

25/00; [2000] VSC 37

## SUPREME COURT OF VICTORIA

**VERDUCI v FAMA PTY LTD**

Byrne J

7, 8 February 2000

**CIVIL PROCEEDINGS – AGENCY – BUSINESS SOLD BY HUSBAND AND WIFE – DEPOSIT PAID TO VENDOR – SALE NOT CONCLUDED – RETURN OF DEPOSIT SOUGHT FROM HUSBAND – CLAIM BY WIFE THAT SHE WAS OWNER OF BUSINESS – CLAIM AGAINST WIFE – QUESTION OF PRINCIPAL AND AGENT – FINDING BY MAGISTRATE THAT WIFE HAD CONTINUING INVOLVEMENT AS PRINCIPAL – FINDING ON QUESTION OF OWNERSHIP OF PROPERTY – FINDING OF AGENCY – WHETHER MAGISTRATE IN ERROR.**

FP/L paid the sum of \$40,000 to Mr V. as deposit on the purchase of a business being conducted by Mrs V. The sale did not proceed and FP/L took steps to recover the sum paid. As part of the steps taken to execute an order obtained against Mrs V's stepson, Mrs V. asserted that the goods seized by the Sheriff were her property and she produced an agreement under which Mr V sold the assets of the business to Mrs V. Accordingly, FP/L brought a claim against Mrs V. on the basis that she was in truth the owner of the business and that the money was paid to her husband as her agent. The magistrate upheld the claim and made an order for \$40,000 less the proceeds of execution taken against Mrs V's stepson. In making this order the magistrate found that Mrs V. was the owner of the premises at the relevant time and that the negotiations for sale were undertaken by Mr V. on behalf of Mrs V. The magistrate also found that Mr V. acted as Mrs V's agent as not as principal. Upon appeal—

**HELD: Appeal dismissed.**

**No attack was made on the magistrate's conclusion that Mrs V. was at the relevant time the owner of the business assets. Whilst the question of ownership was an important issue, the magistrate did not use this to determine the existence of agency except for the obvious facts that Mrs V's ownership was a pre-condition to her being the principal of Mr V and that Mr V. acted for his wife in this commercial transaction. It was open to the magistrate to find that Mrs V. had a continuing involvement as principal and to find that an agency existed.**

**BYRNE J:**

1. The appellant, Elizabeth Clarey Verduci, appeals pursuant to s109 of the *Magistrates' Court Act* 1989 against an order of the Magistrates' Court at Melbourne made on 26 June 1999. By this order the magistrate ordered that she pay the respondent, Fama Pty Ltd ("Fama"), the trustee for the Careri Family Trust, the sum of \$36,681.10, reserving the questions of interest and costs for further argument.

2. The appeal was commenced in the usual way by the filing of an affidavit on behalf of the appellant. The affidavit was that of Giovanni Mirabella, Mrs Verduci's former solicitor, sworn 26 July 1999. Unfortunately the 11 exhibits to this affidavit were not produced. At the suggestion of counsel for the parties I agreed to proceed with the appeal using documents from the Magistrates' Court file and a copy of the magistrate's reasons provided by counsel. In this way the appeal was able to proceed, as it did, without delay.

3. The claim of Fama was for the return of \$40,000 paid to one Guiseppe Verduci, the then husband of Mrs Verduci, on or about 27 December 1995 in connection with the purchase by Fama of the manufacturing and retail business, "Koala Manchester". The case of Fama was that Mrs Verduci was at all material times the owner of this business, that in December 1995 Mr Guiseppe Verduci, as her agent, was negotiating an agreement for its sale to Fama and that the money in question was paid to be held as deposit if and when the sale agreement was made. No sale was concluded so that the money was recoverable. In the alternative it was put that, if a concluded agreement for the sale of the business was entered into, Fama was entitled to and did avoid the agreement pursuant to s53(3) of the *Estate Agents Act* 1980. In these circumstances, too, the money was repayable by her.

4. The past four years have witnessed the efforts of Fama to recover this money. These efforts

were first directed to the commencement of a County Court proceeding against Mr Guiseppe Verduci and his son, John Amadio Verduci, who was then registered as owner of the business name. Mr Guiseppe Verduci became bankrupt on 19 March 1996 and the proceeding against him lapsed. Default judgment was on 18 April 1996 obtained against Mr John Verduci but this judgment was set aside on 27 October 1997 on the basis of his evidence that since July 1995 he had ceased to be the owner of the business.

5. Meantime, in 1996, Fama sought to execute upon its April judgment against Mr John Verduci. Goods seized by the sheriff included machinery and plant of the Koala Manchester business. On 25 May 1996 an adverse claim was lodged to those goods by Mrs Verduci asserting "the goods are my property, I have bought them approx 1 year ago." (Exhibit GM3). In support of this claim she produced an agreement dated 25 June 1995 under which Mr Guiseppe Verduci sold the assets of the business to her for \$100,000. (Exhibit GM4). And so Fama brought the claim in the Magistrates' Court on the basis that Mrs Verduci was in truth the owner of the business and that the money was paid to her husband as her agent. This claim was successful, the amount of the magistrate's order being \$40,000 paid on 27 December 1995 less the proceeds of execution against her step-son. The magistrate found that Mrs Verduci was the owner of the premises at the relevant time and that the negotiations undertaken in December 1995 were undertaken by her husband on her behalf. As part of these negotiations Mr Guiseppe Verduci and a representative of Fama executed a handwritten agreement dated 27 December 1995 which recorded the terms of the intended sale. (Exhibit GM5). I say "intended sale" because the magistrate records that it was conceded on behalf of Mrs Verduci that no concluded agreement was reached. It follows from this the money was recoverable by Fama, the only question being whether money was paid to, and therefore recoverable from, Mrs Verduci or paid to, and recoverable from, her husband. On this question, too, the magistrate found that Mr Verduci acted as his wife's agent and not as principal.

6. Against this background, the following questions of law were stated as arising in the appeal:

"(a) His Worship, in drawing the inference that and finding that the Defendant was the vendor of what constituted the subject matter of the agreement dated 27 December 1995 ('the agreement') and Mr Verduci was the Appellant's agent and was authorised by her to enter into the agreement, erred in law:

(i) by giving undue weight to the question of who owned the equipment, stock and other chattels at the Weston Street premises;

(ii) by wrongly finding that the agreement hinted at the existence of an undisclosed principal whose identity was that of the Appellant;

(iii) by wrongly finding that the Appellant's continued involvement as a principal after 27 December 1995 in a manchester manufacturing and selling business when such a finding was not supported by the evidence.

(b) His worship erred in law in not addressing the question of whether Mr Verduci held the deposit moneys in the sum of \$40,000.00 as a stakeholder or trustee on trust and not as the agent of the Appellant pending an agreement being reached for the sale of the Koala Manchester business"

### **Question (a) – the Agency Issue**

7. Under this question the appellant attacks the magistrate's conclusion that Mr Guiseppe Verduci acted as agent for his wife. It will be noted that no attack is made upon his conclusion that she was at the relevant time the owner of the business assets.

8. The first basis on which it was put that the magistrate fell into error is the weight he gave to the fact that these assets were owned by Mrs Verduci. I can see no substance in this. While it is true that an important issue before the magistrate was the question of ownership, he did not use this to determine the existence of agency except for the obvious facts that her ownership was a pre-condition to her being the principal of her husband, and further that as husband and wife in a family of the kind referred to in the evidence, he acted on her behalf in this commercial transaction.

9. The second basis depends upon the terms of the agreement dated 27 December 1995. In it Mrs Verduci is not shown as vendor. Indeed, Mr Guiseppe Verduci, is defined as vendor and he

signed the document albeit as "agent for the vendor." I do not place much reliance upon this in the present context. The document was dictated by Mr Guiseppe Verduci in the presence of his wife who signed it as witness. None of the negotiating parties had legal training although a type of legal language was adopted in it. There are, as the magistrate observed, a number of hints or clues which suggested that the definition of "Vendor" in the opening lines was an error. Bearing in mind what was the task of the magistrate on this issue and the other evidence as to agency which was before him, I do not see this basis as giving rise to any error.

10. The third basis refers to the finding of Mrs Verduci's continuing involvement in the business after 27 December 1995. It does not appear that the magistrate relied upon this on the agency point. I understand him to be using his findings as to this as a basis for concluding that Mrs Verduci was at the relevant time and continued to act as owner of the business I should add, too, that it seems that the continuing involvement which he considered significant was not so much her activities in the conduct of the business, which he found to be equivocal on the ownership issue. His Worship was doubtless referring to her continuing involvement as principal. The evidence before me shows that she indeed acted in this way.

11. There is, therefore, no substance in the first question of law. There was, to my mind, evidence upon which the magistrate was entitled to find agency and no error of law in his conclusion on this matter.

**Question (b) – the Stakeholder Trustee Issue**

12. Little was said about this question and I think that counsel was correct in approaching it in this way. There was nothing in the defence filed in the Magistrates' Court to raise the issue. It does not appear that anything was put to the magistrate on it. The evidence shows that the cheque for \$40,000 was made payable to Koala Manchester and that it was deposited in its account. It was applied to meet the debts of Mrs Verduci's business. This is not suggestive of the fact that Mr Guiseppe Verduci acted as a stakeholder or a trustee. It is consistent with his applying the funds for his wife's benefit. This is entirely consistent with the magistrate's conclusion that the money was paid to her. This question of law must, likewise, fail.

13. The appeal therefore will be dismissed with costs including costs reserved.

**APPEARANCES:** For the appellant Verduci: Mr D Klempfner, counsel. John Sayers & Associates, solicitors.  
For the respondent Fama Pty Ltd: Mr S Palmer, counsel. Prescott & Associates, solicitors.

---