. It has been said that "... When there is no jury, the proposition 'no case to answer' may obviously mean far more than, 'is there evidence on which a jury could find for the plaintiff?' It may mean, 'would you, the judge, on the evidence given, find for the plaintiff?'": *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 330-331; [1959] ALR 367; 32 ALJR 395, per Windeyer J. If it falls to the judge to decide whether he could find for the respondent party on the evidence so far led, it is quite unrealistic to expect him to do so without being able to consider all questions which bear on the sufficiency of the evidence and without power to draw or to decline to draw all inferences from the evidence given on which the respondent party might seek to rely. Moreover (or perhaps this is no more than another aspect of the same view) the judge, being also the arbiter of the law, could not sensibly be required, in considering a submission of the second kind, to say whether the evidence could establish the case in favour of which it was adduced while shutting his mind to the question of its sufficiency in terms of quality. It might be possible to achieve such **[8]** a measure of detachment in a clear case but in most or very many cases it would not.

In the present case, as I say, the learned judge did not follow the course adopted by Fullagar J in *Puddy's Case* of hearing the submission of no case without requiring counsel first to elect to call no evidence before determining whether he would rule on it. His Honour announced, before hearing the submission, that counsel might make it (and said inferentially that he would rule on it) in any event. That is not necessarily a criticism. His Honour's announcement, however, did commit him to rule on the submission without necessarily first knowing whether he would be required to consider the credit of the appellant's witnesses or otherwise to review the quality of the evidence. The disadvantage of taking that course, if there be one, is that the judge denies himself the opportunity of requiring an election to be made by the moving party if the nature of the no case submission, or its quality, warrant it.

In the event, the submission of no case was of the third kind mentioned above. The task that the learned judge set himself, having committed himself to rule on the submission in any event, was to determine the question of law whether, on the evidence as it stood, any of the defences could be made out. In order to raise a case of deserving of an answer, the appellant of course had no need to demonstrate that it would ultimately have succeeded on one of its defences had the evidence remained unaltered: cf. *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, 658; [1955] ALR 671; *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433, 442; [1963] ALR 165; 36 ALJR 276. What the appellant did have to demonstrate is conveniently **[9]** indicated by Willes J in *Ryder v Wombwell* [1868] LR 4 Ex 32, 39 whose statement, adopting the view of Maule J expressed in *Jewell v Parr* [1853] EngR 563; (1853) 13 CB 909, 916; 138 ER 1460, was approved by Lord Blackburn in *Metropolitan Railway Co v Jackson* [1877] 3 AC 193, 207-208. Those authorities stand for the view that the question of the sufficiency of evidence upon a no case submission is whether there is any evidence that ought reasonably to satisfy the tribunal of fact that the facts sought to be proved are established. See also *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505, 514; (1978) 3 ACLR 289; [1978] ACLC 40-381.

The appellant was certainly entitled to expect that the judge, when ruling on the submission, would draw or leave room for the drawing of all reasonable inferences in its favour. At the same time, the appellant was obliged to suffer the risk that the judge would decline to draw or leave room for the drawing of inferences necessary to support the defences that were not reasonably open on the evidence as it stood when he was asked to make his ruling. The appellant had its due opportunity to provide evidence that could support such inferences. The judge did in my opinion properly decline to say that he could draw them and that was really the basis of the appellant's downfall, as the reasons of Fullagar J show. I think it cannot now successfully complain.

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