34/94

SUPREME COURT OF VICTORIA

JACKSON v WOOD

Hansen J

13 April 1994

CIVIL PROCEEDINGS – WRITTEN AGREEMENT BETWEEN PARTIES AS TO REPAYMENT OF MONEY DUE AND STIPULATED INTEREST – AGREEMENT NOT COMPLIED WITH – WHETHER INTEREST CLAIMABLE PURSUANT TO THE AGREEMENT OR STATUTE – DELAY OF TWO YEARS IN ENFORCING AGREEMENT – WHETHER A FAILURE TO MITIGATE.

W. entered into a written agreement to repay certain monies together with interest at a certain amount per month. W. fell into arrears and after allowing two years to pass J. took proceedings to recover the amount owing plus interest as agreed. The Magistrate allowed the amount sought but awarded interest not on the agreed basis but at a rate calculated under the statute and only for a period of 18 months following W.'s refusal to pay. On appeal—

HELD:
1. Once the Magistrate found that W. was bound by the agreement, J. was entitled to relief in accordance with all of its terms not just part of them in the discretion of the Court.

2. In the circumstances, W. had not established that J.'s failure to sue earlier was so unreasonable as to constitute a failure to mitigate.

HANSEN J: **[1]** This is an appeal from an order of a Magistrates' Court at Melbourne made on 21 June 1993, whereby it was ordered that the respondent pay $4209.21 for the claim, $1050.90 for interest and $3100 for costs. The appeal was commenced by application to Master Evans on 21 July 1993, whose order of that date stated the question of law as "The Magistrate erred in law in failing to award interest in accordance with the terms of the agreement upon which the plaintiff sued." The Master's order required service on the Magistrate of the order and of the affidavits filed by the appellant in support of the application for the order and the exhibits. I have been informed that the order and the other documents were served pursuant to that order, but no affidavit of compliance has yet been filed. I have proceeded to hear the appeal on the basis that an affidavit of compliance will be filed in due course and my order will reflect that basis.

The sole issue on the appeal relates to the amount allowed for interest. It arises in this way; the Magistrate found, correctly, that there was a written agreement between the parties which provided for the repayment of certain monies including a stipulated amount for interest, on a monthly basis. Thus the claim was in reality for money due under an agreement including interest. Inappropriately, the summons sought the monies due as **[2]** damages and the prayer for relief sought interest separately, either under the agreement or under statute. It may be that this formulation was a factor which led the magistrate to deal with the matter of interest in the way in which he did. I am, however, informed by Mr Wise, who appeared for the appellant before the Magistrate, that the case was conducted as one for monies due under the agreement and, in any event, the evidence concerning the case indicates this was so.

The Magistrate allowed the amount sought with costs, as I have mentioned, and accordingly no challenge is made to those parts of the order, nor has the respondent appealed against the order. Further, the respondent has not filed an affidavit or appeared in this appeal. The appellant's affidavit in support was sworn by Sydney John Jackson who is the appellant. He deposed as to the course of events, the evidence, submissions and the magistrate's reasons for decision. No challenge has been made by the respondent or the magistrate to anything contained in that affidavit. The affidavit discloses that the parties decided to mount a production of a play and agreed to contribute $48,000 equally, if needed. It was needed, but the respondent could only raise $8000. The appellant paid $40,000, being his half share of $24,000 and $16,000 in respect of the respondent's share. Interest was not considered by the parties at this stage. The appellant in fact raised the $40,000 by a mortgage on his house, which the respondent knew, and this occurred in 1987.

In the result, the respondent did not repay the **[3]** $16,000. The appellant sought repayment, including interest, and ultimately in early 1989, the agreement to which I have referred was made which provided for terms of repayment, including interest at the rate of $333.94 per month. The defendant admitted having signed a letter of agreement and while there was some contention as to which piece of paper constituted the agreement, being either exhibit SJJ9 or SJJ14, there could have been little doubt that an agreement was made as each of those pieces of paper contained identical terms. After making some payments, at 25 June 1990 the amount owing based on the formula in the agreement was $4209.21, the amount in fact ordered by the Magistrate. Thereafter, no further payments were made by the respondent.

The Magistrate found that the agreement sued upon had been made, being constituted by either exhibit SJJ9 or SJJ14. Specifically, he found the respondent had agreed to pay the interest component of $333.94 per month. However, while ordering payment of $4209.21 in accordance with the agreement, he refused to allow the amount due for interest pursuant to it. Indeed, he allowed no amount for interest on the agreed basis, but allowed instead only an amount for 18 months after the respondent refused to pay in July 1990 and that calculated under the statute. This produced the amount of $1050.90. In doing this, the learned Magistrate, in my opinion, fell into an error of law. Having found the respondent was bound by the agreement, the appellant was entitled to relief in accordance with all its terms, not just part of them in the discretion of the court; nor in my opinion, was there a **[4]** discretion as to the period of time in respect of which such interest may be allowed. It was a matter of right under the agreement, subject to any defence which may be raised.

It was contended before the Magistrate that the appellant should not recover the claim in full as he had failed to mitigate his loss in allowing two years to pass before commencing legal proceedings. The learned Magistrate seems to have accepted this submission and acted on this basis in dealing with interest. But this raises the question whether, in any event, the respondent had discharged the onus upon him of establishing the basis for the contention. The account of the learned Magistrate's reasons does not show that he approached the matter in this way. Moreover in his reasons he overlooked (or did not mention) the appellant's evidence that he, the appellant, knew the respondent was having trouble raising funds and that he did not have the money to sue. Further, the case was one in which the defendant had simply refused to make any additional payments under the agreement, being aware of his obligations to do so.

In these circumstances, it seems to me that the appellant could not be said to have acted unreasonably in not suing before he did, or to put it another way, it could not be said that after 18 months the failure to sue was so unreasonable as to constitute a failure to mitigate. The onus of establishing this was upon the respondent. In addition, and this is relevant to the question of mitigation, one is concerned with a legal right of which the respondent was at all times aware. In summary then, I am of the opinion that the learned **[5]** Magistrate was in error in precluding recovery of interest under the agreement in the way in which he did. On this basis, of course, no question of mitigation arises, but if it did I am of the opinion that the basis of mitigation was not made out in this case. It follows that the order must be varied to allow for interest under the agreement.

A further order was sought on the hearing of the appeal that the respondent be ordered to pay to the appellant the amount of $333.94 per month commencing from July 1993 and continuing until the amount of the claim and interest are paid in full. I do not think it is appropriate to make an order in this form, which is in the nature of an order for specific performance of an agreement. However, s109(6) of the *Magistrates' Court Act* empowers this court to make such order as it thinks appropriate on the determination of the appeal. I think that enables me to now vary the order by allowing interest up to and including March 1994 (see *L. Shaddock & Associates Pty Ltd v The Council of the City of Parramatta* [1982] HCA 59; (1982) 151 CLR 590; 43 ALR 473; (1982) 56 ALJR 875). On my calculations, the amount for interest will then be $15,027.30, being $333.94 for nine months in addition to the amount for interest shown in exhibit SJJ12 as at June 1993. On the basis of those reasons then, the following orders should, in my opinion, be made:

> 1. Subject to the filing on or before 4.30 pm on 20 April 1994 by the appellant of an affidavit of compliance with paragraph l(b) of the order of Master Evans made 21 July 1993, the following orders are made;

2. That the appeal be allowed. **[6]**

3. That the order of the Magistrates' Court at Melbourne made 21 June 1993 be varied by substituting in lieu of the order for payment of interest of $1050.90, an order for payment of interest of $15,027.30.

4. Otherwise the said order is affirmed.

5. Dissolve the stay ordered by paragraph 6 of the said order of Master Evans made 21 July 1993; and

6. The appellant's costs of the appeal including reserved costs be paid by the respondent.

APPEARANCES: For the appellant Jackson: Mr M Wise, counsel. No appearance on behalf of the respondent Wood.
