40/04; [2004] VSC 489

SUPREME COURT OF VICTORIA

TUCKWELL v EGG MARKETING PTY LTD & ORS

Kaye J

23, 29 November 2004

CIVIL PROCEEDINGS – GOODS SOLD AND DELIVERED – PRINCIPAL AND AGENT – FINDING BY MAGISTRATE THAT AGENT OF UNDISCLOSED PRINCIPAL LIABLE – JUDGMENT GIVEN AGAINST AGENT WITH AN ORDER THAT PRINCIPALS INDEMNIFY THE AGENT – WHETHER MAGISTRATE IN ERROR.

1. An agent for an undisclosed principal may be sued on a contract which the agent has made with a third party. Further, the third party is entitled to claim on the contract against the undisclosed principal. However, once the third party has sued the undisclosed principal to judgment, the third party is not entitled to judgment against the agent, or vice versa. The third party is entitled to proceed against both the agent and the undisclosed principal. However, judgment obtained against one will be a bar against the subsequent entry of judgment against the other. Further, and significantly, the liability of the agent and the undisclosed principal is alternative. For that reason, judgment may be entered only against the undisclosed principal or the agent, but not against both.

2. At the conclusion of the proceeding, the magistrate in the present case determined that the first defendant was an agent for undisclosed principals, namely the second and third defendants. In accordance with the principles summarised above, judgment could only be regularly entered either against the first defendant, or alternatively against the second and third defendants, but not against both. The liability of the first defendant was alternative to the liability found against the second and third defendants. Thus those principles precluded judgment being entered against all three defendants. It follows that the judgment which was entered at that stage against all three defendants was irregular and must be set aside.

KAYE J:

1. This is an appeal, pursuant to s109(1) of the *Magistrates' Court Act* 1989, from an order of the Magistrates' Court at Melbourne of 27 August 2004. That order was made in civil proceedings instituted by Egg Marketing Australia Pty Ltd, which is the first respondent to this appeal. In those proceedings the plaintiff claimed $15,472.93 in respect of a debt which it alleged was owed to it by the appellant David Tuckwell, who was first defendant in the proceedings, and by Darryl Lee Tuckwell and Gail Evelyn Tuckwell, who were respectively the second and third defendants in the proceedings. The magistrate by his order gave judgment on the claim against all three defendants together with interest in the sum of $1,930.79. The magistrate ordered that the plaintiff's costs be paid by the second and third defendants, and that the second and third defendants indemnify the first defendant in respect of the judgment sum and interest. The appeal was brought on behalf of the first defendant, David Tuckwell.

2. The proceedings in the Magistrates' Court were originally issued against the appellant alone. The plaintiff claimed the debt as goods sold and delivered by it between March and May 2003. After the receipt of answers to interrogatories, the proceedings were then amended, and the second and third defendants were added as parties. The amended particulars of claim recited that the three defendants "carried on business at all material times under the unregistered names of 'Tuckwell Eggs' and 'DL and GE Tuckwell'." The particulars then alleged that the three defendants were indebted to the plaintiff in the amount claimed.

3. The proceedings came on for hearing on 27 August 2004. Both the appellant and the first respondent have filed affidavits in respect of this appeal. It is common ground between the parties that, in so far as there is any conflict between the two affidavits, I should rely on the affidavit in opposition sworn by Gregory Joseph Meese, who appeared as counsel on behalf of the first respondent. See *Buzatu v Vournazos*[1]. Although the proceedings were tape recorded, unfortunately it has not been possible to locate the tape.

4. The second and third defendants did not attend the hearing before the magistrate. At the commencement of the hearing, counsel for the plaintiffs sought an order from the magistrate in favour of the plaintiff against those two defendants. Mr Meese's affidavit then states:

> "5. The learned Magistrate found against the second and third respondents in the terms of the claim and proceeded to hear the first respondent's claim against the appellant."

5. The only witness called on behalf of the plaintiff was Mr Vince Catalfamo, one of its directors. Mr Catalfamo gave evidence that the first defendant, David Tuckwell, placed the relevant orders with him on behalf of the plaintiff and that the first defendant claimed that he was "the boss". Mr Catalfamo gave evidence as to payments made to the plaintiff for the goods which had been ordered by the first defendant, and he also gave evidence as to the amount of debt then owing. In cross-examination Mr Catalfamo denied that David Tuckwell had ever told him that he was "just the office boy" or "just assisting his son, the second defendant".

6. The first defendant gave evidence. He stated that he was a pensioner who was helping in the business conducted by his son and daughter-in-law. He stated that he received no pay for his work, and that he was not responsible for the money.

7. At the close of evidence the magistrate invited submissions from counsel for both parties. During those submissions the magistrate indicated that he did not consider that the appellant was the proprietor of the business, and he accepted the evidence that the appellant did not receive wages or a share of profits. The magistrate invited counsel for the plaintiff to make submissions on the possibility of the appellant being liable as an agent.

8. Counsel for the plaintiff then submitted that the appellant would be responsible to the plaintiff as he had contracted as agent for an undisclosed principal, and had taken no steps which a reasonable person would consider appropriate to identify that he was acting for a principal. The magistrate stated that he believed that a reasonable person in the position of the plaintiff would have believed that he was contracting with David Tuckwell in person.

9. After adjourning for a short time, the magistrate then returned and delivered his decision. He stated that it was an unusual case which would result in him making unusual orders. He held that the first defendant contracted with the plaintiff as agent for undisclosed principals and therefore would be liable to the plaintiff. He then ordered that the second and third defendants indemnify the first defendant. The magistrate fixed the judgment debt in the sum of $15,472.93 with interest in the sum of $1,930.79. After discussion the amount of the plaintiff's costs were fixed in the sum of $4,280.08. The magistrate held that the second and third defendants were liable to pay the plaintiff's costs.

10. By order made 23 September 2004 Master Wheeler, pursuant to Rule 58.09(1) of the then *Rules of the Supreme Court*, ordered that the question of law shown to be raised by the appeal was as follows:

> "Did the magistrate err in holding that the appellant was liable as principal as well as agent for undisclosed principals being DL and GE Tuckwell Eggs (the partnership of the second and third named defendants) to pay the first named respondent the vendor of the said goods?"

11. Before me Mr J. Lewis, who appeared for the appellant, based his submissions on the proposition that the liability of the appellant, as agent for an undisclosed principal, was alternative to the liability of the second and third respondents as the undisclosed principals. Based on that proposition Mr Lewis made the following two alternative submissions:

> (1) First he submitted that, at the commencement of the proceeding, the magistrate gave judgment in favour of the first respondent against the second and third respondents. That judgment precluded the magistrate from then giving judgment against the first respondent.
>
> (2) Alternatively, if in fact judgment was not given against the second and third respondents until the conclusion of the hearing of the proceeding against the appellant, nevertheless the judgment was irregular, in that it was given against the second and third respondents as principals, and against the appellant as agent for an undisclosed principal.

12. In response, Ms R. Annesley, who appeared on behalf of the first respondent, made the following submissions:

> (1) The submissions made by the appellant were different to, and did not address, the question of law identified by the Master in his order of 23 September 2004.
>
> (2) In any event the appellant seeks to rely on appeal on a point which was not raised on his behalf before the magistrate.
>
> (3) Although the magistrate at the commencement of the hearing made a finding in favour of the first respondent against the second and third respondents, he did not there and then enter judgment against the second and third respondents. Rather, the magistrate entered judgment against the appellant, the second and third respondents at the same time at the conclusion of the hearing. If that judgment is irregular, it should only be set aside as against the second and third respondents. Alternatively, if the judgment is set aside, I should remit it to the magistrate on the basis of the findings already made by him, and for the sole purpose of entitling the first respondent to make an election, before the magistrate, whether to seek judgment against the appellant on the one hand, or, alternatively, against the second and third respondents on the other hand.

13. There is no doubt that the question raised by the appellant before me is different to the question of law identified by the Master in his order of 23 September 2004. It is now well established that the rules still empower the court to direct, in an appropriate case, that the appeal be decided upon the questions of law identified and canvassed in argument, where this is necessary " ... to achieve the effective, complete and economic determination of the appeal and is otherwise just and convenient". See *The DPP v Hinch and anor* (unreported, Mandie J, 5 August 1994; BC 9400955 at 21); *Pettet v Readiskill Pty Ltd*[2]; *Popovski v Ericsson Australia Pty Ltd*[3]; *Davison v Portside United Pty Ltd*[4]; *Siguenza v Secretary to the Department of Infrastructure*[5]. On the other hand, as pointed out by Ashley J in *Mond v Lipshut*[6], caution should be exercised in adopting that procedure, otherwise the intention of s109(2)(a) of the *Magistrates' Court Act* 1989 would be subverted.

14. With some reluctance I have decided that the appellant ought to be permitted to make the submissions which I have summarised above, notwithstanding that they are not comprehended within the question of law identified by the Master. The critical issue before the magistrate concerned the legal status of the appellant when he ordered goods from the first respondent. The question before me concerns the legal consequence of the finding by the magistrate that the appellant so ordered the goods in his capacity as an agent for an undisclosed principal. The appellant does not seek to impugn that finding. Rather, what is at issue is the legal consequence of it. If the appellant's submissions are correct, then the judgment of the magistrate is contrary to law. Both in the written submissions and the oral submissions before me, the first respondent was clearly cognisant of the issue now agitated by the appellant, and was not taken by surprise by it. In those circumstances I consider that it is just and convenient that the appellant be permitted to make the submissions, which he did, before me, and in particular to raise the question whether the magistrate erred in holding that the appellant was jointly liable with the second and third respondents in circumstances where the magistrate had held that the second and third respondents were liable for the debt as principals, and that the appellant was liable as the agent for those undisclosed principals.

15. The second point raised by the first respondent also has some force to it. In the proceedings before the magistrate the appellant did not contend that, given the magistrate's finding that he was the agent for an undisclosed principal, the magistrate ought only to enter judgment either against the principal or against the agent, but not against both. Thus the point which is now taken on appeal was not raised by the appellant before the magistrate. Generally, a party is bound by his conduct in a case. In *University of Wollongong and ors v Metwally (No. 2)*[7], the High Court stated that only in "the most exceptional circumstances" should a party be entitled to raise a new argument on appeal which, whether deliberately or by inadvertence, the party had failed to put during the hearing. The principle, that a party is bound by his or her conduct at trial, is enforced with particular rigour, in a case where, if the point had been taken at trial, the other party might have taken a different course such as by introducing further evidence, by cross-examination, or by submission; see *Waterboard v Moustakas*[8]; *Whisprun Pty Ltd v Dixon*[9]; *Martin v Hendersons Industries Pty Ltd*[10]. In the present case it is not suggested that the first respondent would have led any different evidence, or would have made any different submission, had the appellant

raised the point which it now makes before me. Of course, if the point had been made by the first respondent, the appellant might have accepted the proposition made by the first respondent, and elected to enter judgment only against the appellant. However, the first respondent does not contend that it would have taken any different course during the trial of the proceeding before the magistrate had the appellant raised the issue earlier. On the other hand, as I have already stated, if the point made by the appellant is good, the judgment of the Magistrates' Court as it now stands is irregular. Accordingly, in the circumstances of this case, I do not consider that it is appropriate to preclude the appellant from raising the point, notwithstanding that the appellant failed to do so before the magistrate.

16. The legal principles which are applicable to the issue before me are not in dispute. An agent for an undisclosed principal may be sued on a contract which the agent has made with a third party. Further, the third party is entitled to claim on the contract against the undisclosed principal. See, for example, *Siu v Eastern Insurance Co Pty Ltd*[11]. However, once the third party has sued the undisclosed principal to judgment, the third party is not entitled to judgment against the agent, or vice versa. As explained by Gibbs and Mason JJ in *Marginson v Ian Potter and Company*[12], that proposition rests, not on the doctrine of election, but on the principle that when the judgment is obtained the cause of action merges in the judgment. Thus where judgment is obtained against the undisclosed principal, the liability of the agent merges in that judgment; see also *Peterson v Moloney*[13]; *Kendall v Hamilton*[14]; *Sunray Irrigation Services Pty Ltd v Hortulan Pty Ltd*[15]. The third party is entitled to proceed against both the agent and the undisclosed principal. However, judgment obtained against one will be a bar against the subsequent entry of judgment against the other. Further, and significantly, the liability of the agent and the undisclosed principal is alternative; *Peterson v Moloney*[16]; *Sunray Irrigation Services Pty Ltd v Hortulan Pty Ltd*[17]; *Maynegrain Pty Ltd v Compafina Bank*[18]. For that reason, judgment may be entered only against the undisclosed principal or the agent, but not against both.

17. The primary submission made on behalf of the appellant was that, at the commencement of the proceeding, the magistrate entered judgment against the second and third defendants, being the undisclosed principals. Accordingly, at that stage, the cause of action against the appellant, as agent for the undisclosed principal, had merged in the judgment. Thus, it was submitted, the first respondent was not entitled to proceed to obtain judgment against the appellant.

18. The principle, that judgment against either an agent or the principal bars a subsequent judgment against the other, only applies where the first judgment is final. In the context of a superior court, the judgment is final when it is entered in the records of the court. Thus, in *Buckingham v Trotter*[19], Darley CJ, delivering judgment on behalf of the Full Court of New South Wales, stated:

> "The principle to be deduced from the authorities is that, in the case of principal and agent, the election to sue one or the other is not concluded until after final judgment has been obtained against the one or the other, but after obtaining the final judgment against the one, so long as it remains of record, no action is maintainable against the other, lest such action bring about the inconvenient results alluded to by Lord Cairns in *Kendall v Hamilton*[20]."

19. That passage was quoted with approval by the High Court in *Peterson v Moloney*[21].

20. In *Carroll v Price*[22] the Full Court of Victoria held that the pronouncement by a court of inferior jurisdiction of its decision does not itself constitute the making by that court of its final order; the court only makes its final order when it is entered in the records of the court. In this context, I note that s18(1) of the *Magistrates' Court Act* 1989 provides that the principal registrar of the court must cause a register to be kept of all the orders of the court. Section 18(2) provides that an order made by the court must be authenticated by the person who constituted the court.

21. The difficulty with the submission of the appellant lies in its central premise, namely that, at the commencement of the proceeding, the magistrate actually made a final order or judgment against the second and third defendants. The evidence before me does not establish that that is what occurred. The affidavit of Mr Meese, which I have quoted above, only records that the magistrate found in favour of the plaintiff against the second and third defendants. The judgment extract, which is exhibited in the materials before me, appears to indicate that there was only one judgment recorded, namely, the judgment against all three defendants. Thus the evidence does

not establish the premise to the appellant's submission, namely, that at the commencement of the proceeding the magistrate gave final judgment in favour of the plaintiff against the second and third defendants. Accordingly, at that stage, there was no legal impediment to the magistrate continuing to hear and determine the claim against all three defendants.

22. On the other hand, at the conclusion of the proceeding, the magistrate determined that the first defendant was an agent for undisclosed principals, namely the second and third defendants. In accordance with the principles which I have summarised above, judgment could only be regularly entered either against the first defendant, or alternatively against the second and third defendants, but not against both. The liability of the first defendant was alternative to the liability found against the second and third defendants. Thus the principles, which I have set out above, precluded judgment being entered against all three defendants. It follows that the judgment which was entered at that stage against all three defendants is irregular and must be set aside.

23. The question then remains as to what disposition I should make of the proceeding. Ms Annesley on behalf of the first respondent contended that I should only set aside the judgment against the second and third respondents. Alternatively, she submitted that if I did set aside the whole of the judgment, I should remit the matter to the magistrate for the sole purpose of entitling the plaintiff to elect whether to enter judgment against the first defendant, or alternatively against the second and third defendants. On the other hand, Mr Lewis, on behalf of the appellant, submitted that I should set aside the whole of the order made by the magistrate, and remit the matter for re-hearing. He submitted that the magistrate's decision did not resolve all of the issues of fact between the parties and that accordingly there should be a re-hearing of the issues agitated between them.

24. It is true that the magistrate did not expressly resolve all the factual issues between the parties. However, the conclusion which he reached is clear. The magistrate found that the plaintiff was unaware that the first defendant was contracting with it in its capacity as agent for the second and third defendants. Mr Lewis was unable to identify any other finding of fact which the magistrate would need to make which would justify the re-hearing of the claim by the plaintiff against all three defendants as a whole. After the magistrate had announced his findings, the plaintiff would have been able to elect between entering judgment against the first defendant, or alternatively against the second and third defendant, without the magistrate being called upon to make any finding of fact or law. Accordingly, I consider it is now appropriate to make such orders as are necessary to enable the first respondent to make that election.

25. When the matter was argued before me it appeared to be common ground between the parties that if I were to reach that conclusion, it would be necessary for the matter to be remitted to the magistrate in order that the plaintiff make its election between judgment against the first defendant and judgment against the second and third defendants. However, I note that s109(6) of the *Magistrates' Court Act* 1989 provides:

> "After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the court with or without any direction in law."

26. Section 109(7) provides that an order made by the Supreme Court, other than an order remitting the case for re-hearing, may be enforced as an order of the Supreme Court. I shall hear the parties on whether, instead of remitting the matter to the magistrate so that the plaintiff might make its election in that court, the plaintiff might make the election before me, and I pronounce judgment in favour of the plaintiff, pursuant to that election, in lieu of the judgment ordered by the magistrate on 27 August 2004.

27. Accordingly, for the reasons I have set out above, I have come to the conclusion that the magistrate erred in entering judgment against the first, second and third defendants, in circumstances in which the first defendant was found to be the agent for undisclosed principals, namely, the second and third defendants. Thus I have concluded that the order of the magistrate should be set aside. The plaintiff should be permitted to elect, on the findings of fact made by the magistrate, whether to enter judgment against the first defendant on the one hand, or alternatively

against the second and third defendants. I shall hear counsel as to whether that election may be made before me, and, if not, on the precise terms of the orders which should be made reflecting these reasons for judgment. I shall also hear counsel on the issue of costs.

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[1] [1970] VicRp 63; (1970) VR 476 at 478.
[2] (1999) VSC 195 at paras 2 - 5.
[3] (1998) VSC 61 at paras 30 - 31.
[4] (2002) VSC 50 at paras 3 - 4.
[5] (2002) VSC 46 at para 3; (2002) 35 MVR 408.
[6] (1999) 2 VR 342; (1999) 2 VR 342 at 349.
[7] [1985] HCA 28; (1985) 60 ALR 68; (1985) 59 ALJR 481 at 483.
[8] [1988] HCA 12; (1988) 180 CLR 491 at 498; (1988) 77 ALR 193; (1988) 62 ALJR 209; [1988] Aust Torts Reports 80-160.
[9] [2003] HCA 48; (2003) 200 ALR 447; (2003) 77 ALJR 1598 at paras 51, 52; [2003] Aust Torts Reports 81-710.
[10] (2004) VSCA 19 at paras 22 - 26.
[11] (1994) 2 AC 199 at 207; [1994] 1 All ER 213; [1994] 2 WLR 370.
[12] [1976] HCA 35; (1976) 136 CLR 161 at 169; 11 ALR 64; 26 ALT 157; 50 ALJR 735.
[13] [1951] HCA 57; (1951) 84 CLR 91 at 102 - 104; [1951] ALR (CN) 1057.
[14] (1879) 4 AC 504 at 514 - 515; 48 LJQB 705; 41 LT 418.
[15] [1993] VicRp 55; (1993) 2 VR 40 especially at 41 - 42.
[16] Above at 102.
[17] Above at 42.
[18] (1982) 2 NSWLR 141 at 150 (per Hope JE).
[19] (1901) 1 SR (NSW) 253 at 261; 18 WN (NSW) 217.
[20] (1879) 4 AC 504 at 514, 515; 48 LJQB 705; 41 LT 418.
[21] Above at 103 - 104.
[22] [1960] VicRp 101; (1960) VR 651 at 659.

APPEARANCES: For the appellant Tuckwell: Mr J Lewis, counsel. GWA Douglas, solicitors. For the respondents: Ms R Annesley, counsel. Abrahams Meese, solicitors.
