39/08; [2008] VSC 310

SUPREME COURT OF VICTORIA

HENDERSON & ANOR v ATKINSON & ANOR

Cavanough J

14 August 2008

CIVIL PROCEEDINGS – SALE OF BUSINESS – REPRESENTATION BY VENDOR THAT PREMISES WERE LEASED FOR A 25-YEAR TERM – SUCH REPRESENTATION FALSE OR MISLEADING – FINDING MADE BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – INTERVENTION BY PURCHASERS' SOLICITORS TO OBTAIN CONSENT OF LANDLORD ON THE BASIS OF THE CONTEMPLATED 25-YEAR TERM – WHETHER THE CHAIN OF CAUSATION BETWEEN VENDORS' MISLEADING AND DECEPTIVE CONDUCT AND THE PURCHASERS' LOSS WAS BROKEN – FINDING BY MAGISTRATE THAT THE MISREPRESENTATION MATERIALLY CONTRIBUTED TO THE PURCHASERS' LOSS – WHETHER MAGISTRATE IN ERROR: *FAIR TRADING ACT* 1999, S9.

1. Where the vendor of a business made a false or misleading representation to the purchasers by stating that the vendors had obtained the consent of the landlord to a 25-year lease of the premises, a magistrate was justified in finding that the vendors had breached s9 of the *Fair Trading Act* 1999 and accordingly were liable to pay the purchasers the difference between the value of what the purchasers believed they were acquiring and the price they paid.

2. Despite the finding that the purchasers' solicitors sought to obtain the consent of the landlord to the transfer of the lease on the basis of the contemplated 25-year term, it was open to the magistrate to find that the vendors' misrepresentation continued to have an operative effect on the purchasers' minds and materially contributed to the purchasers' loss.

CAVANOUGH J:

1. This is an appeal under s109 of the *Magistrates' Court Act* from a decision of his Honour, Mr B Cottrill, Magistrate, given at Bendigo on 20 December 2007 in which the appellants were ordered to pay the respondents $100,000 together with interest and costs.

2. The order was based on a finding that the appellants had breached s9 of the *Fair Trading Act* 1999 by engaging in misleading and deceptive conduct in connection with the sale of the business of the Calder Motel in Bendigo.

3. The appellants do not seriously attack the finding that the first appellant made a false or misleading representation to the respondents to the effect that the appellants had obtained the consent of the landlord to the provision of, in effect, taking into account options, a 25-year lease term for the premises. The substance of that representation was indeed later reproduced as a term of the contract of sale of the business.[1]

4. The representation made by the first appellant, in effect for both appellants, was not merely a representation as to the future. He said, "I have got those two extra terms. They will be there on the day. Don't worry about it", according to the magistrate's undisputed findings. That comment included a comment about the then present situation. It was simply untrue, in that the only prior communications that had taken place as between the appellants and the landlord about the extension of the lease had involved extra demands by the landlord to which the appellants had not fully responded and of which, in any event, the appellants did not inform the respondents.

5. Insofar as the appellants' representation related to the future, there was a finding by the magistrate that Mr Henderson did not have reasonable grounds to believe that what he predicted would come true. Contrary to the appellants' submission, there was evidence before the magistrate to justify that finding, too, including the evidence of the landlord in that respect. In any event, it is not possible for the appellants to succeed on a no evidence case in this proceeding because they have not included any no evidence grounds in their notice of appeal and because they have chosen not to put before this Court all of the evidence that was before the Magistrates' Court.

6. Another submission made by the appellants was that there was no evidence that the landlord would not have given the additional terms to the respondent had the respondents' solicitors requested them prior to settlement of the sale transaction. Again, that submission is not open to the appellants given the way in which the appeal has been framed and in any event it is not backed up by the factual material. It appears from the magistrate's findings that the landlord, who was an independent witness, did give direct evidence, accepted by the magistrate, to the effect that he would not have been prepared to grant additional options save on significantly restricted terms as to rent, payment and the like.

7. Nevertheless, the settlement of the sale went ahead with the lay clients on both sides being of the belief that the effective 25-year term was in place. The purchase price had been negotiated on that basis. The vendors and the purchasers were represented by separate firms of solicitors. [2]

8. There is no attack on the magistrate's finding as to the quantum of the loss. The difference between the value of what the purchasers believed they were acquiring and the price they paid was found to be a little over $100,000, and the respondents abandoned the excess so as to bring the matter within the jurisdiction of the Magistrates' Court.

9. The appellants' challenge to the magistrate's decision is based essentially on the proposition that the chain of causation between their misleading and deceptive conduct and the respondents' loss was broken by intervening conduct on the part of the respondents' solicitors.

10. The appellants point to the finding that the respondents' solicitors (in unexplained circumstances) took over the appellants' role under the contract to obtain the consent of the landlord to the transfer of the lease on the basis of the contemplated 25-year term.[3] The appellants say that, despite the solicitors' (now obvious) failure to obtain the requisite consent, the solicitors must be taken to have represented to their clients, the respondents, by silence, that the solicitors had done their self-imposed job and that the consent was duly in place at the time of settlement, as distinct from the time of the contract. The appellants say that this distinguishes the present case from cases of mere intervening negligence on the part of the complaining party or their agent such as *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[4]; *Henville v Walker*[5]; *Burke v LFOT Pty Ltd*[6] and *Havyn v Webster*[7], to each of which the magistrate referred.[8]

11. However, I do not see any real or significant distinction in this regard. On my reading of the magistrate's reasons, he found as a fact that, despite the solicitors' conduct, which at worst can only have been a misrepresentation by silence, the appellants' misrepresentation continued to have an operative effect on the minds of the respondents even at and after settlement, or, in other words, that the respondents continued to rely, in part at least, on the misrepresentation by the appellants. To use the magistrate's own words, he found that the misrepresentation "materially contributed" to the respondents' loss. This view was open to the magistrate and it was enough. [9] The fact that any misrepresentation by the solicitors can only have been by silence reinforces the soundness of the magistrate's view of the matter.

12. In this appeal, which must be confined to questions of law, no proper basis has been shown for impugning this finding of the magistrate. The appellants' counsel has referred me to *Mallesons Stephen Jaques v Trenorth Limited*[10] in which it was held that the chain of causation between certain negligence on the part of the appellant solicitors and the loss complained of by another party was broken because the intervening fraud of the third party concerned was so unexpected as a consequence of the negligence of the solicitors as to break the chain of causation. That was a decision on its own facts. It does not establish that the magistrate was bound to take a corresponding view of the facts of the present case. Indeed, I notice that the *Mallesons* case was not cited to the magistrate below and that, if this point was raised below at all, it was raised only obliquely.

13. The appellants' counsel made passing reference before me to the doctrines of waiver, election and estoppel, but frankly conceded that they were tied to his arguments concerning the asserted breaking of the chain of causation and could not succeed independently. Because I do not accept those arguments, strictly speaking I need not consider those doctrines further.

14. However, in passing, I would note that the appellants could hardly be heard to rely on

estoppel in circumstances where at the time of settlement they themselves were apparently under the same impression as the respondents and, moreover, they did not take any steps to their detriment or at all in reliance on anything done or not done by the appellants or by their solicitors.

15. As to election, there is no suggestion that the respondents made a choice between inconsistent alternatives.[11]

16. Any argument based on waiver would have been bedevilled by the absence of knowledge on the part of the respondents as to what their solicitors had done or not done, together with doubts as to the state of knowledge of the solicitors themselves and difficulties in attributing their knowledge to the respondents in all the circumstances.[12]

17. It is not necessary to decide whether the respondents would have been entitled to succeed in contract also, but I note that, generally speaking, a solicitor does not have implied or ostensible authority to vary important terms of his or her client's contract without actual instructions: see *Nowrani Pty Ltd v Brown*[13].

18. In my view the appeal should be dismissed. I will hear counsel as to costs.

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[1] See Schedule C.

[2] None of the solicitors involved gave evidence before the magistrate. The appellants' notice of appeal included a ground referring to *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395 in connection with the omission of the respondents to call their solicitor. However the appellants' counsel did not seriously press this ground after it was pointed out that the appellants themselves had subpoenaed the respondents' solicitor and then decided not to call on their subpoena. In any event there was nothing in the material to indicate that the magistrate had misunderstood or misapplied the law as expounded in *Jones v Dunkel*. The firm that acted for the purchasers (the respondents) in the sale transaction is not the firm on the record in this appeal.

[3] The magistrate's finding on this point is expressed in more general language than that. It does not in its own terms make reference to the 25-year lease proposal. So far as is relevant, it merely refers to the solicitors having taken over the role of obtaining the consent of the landlord to the transfer of the lease. But, even assuming (as I do) that what the magistrate said in that regard should be read with specific reference to the proposed 25-year term, the outcome would be the same.

[4] [1990] FCA 51; (1990) 26 FCR 112; [1990] ATPR 41-015.

[5] [2001] HCA 52; 206 CLR 459; (2001) 182 ALR 37; (2001) 75 ALJR 1410; [2001] ATPR 41-841; [2001] CA 52; [2002] ANZ Conv R 64; [2001] Aust Contract Reports 90-136; (2001) 22 Leg Rep 26.

[6] [2002] HCA 17; (2002) 209 CLR 282; (2002) 187 ALR 612; (2002) 76 ALJR 749; [2002] ATPR 41-869; [2002] ANZ Conv R 319; [2002] Aust Contract Reports 90-145; (2002) 23 Leg Rep 12.

[7] (2005) NSWCA 182; (2005) 12 BPR 22,837.

[8] The magistrate also cited *Reiterer v Csenar* [2005] VSC 12 at [38] where Harper J quoted a passage from the judgment of Gummow J (sitting as a single judge of the Federal Court) in *Elders Trustee and Executor Company Limited v EG Reeves Pty Ltd* [1987] FCA 332; (1987) 78 ALR 193 at 241 to the effect that it is "fundamental that s52 of the *Trade Practices Act* 1974 (Cth) [the federal equivalent of s9 of the *Fair Trading Act* 1999 Vic] is not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests". It is not necessary for me to decide whether that statement or the further statement of Gummow J to similar effect at 243, to which I was referred by the appellants' counsel, can be reconciled with the later authorities to which the magistrate referred. See esp *Henville v Walker* [2001] HCA 52; 206 CLR 459 at 468-469 [13]-[14]; (2001) 182 ALR 37; (2001) 75 ALJR 1410; [2001] ATPR 41-841; [2001] CA 52; [2002] ANZ Conv R 64; [2001] Aust Contract Reports 90-136; (2001) 22 Leg Rep 26 per Gleeson CJ; at CLR 493 [106] per McHugh J and at CLR 509-510 [163]-[165] per Hayne J with whom Gummow J agreed. The appellants' counsel did not submit that the magistrate had misunderstood the relevant binding case law.

[9] See *Henville v Walker* [2001] HCA 52; 206 CLR 459 at 493 [106]; (2001) 182 ALR 37; (2001) 75 ALJR 1410; [2001] ATPR 41-841; [2001] CA 52; [2002] ANZ Conv R 64; [2001] Aust Contract Reports 90-136; (2001) 22 Leg Rep 26 per McHugh J, and see also the other passages from *Henville v Walker* cited in the previous footnote.

[10] [1998] VSCA 15; [1998] V Conv R 54-593; [1999] 1 VR 727.

[11] Cf *Sargent v ASL Developments Ltd* [1974] HCA 40; (1974) 131 CLR 634; 4 ALR 257; 48 ALJR 410.

[12] Cf *The Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 395; *Sargent v ASL Developments Lt*d [1974] HCA 40; (1974) 131 CLR 634; 4 ALR 257; 48 ALJR 410; *Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582.

[13] [1989] 2 QR 582.

APPEARANCES: For the appellants Henderson: Mr D Colman, counsel. Beck Legal, solicitors. For the respondents Atkinson: Mr T Sowden, counsel. Gary Prince, solicitors.