

29/06; [2006] VSC 305

SUPREME COURT OF VICTORIA

QUIROGA v CREDIT CORP SERVICES PTY LTD

Hansen J

28 July, 17 August 2006

CIVIL PROCEEDINGS – CREDIT CARD DEBT – ASSIGNED BY BANK TO A DEBT COLLECTOR – DEBT SALE AGREEMENT BETWEEN BANK AND DEBT COLLECTOR - REFERENCE IN AGREEMENT TO DEBTS ASSIGNED AS SPECIFIED IN ANNEXURE A – NOTICE OF ASSIGNMENT SENT TO DEBTOR – CLAIM FOR BALANCE DUE – EVIDENCE GIVEN BY DEBT COLLECTOR – ANNEXURE A NOT PRODUCED – COMPUTER PRINT-OUT OF DEBTS RELATED TO AGREEMENT – PRINT-OUT NOT PART OF THE AGREEMENT – FINDING BY MAGISTRATE THAT BANK HAD ASSIGNED DEBTS TO THE DEBT COLLECTOR NOTWITHSTANDING THE ABSENCE OF ANNEXURE A – WHETHER MAGISTRATE IN ERROR.

Q.'s application for a credit card was approved a bank. When Q. failed to pay debts on his credit card, the bank assigned the debt to CCS. A Debt Sale Agreement was made between the bank and CCS and the Agreement referred to the debts assigned as those specified in Annexure A. Also, a Notice of Assignment of Debt was sent to Q. When action was taken to recover the debt, the Annexure A was not produced to the court but a computer print-out of debts relating to the Agreement included the amount owed by Q. at the time of the assignment. The question for the magistrate was whether he could be satisfied on the basis of all of the evidence that CCS was the purchaser and assignee of the debt owed by Q. to the bank. Notwithstanding the unexplained absence of the annexure, the magistrate was satisfied that the bank had assigned Q.'s debt to the CCS and made an order on the amount claimed. Upon appeal—

HELD: Appeal dismissed.

Taking into account the cautionary statements in the authorities as to the need for cogent evidence of a document that affects a right to property, the requirement of writing for a legal assignment in s134 of the *Property Law Act 1958*, and of the absence of Annexure A and the failure to explain that absence, it was open to the Magistrate to be satisfied that the bank had assigned Q.'s debt to CCS. The evidence had travelled beyond the stage of production of the Debt Sale Agreement and the computer printout and extended to all of the evidence including that pertaining to sending the notice of the assignment to the appellant. The notice was signed by the bank and CCS and identified as having assigned any debt owed by Q. to the bank. Standing back and considering the evidence overall, and noting the absence of Annexure A, there was yet sufficient, directly and inferentially, to found the conclusion on the balance of probabilities at which the Magistrate arrived.

HANSEN J:

1. This is an appeal under s109 of the *Magistrates' Court Act 1989* from orders made by the Magistrates' Court at Melbourne on 21 October 2005 whereby the appellant/defendant was ordered to pay the respondent/plaintiff the amount claimed of \$10,728.94, interest in the sum of \$1,801.80 and costs to be assessed in default of agreement.

2. As stated in particulars to the Complaint the appellant was sued on the following basis:

(a) On 3 August 1999 Westpac Banking Corporation Ltd ("Westpac") approved the appellant's application for credit by the issue of a Visa card. By his defence the appellant said that he admitted the allegations although he could not recall the date of the approval. '

(b) On 8 July 2004 Westpac assigned the debt to the respondent notice whereof was forwarded to the appellant on 4 March 2004. The defence denied these allegations, specifically denying receipt of notice of the assignment, and that the assignment was valid at law.

(c) The amount claimed was owed as the balance due pursuant to the Visa card following default on 15 November 2002, and including interest at 16.95 percent per annum. The appellant denied being indebted to the respondent. In particulars to that denial it was said, in summary:

(i) the alleged debt was extinguished by an agreement made by his solicitors with Westpac in September 2002 by which Westpac agreed to take a lesser sum in satisfaction of the amount

allegedly owing, and pursuant to which the agreed sum was sent to Westpac.

(ii) the alleged assignment was invalid as it constituted a breach of the terms of the appellant's agreement with Westpac which included Westpac's privacy code which forbade disclosure of the appellant's personal information to the respondent.

3. The case was heard on 25 July 2005. I have been provided with a transcript of the hearing. The respondent called one witness, Leslie Joanne Cass, a senior legal clerk in the employ of the respondent. In the course of her evidence three documents were produced, a Debt Sale Agreement between Westpac and the respondent dated 8 July 2003, a proforma Notice of Assignment of Debt addressed to the appellant, signed on behalf of Westpac and the respondent and dated 23 June 2005, and a computer printout of debts concerned with the Debt Sale Agreement including the amount owed by the appellant at the time of the assignment. The first two documents were marked as Exhibits 1 and 2 respectively. The third document was not so marked but it was received and taken into account by the Magistrate and is to be treated as an exhibit in the case.

4. Following completion of the evidence of Ms Cass counsel for the respondent closed his case. Counsel for the appellant elected to call no evidence, and submitted that for several reasons the respondent had not established its case. The first reason was that the Debt Sale Agreement, which constituted the assignment, contained no reference to the appellant. The Agreement referred to the debts assigned as being those specified in Annexure A, but the Agreement produced in evidence did not include that annexure. Nor had it been discovered and no evidence had been given as to its whereabouts. Hence the respondent had failed to establish an assignment to it of any debt owed by the appellant to Westpac. Further, the computer printout was not part of the Agreement.

5. Counsel for the appellant then went to another point which relied on the Victorian Consumer Credit legislation. It is not necessary to explain the contention as no point concerning it is raised on the appeal.

6. After hearing counsel for the respondent the Magistrate directed the provision of sequential written submissions, gave liberty to apply to list the matter for further mention and reserved the costs of the proceeding. In doing so the Magistrate said that the appellant "no longer or can rely upon accord and satisfaction, nor the *Privacy Act* nor upon the sending of the notice of assignment". He had earlier observed that "the *Privacy Act* provisions are not going to be relied upon nor is the failure to send notice of assignment". It is convenient to add that before me counsel for the appellant said that the existence of the credit card facility with Westpac, and the amount of the debt, were not in issue before the Magistrate.

7. Pursuant to the directions the parties provided written submissions.

8. On 21 October 2005 the Magistrate published reasons for judgment and made the orders referred to above. In his reasons, shortly stated, he concluded that the respondent had established the assignment of the appellant's debt and that the respondent sent notice of the assignment to the appellant. He then went on to deal with other grounds of defence as to which it is unnecessary to make reference as no question concerning them arises on this appeal. It is sufficient to note that he concluded in favour of the respondent.

9. The notice of appeal filed by the appellant sought the setting aside of the orders on a number of grounds. In an outline of argument filed on 26 July 2006, the day before the scheduled hearing of the appeal, the appellant limited his appeal to ground one in the notice of appeal. That ground concerned the finding of the Magistrate that the respondent had established the assignment of the appellant's debt, which finding was attacked on the basis that the original assignment including the annexure, or a copy thereof, had not been produced and evidence had not been given, whether under s53B of the *Evidence Act* 1958 or otherwise, which established the assignment.

10. In light of the abandonment of all but ground one it is not necessary to refer to the other grounds set out in the notice of appeal. It should be noted however that in presenting his argument counsel for the appellant relied on an additional ground, which might be comprehended by ground three, that it was not open to the Magistrate to find that notice of the assignment had been sent to the appellant. I heard the argument on the point but, having done so and considered the evidence,

the point must fail for the simple reason that the finding was open on the evidence. It is important in this respect to bear in mind the approach that is taken to a finding of fact on an appeal from the Magistrates' Court on a question of law. On such an appeal the question is whether there was any evidence upon which the Magistrate could have made the finding or decision in question^[1]. In my view there was such evidence, to which I make further reference below in the course of discussing the evidence.

11. That leaves for consideration the sole ground that the respondent had not established the assignment of the appellant's debt to the respondent. More specifically, it was submitted that there was no evidence on which the Magistrate could have been satisfied on the balance of probabilities of the alleged assignment. On the other hand, counsel for the respondent submitted that there was uncontradicted evidence of the assignment of the appellant's debt.

12. These submissions require reference to the evidence.

13. Ms Cass first explained that the respondent operated as a debt collector and credit provider and purchased debts from banks including Westpac and other financial institutions. She had been employed by the respondent for three months. Employees "there when all this happened" had left. She obtained her information from the normal business records. She said that the respondent purchased some book debts from Westpac on 8 July 2003 and produced the Debt Sale Agreement. Counsel for the appellant pointed out that the document was incomplete as the annexure was not included, to which counsel for the respondent said that that was all he had in respect of that document. Ms Cass then agreed with counsel for the respondent that she had made "inquiries in respect of these matters and this matter specifically" and produced "a computer printout of a number of debts that are concerned [with] this particular agreement including the defendant". The list showed the amount of \$10,426.26 as outstanding at the time of the deed of assignment. On the printout then being tendered counsel for the appellant sought clarification as to the basis of the tender as the Agreement tendered referred to Annexure A but not to some other computer printout. He also called for production of Annexure A. Ms Cass said that she did not have "the complete full schedule".

14. The evidence in chief continued with Ms Cass explaining how matters were handled by reference to the respondent's file which she had. She referred to an Entry List on the file and to communications with the appellant commencing on 8 March 2004 in which the appellant referred to a final deed with Westpac and having paid the account. In the course of this evidence counsel for the appellant stated that there was a settlement. Then, Ms Cass referred to notice of the assignment having been sent to the appellant at several addresses and on different dates. The respondent did not keep a copy of each notice of assignment sent to debtors. She produced a proforma of the notices of assignment, which became Exhibit 2, which, in its terms, stated that on 8 July 2003 Westpac assigned to the respondent its interest in any amount owing or to become owing by the appellant to Westpac in connection with his account, and stating that any further communication should be sent to the respondent.

15. Ms Cass was cross-examined in the course of which she said that a notice of assignment was sent to the appellant on 4 March 2004. Further on she said that she believed that there was a person at the respondent who was responsible for ensuring compliance with the agreement between Westpac and the respondent and that that person read the agreement and made sure it was complied with. She later denied, based on the file, that notice of assignment was not sent.

16. I turn then to the reasons of the Magistrate. Insofar as they concern the ground taken on appeal, and the issue of sending the notice of assignment, the reasons were short, and may be summarised as follows. He first referred to the evidence being that of Ms Cass and documents concerning the Debt Sale Agreement and a document (the computer printout) "tendered as being a schedule of the credit contracts covered by the sale agreement". The evidence of Ms Cass "was that the plaintiff company had bought the debts including that of the defendant in July 2003 and that subsequent notices of assignment of the debt had been sent to the defendant". He then said that insofar as it was an issue he had determined that the respondent had in fact sent the required notices of assignment.

17. The Magistrate then observed that save for a minor qualification as to the date on which

his credit card application was approved, the appellant admitted the existence of the credit card contract with Westpac.

18. The Magistrate then turned to deal with the issues, commencing with the appellant's submission that there was insufficient admissible evidence to establish that the respondent was an assignee of the appellant's debt to Westpac. As to this, he said:

"Insofar as the tendering of the documentary evidence referred to above is concerned, submissions as to the tender of those documents was [sic] made in the course of hearing, the documents were admitted. I do not propose to revisit that decision. It must be said that the documentary chain, if it can be so dignified, is hardly comprehensive given that no evidence was received from Westpac, and the plaintiff's witness was essentially referring to matters appearing on a file of business papers held by the plaintiff and as to which she had limited personal knowledge and involvement. Be that as it may, the only question I have to consider is whether I can be satisfied on the basis of all of the evidence that the plaintiff was the purchaser and assignee of a debt owed by the defendant to the Westpac Bank. In this respect I note that the Notice of Assignment was signed by Westpac. After some consideration I have reached the conclusion that I can be so satisfied."

19. The question is whether it was open to the Magistrate acting reasonably to make this finding.

20. In submitting that the finding was not thus open counsel for the appellant relied on the failure to produce the original or a copy of the Debt Sale Agreement with Annexure A attached or to give evidence explaining non-production. There was, for instance, no evidence of loss or destruction or any other reason explaining why such production was not made. Nor did Ms Cass give evidence of her "inquiries". It was submitted that the non-production of Annexure A, which was the document which identified the debts assigned, meant that the respondent had not established that the appellant's debt was one of those assigned. Of course secondary evidence of the fact could be given but not without clear and convincing proof of the existence of Annexure A and of its contents by a person able to give personal evidence thereof, as to which see *Maks v Maks*^[2] (secondary evidence of a written agreement constituting a declaration that the defendant held a house property as to one half for the plaintiff); *Mack v Lenton*^[3] (secondary evidence of a lost tenancy agreement), and *Masquerade Music Ltd v Springsteen*^[4] (proof of chain of title to copyrights). I have regard to the discussion in those cases of the approach to the admission of secondary evidence and the reasons for caution in accepting evidence of a document in its absence. This case does not call for elaboration on the matter.

21. Counsel for the appellant relied on the lack of personal knowledge of Ms Cass of Annexure A, and the failure of the respondent to call evidence from any person with personal knowledge of the assignment or to explain why no such witness was called. In the absence of such evidence the respondent had relied on Ms Cass to give evidence from the file and produce documents including the computer printout and, on that basis, together with the admission of the credit card facility and the debt, to infer the assignment of the appellant's debt. It was submitted that the evidence of Ms Cass did not constitute secondary evidence of the contents of Annexure A. Thus there was no secondary evidence of that annexure. Further, the existence of the assignment could not be inferred from the proforma notice of assignment. The result was that the respondent had not proved the assignment of the appellant's debt. It followed that there was no evidentiary basis for the finding of the learned Magistrate that the debt had been assigned.

22. It is evident from the reasons of the learned Magistrate that he was well aware of, and bore in mind, the limited nature of the evidence, and that he arrived at his conclusion in that light.

23. Further, the Magistrate correctly identified the question as one that turned on the sufficiency of admissible evidence. It was not submitted that there was a lack of *bona fides* in the evidence. Nor was it submitted that Ms Cass was an unreliable witness whose evidence should for that reason not be accepted. Rather, the point taken in the course of the giving of the evidence was that Annexure A was not produced notwithstanding which, as the Magistrate noted, he admitted the documents referred to above.

24. In the passage quoted above the Magistrate posed as the question for consideration whether he could be satisfied on the basis of all of the evidence that the respondent was the purchaser and

assignee of the debt owed by the appellant to Westpac. As the case was left for his consideration, that correctly stated the issue.

25. I note that in the written submission provided to the Magistrate by counsel for the appellant it was submitted that the Debt Sale Agreement was not admissible as in the absence of Annexure A it was not the complete agreement. At the time of the trial however all that counsel for the appellant said was that the document was not complete because the annexure was not attached and counsel asked if the annexure was being tendered. To this counsel for the respondent indicated that he did not have the annexure and moved to the computer printout. That is all that was said. In that limited way the absence of the annexure was explained (although it was not explained why counsel did not have it) and the evidence moved on. The document was admitted. The objection to admissibility subsequently made, and made to me, was not made in terms to the Magistrate at that point. In my view the document could be admitted notwithstanding the unexplained absence of the annexure. How far it went to establishing the case was another matter. The tender occurred at a very early stage in the hearing as the case was beginning to unfold and at a time when the Magistrate would not have known what further evidence was to come on the matter of establishing the assignment of the appellant's debt.

26. The next step in the evidence was the evidence as to and production of the computer printout. This was produced in response to a question from counsel for the respondent. This was the question which referred to Ms Cass having made inquiries in respect of the matter and to the computer printout she produced including the appellant's debt concerned with "this particular agreement". No objection was taken to the question and answer. Ms Cass went on to identify the amount owed by the appellant in July 2003. It was then that the point was taken that the computer printout was not a document referred to in the Debt Sale Agreement. That was correct, and the contrary was not suggested by counsel for the respondent. Nevertheless the Magistrate described Ms Cass's evidence as being that the respondent "had bought the debts including that of the defendant in July 2003 ...". In so stating the evidence it is clear that he accepted it as amounting to that stated.

27. I have considered the authorities to which counsel for the appellant referred. I take account of the cautionary statements therein as to the need for cogent evidence of a document that affects a right to property. I take account also of the requirement of writing for a legal assignment in s 134 of the *Property Law Act* 1958, and of the absence of Annexure A and the failure to explain that absence. Taking account of all such matters, and all that counsel submitted, I am nevertheless of the view that it was open to the Magistrate to be satisfied that Westpac had assigned the appellant's debt to the respondent.

28. In so concluding the Magistrate said that he was satisfied on the balance of all of the evidence. In my view that conclusion was open. By the time it concluded the evidence had travelled beyond the stage of production of the Debt Sale Agreement and the computer printout and extended to all of the evidence including that pertaining to sending notice of the assignment to the appellant. Exhibit 2 showed that the notice was signed by Westpac and the respondent and identified as having assigned any debt owed by the appellant to Westpac. There was, as I have observed, no attack on the *bona fides* of the evidence or cogent reason to doubt its honesty. Standing back and considering the evidence overall, and noting the absence of Annexure A, there was yet sufficient in my view, directly and inferentially, to found the conclusion on the balance of probabilities at which the Magistrate arrived. Or, to put it another way, it cannot be said that the contrary conclusion was the only conclusion open to be made by the Magistrate.

29. For these reasons the appeal must be dismissed with costs including reserved costs.

30. I add only that the result in this case should not be taken as indicating that a party seeking to establish a case in which its title to sue, or the right to be enforced, is found in a document, need not produce that document or, in its explained absence, a copy thereof in establishing its claim. Of course all cases depend on their own facts and circumstances and must be determined on the evidence. The present case is no more than a decision on its own particular facts and circumstances.

^[1] See my judgment in *Harris v QBE Workers' Compensation (Vic) Limited*, 11 October 1994, unreported,

BC9406247 at pp6-7; and *Civil Procedure Victoria*, Williams, Vol 1, para 58.06.45.

^[2] (1986) 6 NSWLR 34.

^[3] (1993) 32 NSWLR 259.

^[4] [2001] EWCA Civ 318; (2001) 51 IPR 650; [2001] EMLR 654; [2001] All ER (D) 101; [2001] Emp LR 405; [2001] IRLR 269; [2001] ICR 819.

APPEARANCES: For the appellant Quiroga: Mr CB Thomson, counsel. Challenge Legal, solicitors. For the respondent Credit Corp Services Pty Ltd: Mr SGR Wilmoth, counsel. Anderson Rice, solicitors.
