39/93

SUPREME COURT OF VICTORIA

GOLD MEDAL DRINKS PTY LTD v OUGH

Harper J

8, 11 October, 1993

CONTRACT – TERMS OF AGREEMENT – DIFFICULT TO CONSTRUE – WHETHER COURT SHOULD UPHOLD "NO CASE" SUBMISSION THAT WHOLE AGREEMENT VOID FOR UNCERTAINTY – RESTRAINT OF TRADE – CLAUSE PREVENTING SALE OF ANY OTHER BRAND – WHETHER IN RESTRAINT OF TRADE – WHETHER VOID.

1. Where over a period of time parties agreed to supply soft drinks for sale to customers, this envisaged a continuing relationship whereby rights and obligations arose which were enforceable in a court of law. Notwithstanding that the written agreement may have been difficult to construe, the magistrate was in error in upholding a 'no case' submission and dismissing the claim on the basis that the agreement was so vague and uncertain as to be void.

***Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1967) 118 CLR 429; 41 ALJR 348, applied.**

2. Where a clause of the agreement provided that one party was forever restrained from selling any other brand of soft drink, the clause was void as against public policy because it constituted a restraint of trade.

***Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1893] 1 Ch 630; [1894] LR AC 535, referred to.**

HARPER J: [1] On 14 February 1990 the parties to the proceeding before me signed a document headed "Sales Territory Agreement". The appellant was then represented by a Mr Allan John Thomas, its manager and the respondents signed in person. The parties thereafter sold and purchased soft drinks manufactured by the appellant. The arrangement in general terms was that the respondents would sell the appellant's product in an area described in the document to which I have referred as "Bellarine Peninsula (Portarlington - Lorne)". The soft drinks thus sold were to be and were in fact purchased by the respondents from the appellant and thereafter sold to individual customers.

The respondents' income was derived from the moneys received from the customers on the ultimate sale of the product but, of course, the respondents initially paid the appellant for that product at the then current prices charged by the appellant to the respondents. Pursuant to the relationship thus created the parties traded for a period of, I think, some two years. The arrangement came to an end in effect when the respondents decided that they would no longer purchase the appellant's product. The appellant, being aggrieved by this circumstance, instituted proceedings in the Magistrates' Court at Geelong which in due course were heard before a Magistrate in March this year. On 5 May 1993 His Worship delivered judgment. Pursuant to that judgment the orders of the court as set out in a certified extract of the Registrar of the Magistrates' Court at Geelong were as follows:

> **[2]** "Having heard evidence on behalf of the plaintiff and upon a "no case" submission the court finds that the agreement as alleged by the plaintiff dated 14 February 1990 between the plaintiff and the defendant is null and void or alternatively is unenforceable and therefore the claim is dismissed. The plaintiff to pay the defendant $2,879 costs. Counterclaim otherwise adjourned *sine die*."

His Worship then gave liberty to apply upon seven days notice to the court and to the opposite party. The appellant appeals from these orders. The matter came before Master Wheeler on 3 June 1993 and the Master formulated a question of law to be considered by the court on the appeal. That question is in the following terms:

> "For the purpose of a "no case submission" was it open to the Magistrate to find

(a) there was no enforceable agreement between the parties as alleged in paragraph 2 of the amended statement of claim;

(b) there was no agreement between the parties."

The reference to paragraph 2 of the amended statement of claim is a reference to a statement of claim dated 11 February 1993 and filed in the Magistrates' Court at Geelong. By paragraph 2 of that document the appellant alleges that: "By a contract made between the plaintiff" – I interpolate to say that is a reference to the appellant - "And the defendants" – I interpolate again to say that is a reference to the respondents -

"on or about 14 February 1990 ("the distribution agreement") the defendants agreed to act as the plaintiff's exclusive distribution agents of the plaintiff's soft **[3]** drinks ("the products") in the Bellarine Peninsula area in Victoria ("the territory")."

There are then set out under that paragraph particulars of the agreement as alleged. The argument before His worship following the conclusion of the plaintiff's case was concentrated upon a submission put by Mr De Vries on behalf of the respondent there was no case for the respondents to answer. As I understand his submission, Mr De Vries submitted that the document of 14 February 1990 was so vague and uncertain as to be void. His Worship accepted that argument and upon that basis held that there was indeed no case to answer and further, that there was no contractual relationship between the parties, and that the orders to which I have referred should accordingly be made.

In my opinion the approach adopted by His Worship in considering the submissions of the respondents was incorrect. This follows, it seems to me, because on any view of the evidence there was an agreement between the parties pursuant to which soft drink was bought and sold for the purposes not of consumption by the respondents but of sale to the respondents' customers. It was an agreement which envisaged a continued relationship albeit one that would not necessarily last for any particular period.

It necessarily follows that rights and obligations arose pursuant to the agreement. Those rights and obligations are rights and obligations which the parties effectively have a corresponding right to enforce in a court of law; and it is the court's duty **[4]** when a party seeks the enforcement of rights and obligations to enforce them in accordance with law. It is not in these such circumstances open to a court to take the view that because an agreement, from which the rights and obligations in question are said to arise, is at least in part in written form, and because the relevant document or documents are difficult to construe, the entire agreement is void. Any such finding would fly in the face of the relationship between the parties and would, in my opinion, properly deny the parties the right to which I have referred, namely the right to enforce such rights and obligations as are properly found to reside in the agreement.

In these circumstances it seems to me that the Magistrate was wrong to accept the "no case" submission. There was, clearly, an agreement between the parties. The issue was whether the respondents were in breach of any of its terms. If they were, it was then for the Magistrate to decide to what extent the appellant was entitled to relief. An antecedent question might well have been whether or not any particular term was void for uncertainty. But the entire agreement could not be so void since it regulated the relationship between the parties for the whole period of that relationship. If the Magistrate was properly satisfied both that a term of the agreement was sufficiently certain to be enforceable and that that term had been breached, then it was the duty of the Magistrate to consider whether any relief should be granted to the appellant. In this case however His Worship, in my opinion, failed to approach the task before him in the appropriate **(5)** manner. As a result the judgment of His Worship and the orders which follow that judgment were not properly based and the proceedings should, in my opinion be referred back to His Worship for further consideration.

I have considered whether I ought to myself examine the appellant's allegations of breach and determine for myself whether those allegations can be made out on the pleadings and on the evidence which was before His Worship. In my view I ought not undertake that task. It is clear, as I understand His Worship's reasons for judgment, that His Worship did not consider individual clauses or individual terms of the agreement with a view to ascertaining whether or not those

terms or provisions were attended with such certainty as would render them enforceable; nor did His Worship consider whether, if the terms upon which the appellant relied were enforceable, there had been a breach of them. These being matters peculiarly within the jurisdiction of the Magistrates' Court they ought not be determined by the court by way of appeal, particularly given that any such determination would, in effect, be through the back door and before the court with primary jurisdiction had considered the issue thus raised.

In argument before me Mr Searle for the appellant relied principally upon a decision of the High Court in *Upper Hunter County District Council v Australian Chilling and Freezing Co. Ltd* [1968] HCA 8; (1967) 118 CLR 429; 41 ALJR 348. In his judgment in that case the Sir Garfield Barwick CJ said at pages 436-437:

> "But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void **[6]** for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the court, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connexion in *Hillas & Co. Ltd. v Arcos Ltd* [1932] UKHL 2; [1932] All ER 494; (1932) 147 LT 503 at 512; (1932) 38 Com Cas 23; (1932) 43 Lloyds Rep 359 ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell & Nephew Ltd v Ouston* (1941) AC 251; (1940) 164 LT 379 is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved."

I accept, with respect that passage as being an accurate formulation of the law applicable when the court has before it the question of whether or not a contract is void for uncertainty. The same principles apply (in the slightly different circumstances which then obtain) when the question is not whether the entire contract is void for uncertainty but whether a term of the contract is so uncertain as to be unenforceable. Of course, if a particular clause is essential to the operation of the contract as a whole and if that clause is one to which a meaning cannot be given then the entire contract will fall. Here however the terms upon which as pleaded in the statement of claim the appellant seeks to rely are not terms which, in my opinion, go to the heart of the contract and which if so uncertain to be meaningless cannot be severed from it. I do not by anything I say **[7]** in these reasons for judgment wish to preclude either party to this proceeding from arguing before His Worship that individual terms upon which the appellant relies for its claim for relief are or are not so uncertain as to be meaningless. It may well be that after hearing argument His Worship will decide that one or more of the terms upon which the appellant relies cannot be enforced because no meaning can be attached to that. The point here however is that His Worship has not yet given the individual terms of the agreement the consideration which, in my opinion, he was bound to give.

I should however deal with clause 9 of the agreement of 14 February. That clause provides that:

> "The contract also includes that after the .... has been sold that he/she or any of their agents will not sell another brand of soft drink to the customers in this territory."

It was submitted before His Worship, as it was submitted before me, that this clause is void as against public policy because it constitutes a restraint of trade. In my opinion this submission is one which ought to be upheld. The general rule applicable here is that a contract in restraint of trade is void. The principle can indeed be rebutted because the restraint may be justified; but to quote the words of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1893] 1 Ch 630; [1894] LR AC 535 at 565:

> "Restraints of trade and interferences with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interest of the public, so framed and so **[8]** guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

If clause 9 of the agreement were given its full operation it would prevent the respondents from selling any other brand of soft drink to any of its customers forever more. In my opinion a restraint of this kind cannot be justified as affording no more than adequate protection to the party in whose favour it is imposed. It may well be that some restraint upon the respondents' liberty to trade by selling soft drink to its former customers could be justified. The restraint imposed here, being unlimited in time, cannot.

Accordingly it seems to me that clause 9 is not enforceable and I so rule. I do this on the basis that the determination of this question falls within the scope of the questions asked of me by the orders of Master Wheeler and in order to save time and expense when the matter is remitted to the Magistrates' Court. For these reasons it seems to me that the question of law should be answered as follows:

> (a) There was an enforceable agreement between the parties as alleged in the amended statement of claim. I refrain from a direct reference to paragraph 2 because I am not confident that paragraph 2 sets out the agreements as proved before His Worship; and it may be that the statement of claim requires further attention. I make no ruling about this.
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> The next part of the question should be answered:
> (b) There was an agreement between the parties. **[9]**

MR DE VRIES: Would Your Honour qualify that in the same way that the Master did and say for the purposes of the no case submission, because part of the defendants case may in fact be enforceable for other reasons that it was obtained on the basis of misrepresentation.

HIS HONOUR: Yes. The question I was asked is preceded by the words "for the purpose of a no case submission" and the parts should be qualified.

MR SEARLE: I ask for costs.

MR DE VRIES: In my submission given what Your Honour has stated in that part of the agreement both parties have been successful in part and that Your Honour ought to make no order as to costs.

HIS HONOUR: In my opinion the appellant has been substantially successful in this application and it ought to get its costs of the appeal. Do you seek a certificate? I will order that the respondents pay the appellant's costs of the appeal but I certify those costs pursuant to section 13 of the *Appeal Costs Act*.

APPEARANCES: For the appellant Gold Medal Drinks: Mr PK Searle, counsel. Winneke Sinclair, solicitors. For the respondents Ough: Mr GA De Vries, counsel. JA Fillmore, solicitor.
