

41/07; [2007] VSC 381

SUPREME COURT OF VICTORIA

***EUGINIA v CHONG***

Bell J

10 September, 10 October 2007 — [2008] V Conv R 54-741

**CIVIL PROCEEDINGS – FAIR TRADING – LANDLORD AND TENANT – RENT NOT PAID – REPRESENTATION BY BROTHER THAT HE WOULD USE HIS BEST ENDEAVOURS TO ENSURE BROTHER PAID RENT – WHETHER SUCH REPRESENTATION MISLEADING OR DECEPTIVE – WHETHER WITH RESPECT TO A FUTURE MATTER – FINDING BY MAGISTRATE THAT BROTHER DID NOT HAVE TO PAY RENT HIMSELF – WHETHER MAGISTRATE IN ERROR: *FAIR TRADING ACT* 1985, SS10A, 11.**

1. Whether a representation is misleading or deceptive is a question of law that has to be answered by reference to the words spoken in their individual context. It is common ground that that question has to be considered from the point of view of the objective impact of the words, in that context, on a reasonable person in the position of the parties.

2. Where a reasonable person of business in the position of the parties would have understood a person's representation that he would use his best endeavours to ensure that the tenant paid the rent on time, the magistrate was not in error in deciding that the representation was not misleading or deceptive.

3. Section 10A(1) of the *Fair Trading Act* provides that a representation with respect to a future matter (including the doing of an act) is taken to be misleading if the person does not have reasonable grounds for making it. Under s10A(2), unless the person has adduced evidence to the contrary, he or she will be deemed not to have had reasonable grounds for making the representation.

4. Where a person represented he would use his best endeavours to persuade and assist his brother to pay the rent on time, this was a representation to use those endeavours in the future which was a representation as to that future matter. Therefore, the person had to prove he had reasonable grounds for the representation made. In view of the fact that rent had been paid for many years before the default and that the person making the representation was in regular contact with the tenant and had considerable involvement in his financial affairs, it was open to the magistrate to find that the person making the representation had satisfied the onus of adducing evidence of reasonable grounds for making the representation.

**BELL J:**

**INTRODUCTION**

1. Joo Chong was not, it may be said, his brother's keeper. So when John Chong couldn't pay the rent on the premises of his failing business, Joo Chong could assist him and encourage him to pay the rent on time. But in the end, it was John Chong, not Joo Chong, who was the tenant.

2. The premises were at the Oakleigh Market and were leased to John Chong for a fruit and vegetable shop. After the lease expired, John Chong carried over on a monthly tenancy. When he failed to pay the rent for two and a half months, Euginia terminated the tenancy and sued Joo Chong, not John Chong, for the amount outstanding (\$25,000).

3. Joo Chong was sued because Euginia contended it had leased the premises to John Chong, and allowed him to continue as a monthly tenant, in reliance on representations made by Joo Chong. The representations alleged were that Joo Chong would pay the rent personally or, alternatively, that he would ensure his brother did so. Euginia alleged those representations were misleading or deceptive contrary to s11 of the *Fair Trading Act* 1985.

4. A magistrate dismissed Euginia's claim. Her Honour found the only representation made by Joo Chong was that he would use his best endeavours to persuade and assist his brother to pay the rent on time, which was not misleading or deceptive in the circumstances.

5. Under s109 of the *Magistrates' Court Act* 1989, Euginia appeals against the magistrate's

decision to dismiss its claim with costs. Euginia contends that her Honour made errors of law falling into these two categories:

- having found what words were spoken by Joo Chong, the magistrate should have decided they contained a representation that was misleading or deceptive
- the representation was with respect to a future matter but was not proved to be based on reasonable grounds as required by s10A of the *Fair Trading Act*.

### **WAS JOO CHONG'S REPRESENTATION MISLEADING OR DECEPTIVE?**

6. I deal here with grounds 1 and 2 of the amended notice of appeal, which were developed in oral argument.

7. Before getting to Joo Chong's representation, it is necessary to look briefly at some undisputed background facts.

8. Euginia had been the owner of the premises since before 1992. In that year, it leased them to Trop Pty Ltd. In 1993, with Euginia's consent, Trop assigned the lease to Jenola Falls Pty Ltd. John Chong was a director of Jenola. When that lease expired in 1997, Euginia leased the premises to John Chong. That lease expired in February 1999. Euginia allowed John Chong to continue in occupation on the monthly tenancy. When John Chong failed to pay the rent from 13 May 1999 until 31 July 1999, Euginia resumed possession. Although sometimes late, the rent on the premises had been paid from 1992 until mid-May 1999.

9. Against the background of those facts, the magistrate received evidence from Mr Kapiris and Joo Chong. The question of what representations were made by the latter to the former was gone into in some detail. Joo Chong admitted in evidence that he gave Mr Kapiris his "personal assurance that the rent would be paid on time." The primary finding for which Euginia contended was that Joo Chong had thereby represented he would be personally bound by the 1997 lease and the overholding tenancy.

10. The magistrate examined the evidence on this subject carefully. She particularly referred to evidence that Joo Chong had given an "assurance that he would ensure" the rent would be paid on time. On the basis of her examination of the evidence, her Honour refused to make the primary finding sought by Euginia. There has been no appeal from that aspect of her decision.

11. The most the magistrate was prepared to find was that, by giving Mr Kapiris an assurance the rent would be paid on time, Joo Chong was saying he would use his best endeavours. To be precise, her Honour decided this:

The assurances in my view meant and were understood to mean that Mr Joe Chong would use his best endeavours to persuade and assist his brother to pay the rent on time. Such assistance did not include paying the rent himself.

12. Her Honour found that Joo Chong had made this representation:

- when John Chong took the lease in 1997
- when John Chong was allowed to remain on a monthly tenancy in 1999.

13. The magistrate decided Joo Chong's assurances did not mislead or deceive Mr Kapiris, nor did he intend them to have that effect. In reaching that decision, her Honour took into account these findings, which were plainly supported by the evidence:

- Mr Kapiris was a businessman of considerable expertise and acumen
- Mr Kapiris was not a "simple man" as he had asserted
- Mr Kapiris understood the difference between personal liability and corporate liability, and between legal liability and moral liability.

14. In the appeal before me, Euginia submitted her Honour was bound to decide Joo Chong's

words were misleading or deceptive because s11 of the *Fair Trading Act*, properly applied to the words that were spoken, demanded that result. The company's contention was commendably precise: a representation to "ensure" the rent would be paid, or giving an "assurance" that it would be paid, was a representation to bring about that result. The representation was misleading or deceptive because Joo Chong did not bring the result about.

15. The parties relied in argument on dictionary definitions of the word "ensure" and on a number of authorities that dealt with the meaning of that word in different contexts. I have looked at those sources but, in the end, I do not think they assist in the present case.

16. Whether the representation was misleading or deceptive is a question of law that has to be answered by reference to the words spoken in their individual context. It is common ground that that question has to be considered from the point of view of the objective impact of the words, in that context, on a reasonable person in the position of the parties.

17. With a representation like this, context is a fundamental consideration. For that reason I accept the thoughtful submissions of counsel for Euginia to this extent: such a representation, depending on the context, could be understood to mean Joo Chong would use more than his best endeavours. So, in a particular context, I think the representation could extend to paying the rent personally if the tenant failed to do so. Did it in this case?

18. The answer I must give is no. I think a reasonable person of business in the position of the parties would have understood Joo Chong's representation to mean he would use his best endeavours to ensure John Chong paid the rent on time. The magistrate correctly decided the representation, correctly so understood, was not misleading or deceptive.

19. It is important to my reasoning that Euginia unsuccessfully tried to establish Joo Chong had personally undertaken to observe the lease and the overholding tenancy. The magistrate's rejection of that primary case was unchallenged and unchallengeable. Euginia's fallback argument was that Joo Chong had accepted a positive obligation to ensure John Chong would pay the rent. But that was just another way of putting the failed primary case. I am quite unable to see how, lawfully, you can get your brother – or anyone else, for that matter – to do something he will not or cannot do. The only thing that Joo Chong could additionally do, if his best endeavours failed, was to pay the rent himself, which the magistrate decided was not an element of the representation.

20. Grounds of appeal 1 and 2 must therefore be rejected.

#### **REPRESENTATION AS TO A FUTURE MATTER**

21. I deal here with grounds 3 and 4 of the amended notice of appeal, which were also developed in oral argument.

22. Section 10A(1) of the *Fair Trading Act* provides that a representation with respect to a future matter (including the doing of an act) is taken to be misleading if the person does not have reasonable grounds for making it. Under s10A(2), unless the person has adduced evidence to the contrary, he or she will be deemed not to have had reasonable grounds for making the representation.

23. Section 10A applied to the proceeding before the magistrate. If Joo Chong's words amounted to a representation as to a future matter, he carried the onus of establishing it was made on reasonable grounds.

24. The first question that arises is whether the representation was with respect to a future matter. I think it was. As correctly decided by her Honour, Joo Chong represented he would use his best endeavours to persuade and assist his brother to pay the rent on time. This was a representation to use those endeavours in the future which was a representation as to that future matter.

25. That conclusion triggers the operation of s10A so that, in the proceeding before the magistrate, Joo Chong had to prove he had reasonable grounds for the representation he made. The magistrate was obliged to approach the matter on that primary basis.

26. Euginia submits her Honour erred in law by failing to apply s10A in that manner.
27. I have considered the way the magistrate decided the case. I think it is a fair reading of her reasons for decision that she did so on a primary basis and an alternative basis.
28. As to the primary basis, after her Honour identified the meaning of Joo Chong's words, she did not move directly to the question whether the representation he so made was with respect to a future matter. Her Honour decided the representation had the now familiar meaning, which she considered not to be misleading or deceptive. She then moved on to other matters. With respect, the application of s10A arose, and should have been dealt with, before she moved on.
29. Although her Honour did not expressly say so, I think it likely she dealt with the matter in the way she did because she was not completely convinced the representation was with respect to a future matter.
30. But the magistrate very properly returned to this issue later in her reasons. She said that, if it had been necessary to consider s10A, she would have found Joo Chong had reasonable grounds for making the representation. In doing so, her Honour was, in effect, supplying an alternative basis for her decision that the representation was not misleading or deceptive.
31. I have examined the magistrate's reasons for being persuaded that Joo Chong had reasonable grounds for making the representation, which were:
- the rent had been paid for many years up to mid-May 1999
  - Joo Chong was in regular contact with his brother and had considerable involvement in his financial affairs.
32. I respectfully think those reasons, which were also based on undisputed facts, were very convincing. The magistrate's alternative basis for deciding the case was correct, for Joo Chong did discharge his onus of establishing reasonable grounds for the representation.
33. Grounds of appeal 3 and 4 must also be rejected.

## CONCLUSION

34. Euginia Pty Ltd has appealed on grounds of error of law against a decision of a magistrate dismissing with costs its claim against Joo Chong. The claim was for \$25,000 rent that had not been paid by Joo Chong's brother pursuant to a tenancy for business premises with Euginia.
35. The two bases of the claim were that Joo Chong had represented he would observe the terms of the tenancy or, alternatively, that he would ensure his brother paid the rent. Euginia contended Joo Chong had engaged in misleading or deceptive conduct under s11 of the *Fair Trading Act*, for the brother fell behind with the rent.
36. The magistrate dismissed the first basis of the claim. Euginia has not appealed against that decision. Her Honour also dismissed the second basis, holding that Joo Chong had represented only that he would use his best endeavours to ensure his brother paid the rent on time, which was not misleading or deceptive in the circumstances. That is the decision against which Euginia appeals.
37. I have concluded the magistrate did not err in law in dismissing Euginia's claim. Her Honour correctly characterised Joo Chong's representation as one involving the use of best endeavours; that representation was correctly held not to be misleading or deceptive. Her Honour did incorrectly fail to apply s10A in her primary analysis of the legal problem; but she correctly held in the alternative that Joo Chong had satisfied his onus to adduce evidence of reasonable grounds for making the representation.
38. The appeal will therefore be dismissed with costs.

**APPEARANCES:** For the plaintiff Euginia Pty Ltd: Mr PJ Riordan SC and Mr SW Stuckey, counsel. Wilmoth Field Warne Lawyers. For the defendant Chong: Mr BJ McCullagh, counsel. Dov Silbermann Lawyer.