53/92

SUPREME COURT OF VICTORIA

CONDOR ENGINEERING PTY LTD v MOLLOY

Hedigan J

18, 21 September 1992

CIVIL PROCEEDINGS – ACCORD AND SATISFACTION – TERMS OF SETTLEMENT FILED – PROCEEDING STRUCK OUT WITH RIGHT OF REINSTATEMENT – TERMS OF SETTLEMENT NOT PERFORMED – WHETHER ACCORD AND SATISFACTION – WHETHER ACCORD EXECUTORY – WHETHER PROCEEDING SHOULD BE REINSTATED.

One of the terms of M's contract of employment was that his employer Condor would provide M with a motor vehicle for use in his employment. As this condition was not complied with, M sued Condor for damages. When the matter came on for hearing, the parties agreed to Terms of Settlement whereby the matter would be struck out with a right of reinstatement and Condor agreed to provide M with a motor vehicle, pay part of M's legal costs and not deduct from M's salary the wages lost in attending Court. When Condor failed to perform any of these conditions, M applied to have the original matter reinstated. The Magistrate granted the application, heard evidence and made an order in M's favour. Upon appeal—

HELD: Appeal dismissed.

1. The essence of accord and satisfaction is the acceptance by a plaintiff of something in place of his action. The accord is the agreement to accept the satisfaction. However, until the satisfaction is given, the accord remains executory and does not extinguish the old cause of action.

***McDermott v Black* [1940] HCA 4; (1938) 63 CLR 161, applied.**

2. In the present case, the question was whether M's cause of action was exchanged for a fresh promise of performance or performance itself. According to the Terms of Settlement, the obligations were on Condor so that any release of Condor only became effective upon the performance by Condor of certain acts. Accordingly, M agreed to accept not Condor's promise in satisfaction but the performance of certain conditions. Discharge of M's original cause of action was subject to an executory obligation which was not performed. In that case, the original proceeding remained on foot and was properly reinstated.

HEDIGAN J: [1] This is an appeal pursuant to the provisions of the *Magistrates' Court Act* 1989. The facts of the matter may be shortly stated as follows, and are derived by me from the affidavits of Horst Schiffer, the principal of Condor Engineering Pty Ltd, the appellant, and the affidavits of the respondent and his counsel at the Magistrates' Court, Mr Parry. The appellant employed the respondent pursuant to an agreement in writing on the 10th day of January 1990. The principal relevant terms were as follows. The agreement provided for the payment of salary and working hours, and went on to provide further:

> "Company car will be provided (current model) that is, Commodore Executive 6 cylinder, air conditioning included. All costs associated with running of car supplied to be met by Condor; that is, full comprehensive insurance, service, maintenance, petrol, et cetera. You will have unlimited use of company car, that business as well as personal use. You will retain current car for a maximum of four years or 100,000 kilometres, whereupon you will be supplied with the current model of that time, equivalent to the above."

The agreement also contained a provision that the commencing date of the service would be 30 January 1990, and provided, in paragraph 4, that the position offered required a period of one month's notice to be given by either party to the required date of termination of employment. It was executed by both parties. Following this, Molloy commenced working and, according to the evidence, he was not supplied with the motor vehicle and was paid, but temporarily, a fuel allowance; notwithstanding complaints and some discussions, he was not provided with a motor vehicle, and ultimately sought legal advice. This led to the commencement of proceedings in June of 1991.

[2] The claim was ultimately amended. In substance, the claim was a claim for breach of the agreement to which I have referred. The particulars given under paragraph 3 set out details of the alleged failure of Condor to provide the vehicle and the associated benefits. Damages claimed in paragraph 6 were founded upon the estimated running costs of the vehicle between January 1990 to the date of the commencement of the proceedings. The amendment appears to have been made on 12 November 1991, apparently bringing the alleged loss up to date. The defendant's defence in the matter routinely admitted non-contentious matters and alleged that there had been a variation whereby the requirement that the defendant should provide the plaintiff with a company car no longer applied.

The matter came on for hearing on 13 November 1991. According to the affidavit of Mr Schiffer, shortly prior to the matter being called on for hearing, the action was compromised, and terms of settlement were signed by counsel for the parties. A copy of the terms of settlement, to which I shall shortly refer, were an exhibit to Mr Schiffer's affidavit. The affidavit described that minutes of consent order were also drawn up and signed by counsel. A true copy of the minutes was exhibited, and, according to the affidavit, the settlement was not mentioned in open Court, but the original of the terms of settlement and the minutes of consent orders were left with the clerk to enable consent orders to be made by the presiding Magistrate later that day.

The minutes of consent orders provided as follows:

[3] "Consent orders:
1. Struck out with right of reinstatement;

2. No order as to costs."

The terms of settlement between the parties were in handwriting and contained the heading and the number of the proceeding and the name of it, abbreviated. They were headed "Terms of Settlement" and stated:

"It is hereby agreed between the plaintiff and the defendant as follows:
1. The defendants will supply a car and the associated benefits to the plaintiff as per clause 3 of the contract of employment on and from 7 December 1991;

2. The defendant shall pay the plaintiff $1,000 in part payment of legal costs by 7 December 1991;

3. The plaintiff shall not lose any pay for 13 November 1991;

4. If within 12 months from 7 December 1991, the defendant terminates the employment of the plaintiff, the plaintiff shall have the right to have this action reinstated, and this settlement shall be without prejudice to the plaintiffs cause of action pursuant to the particulars of demand herein. The right of reinstatement and preservation of rights shall not operate where the plaintiff resigns his employment or the defendant terminates the employment of the plaintiff for misconduct within the 12 month period;

5. The terms of settlement shall be kept confidential between the parties thereto."

Letters were written by the plaintiff's solicitors to the defendant requiring observance of the times referred to in the terms of settlement, and the carrying out of the obligations on the due dates. Time was, therefore, I think, made of the essence. But this is not of significance as the terms were not fulfilled and carried out, in any event. No issue of the tender of any late payment arises in this case. However, it is clear that the obligations referred to in paragraphs 1, 2, and 3 **[4]** were not complied with.

According to Mr Schiffer's affidavit, Condor's solicitors, Mr Smith, received the letters to which I have referred. One of those letters advised that it was intended by the plaintiff to have the action reinstated. That must have meant, of course, no more than an application to have the action reinstated would be made. It was brought on to enable that application to be made, and, if successful, the proceeding heard, on 28 January 1992. At the outset, Condor's counsel submitted that the action could or should not proceed as the action had been settled. The terms of settlement to which I have referred were tendered. He argued that the right of reinstatement was specifically limited, that is, that the plaintiff had contractually bound himself, in effect, not to apply to reinstate, save in the circumstances that he was dismissed other than for misconduct.

It was said, correctly, that Molloy was still employed, and indeed, from that was said to me, he still is. It was contended that although paragraphs 1, 2, and 3 were not performed, the plaintiff had a right to sue for breach, but only by way of a fresh proceeding, based on the terms. The reinstatement sought, so the submission ran, was therefore barred or estopped, or there was no subject matter on which the application to reinstate could be made, having regard to the terms of settlement.

I interpolate that it may have been possible to have brought in any proceedings concerned with the breach of terms of settlement as part of or a separate proceeding to be heard with the existing proceeding. However, no **[5]** application appeared to have been made to have this done, and that aspect is therefore irrelevant. See, however, *Roberts v Gippsland Agricultural Company Pty Ltd* [1956] VicLawRp 86; [1956] VLR 555 at 562; [1957] ALR 71.

The plaintiff claimed, on the other hand, that the defendant's breach of the terms was a fundamental breach that triggered the right to reinstatement of the original proceeding. It is not necessary to describe in detail what the affidavits disclosed as to the manner in which the Magistrate handled these submissions. In effect, he rejected the argument that the terms of settlement inhibited reinstatement of the proceeding. He reinstated it, heard evidence, and entered judgment for the plaintiff, ordering that there be an order on the claim of $14,246, with $873 interest, and $2,497.95 costs, with a stay of one month.

An application for an order for appeal to the Master failed. This was taken to the Practice Court, and indeed, I made an order on 13 March 1992 setting out grounds, describing the basis of review of the Magistrate's decision. It is not necessary for me to reproduce those grounds. Before me, counsel acted with the utmost good sense, agreeing that the essential question for determination was whether the terms of settlement raised an executory accord or an accord and satisfaction; that is, whether, on their proper construction, the right to reinstatement arose only in the circumstances described in paragraph 4, or whether a breach of the other terms permitted the proceeding to be brought back on. Mr Turley, who appeared for the appellant, **[6]** argued that in cases of this kind there were three ways of approaching terms of settlement: 1, that they established an executory accord; 2, that they established a completed agreement with conditions yet to be fulfilled; 3, that they created an accord and satisfaction that terminated the original proceeding, save for the specified condition.

He accepted, as I understood his submission, that if either of the first two characterisations of these terms was correct, his appeal must fail; if the third were the proper construction, it would succeed. The legal and factual situation here raised for consideration is by no means common. Its solution, as usual, is to be found in the application of the law to the facts. The facts include the terms of settlement, which must be construed against the matrix of facts that gave rise to their execution, including the history of the employer/employee relationship.

The law has found frequent exposition in English and Australian Courts, and it might be prudent to commence, as indeed Mr Turley's submission did, with a reference to the well-known statement of Dixon J, as he then was, in *McDermott v Black* [1940] HCA 4; (1938) 63 CLR 161 at 183 to 184, and I cite:

> "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract, or it may be the act or thing promised. But whatever it is, until it is provided and accepted, the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given, the accord remains executory, and cannot bar the claim. The distinction between an accord executory and an accord in satisfaction remains as valid and important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one."

[7] After referring to the decision of the Court of Appeal in *British Russian Gazette v Associated Newspapers Ltd* (1933) 2 KB 616 His Honour went on to say, concerning that case:

> "The case, therefore, provides no more than a late illustration of the doctrine finally established perhaps by *Flockton v Hall* [1851] EngR 214; (1851) 16 QB 1039; 117 ER 1179, that in an accord and satisfaction there are two cases: one where the maker of the agreement itself is what it is stipulated

> for, and the other where it is the doing of the things promised by the agreement. The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of abandonment of the claim may be accepted in substitution or satisfaction of existing liability; or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money to the other party, and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate. If the performance, then there is no discharge unless and until the promise is performed."

In *Scott v English* [1947] VicLawRp 67; [1947] VLR 445; [1947] ALR 284, Fullagar J, then a member of the Bench of the Supreme Court of Victoria, put the matter in similar terms, (VLR 453):

> "The essence of the matter may be said to be that a mere 'accord' is not a contract at all. But, if we find in any particular case that there is a contract – a promise accepted in 'satisfaction' against a promise – our problem is not necessarily at an end. We have still, I think, in some cases to construe the contract to see whether its effect is to discharge the original cause of action absolutely, so that the plaintiff can never thereafter sue on it but can only sue on the new contract, or whether it effects only a conditional discharge, merely suspending the original cause of action, so that, if it is not performed by the defendant according to its tenor, the plaintiff may still maintain that original cause of action."

After further reference to some of the situations that might prevail, His Honour concluded by saying:

> "The question, I think, is to be decided as a matter of construction of the new contract."

[8] These cases not only propound the principle but demonstrate application of it. The critical issue frequently is to determine whether consideration of the language of the compromise leads to the conclusion that the original cause of action was being exchanged, as it were, for a fresh promise of performance, or performance itself. It should be observed that, frequently, the proceeding is adjourned *sine die* or, as in *Scott*, to a date to enable performance to occur.

In my experience, an additional reason for so doing is this: that if performance of the new arrangement, the defined acts, does not take place in accordance with the terms or conditions, if they are conditions, then the action for breach of the terms or conditions of the compromise may be joined with the existing proceeding – a convenient and economical course. It is not necessary to consider some features that might have to be taken into account in some cases, such as acts extraneous to the original contractual subject matter.

No counsel referred to this aspect, correctly, in my view. See *Fraser v Elgen Tavern Pty Ltd* [1982] VicRp 38; (1982) VR 398, and *Koutsaradis v Koutsaradis* [1983] VicRp 108; (1983) 2 VR 487. Although one may, without difficulty, perceive that an adjournment of the proceeding clearly leaves it alive, perhaps assisting an inference that performance rather than promise was intended, and also perhaps that the terms were fundamental conditions, the striking out of an action clearly does not dispose of it, with or without the words "with the right of reinstatement", unless particular circumstances prevail. See *Miller v Hanson* [1891] VicLawRp 135; (1891) 17 VLR 715 at 716, and *R v McGowan* [1984] VicRp 78; [1984] VR 1000. And, finally, in referring to the law, Murphy J, in *Fraser v Elgen Tavern* put the matter in this way: (at p401)

> "In many cases of disputed liability, where the plaintiffs claim is for a liquidated sum or unliquidated damages, a plaintiff may be content to accept in substitution for and discharge of his disputed claim a new promise in writing by the defendant to pay a sum certain on or before a specified date. The promise is given by the defendant and accepted by the plaintiff in satisfaction of his cause of action. If the promise is broken, the question must always be whether the giving of the promise discharged the defendant absolutely from the cause of action, so that the plaintiff could only sue thereafter on the new agreement, or whether the discharge effected by the agreement was conditional."

In that case the issue was whether it was promise or performance which was the satisfaction, and whether time was of the essence. The Court there construed the words "will accept" as "accepting the sum" and not as "accepting a promise to pay the sum". Mr Turley argued that the critical factor in this case was that the parties addressed the circumstance of reinstatement in paragraph 4, and confined their agreement to reinstatement of the original proceeding, and

preservation of the rights therein claimed, to the circumstances wherein the defendant terminated the plaintiff's employment other than for misconduct, within a 12 month period from December 7th 1991. Accordingly, he submitted the proper construction of the terms led to the conclusion that that was the only circumstance of preservation of right of action, all other breaches of the terms requiring a fresh action. This submission, therefore, treated performance of the acts in paragraphs 1, 2, and 3 and as unrelated to the accord and satisfaction. They were simply promises, the breach of **[10]** which conferred a right of action but did not affect the completed accord.

The contrary view, put by Mr Panna for the respondent to the appeal, was that performance of the acts set out in paragraphs 1, 2, and 3, was fundamental; that is, that the agreement was absolutely founded on that performance, so that if it did not occur within the time stipulated, or at all, then the plaintiff's original cause of action, and the proceeding on it, remained intact and could be reinstated. He argued that the consent order, striking out with the right of reinstatement, was made not only to accommodate clause 4, but the necessary performance of 1, 2, 3 and 5. He pointed out that the defendant/appellant's argument really meant that the plaintiff traded away his existing right to a car and benefits, for nothing more than a repetition of the previous promise, and that it confined reinstatement only to a sacking situation.

The background to this proceeding is of importance, in my view. Molloy's case was that Condor had agreed to provide him with a vehicle, had delayed and delayed, given palpably false excuses and finally said that it could not provide the motor car. Even the defence admitted the car was not given, albeit that it alleged a variation in the original agreement. I note that the appellant called no evidence at the ultimate hearing to contradict any of Molloy's evidence. It must be assumed, I think, that at the time the terms were entered into on 13 November, Condor intended to perform, and that Molloy expected Condor to perform. The issue that brought them to the Court on that date was the issue concerning the **[11]** vehicle, not any issue of employment or sacking. Molloy had in fact commenced his proceeding in June 1991, and this had not led to his dismissal, either in November of 1991 nor in January of 1992, and indeed, I was informed, even now.

Mr Turley argued that clause 4 was put in to give security of employment to Molloy. But, as I said during the course of argument, it does not secure his employment at all; not an extra day over the month's notice he might get. All it gave was a right to reinstate his action; not a right to his job for 12 months. The fourth paragraph appears to me to have been included to cover a particular situation. By the terms of settlement, Molloy gave up his claim for damages for non-provision of the vehicle, that is, the money equivalent of it, between January 1990 and November of 1991. He was, apparently, prepared to do that, if he were given his car, virtually immediately, and $1,000 towards his costs, and his pay for 13 November 1991. But if he were given all that, he could still forfeit his claim for the past, and the car for the future, by Condor sacking him by notice on December 8th or thereafter. Clause 4 was, in my judgment, directed to coping with that aspect. Put another way, Molloy was exchanging the past for the future, but he wished to retain his right to reactivate his past claim if Condor, having paid him his $1,000 and November 30 pay, and delivered the vehicle, sacked him other than for misconduct shortly thereafter, and assumed the vehicle. This is why it was agreed that he lost the right to reinstate the claim for the loss, if he resigned. Once this is understood, then it is not difficult to **[12]** construe the terms of settlement. The parties only found it necessary to provide expressly for reinstatement and trial of the past damages issue in the case of sacking because it was clear to them both that if Condor did not perform the first three conditions by December 7th, the action would be brought back on. It is impossible to conclude that Molloy or Condor intended that Molloy's claims for past loss would have to be sued for, afresh, having regard to the mutual knowledge of Condor's track record in that respect.

It is to be noted that, although no counsel addressed me on it, that the terms of settlement do not provide expressly for any mutual release or releases in the future, or that Molloy release Condor from the claim at all. Since the proceeding was merely, in effect, out of the list, (see *McGowan*) unless the plaintiff's right had been extinguished by the terms, then in my view the proceeding could be reinstated and heard. If it is to be implied that the plaintiff's rights had been so extinguished or released, then in my judgment there should also be implied a condition that the rights should not be extinguished and were not intended to be extinguished unless Condor performed the acts specified in paragraphs 1, 2, and 3. According to the terms, other than mutual

confidentiality of them, there were no obligations on Molloy. They were all on Condor. Accordingly, I conclude that any implied release by the plaintiff/respondent of the defendant/appellant was only to become effective upon the defendant/appellant performing the described acts. Discharge of the defendant/appellant was subject to an **[13]** executory obligation which it did not perform within the time stipulated, or at all. The original proceeding therefore remained on foot, and was properly reinstated. It is to be noted in *Fraser*, (404), Murphy J addressed a similar aspect. No other matter was argued before me, as to the proceeding. The appeal is therefore dismissed and the order nisi discharged. (Discussion ensued as to costs).

Mr Panna has made application for costs on a solicitor/client basis, urging that the Court should, as it were, mark its disapproval of the conduct of Condor, referring to the delays which have occurred, including the delays in the provision of the vehicle; so much so that his client had to take the proceeding. He has referred to the fact that no evidence was called to the contrary of the plaintiff's case in the lower Court. However, those matters seem to me to have been matters that might have been taken into account by the Magistrate in determining whether or not he would order, or might order, solicitor/client costs in the lower Court. I am unaware whether any application was made, but if it was made it did not succeed, the Magistrate ordering costs on the ordinary basis. The application of Mr Panna was, of course, confined to the costs of the appeal, but it would seem to me not an appropriate case to take into account events which had occurred at an earlier time. Whilst it is true that the Master refused to grant an appeal so that the matter had to be taken on appeal to a Judge of this Court, that does not, in my view, change the nature of the dispute here. It is apparent to me that, notwithstanding the pleadings, the facts essentially **[14]** have been not in dispute throughout. The issue has been a question of the construction of the agreement, in association with the consent order made by the Court.

Notwithstanding the conclusion which I reach, with the benefit of extended argument, I am satisfied the point was at all times arguable. If a particular view of the circumstances had been taken, there was ample authority, in terms of the law, that supported arguments of the appellant that it was entitled to succeed. Accordingly, I do not, having regard to the whole of the circumstances, regard it as an appropriate case in which to order solicitor/client costs. Mr Turley has made application for a stay of one month of the operation of the order from the time of the dismissal of this appeal; in effect, merely attaching the delay or the time that the Magistrate had attached in disposition of the matter to final disposition of the matter. However, it seems to me there has been an ample period, as it were, to prepare for the result that might occur here, and I don't propose to grant any stay.

MR PANNA: If Your Honour pleases.

APPEARANCES: For the appellant Condor Enginering: Mr I Turley, counsel. John X Smith, solicitor. For the respondent Molloy: Mr A Panna, counsel. Swersky McPhee & Velos, solicitors.
