46/08; [2008] VSC 383

SUPREME COURT OF VICTORIA

CLB No. 2 PTY LTD and ANOR v MAXIMUM BUSINESS PTY LTD

Judd J

15 July, 29 September 2008

CIVIL PROCEEDINGS – DAMAGES FOR BREACH OF A WRITTEN AGENCY AGREEMENT – CLAIM THAT PARTY INCURRED LOSS BECAUSE OF MISLEADING AND DECEPTIVE CONDUCT – FINDING BY MAGISTRATE THAT A PARTY'S CONDUCT WAS MISLEADING AND DECEPTIVE IN THAT A LEASE WAS CAPABLE OF BEING ASSIGNED AND IN NOT APPRISING OTHER PARTY THAT THE LEASE WAS IN DEFAULT AND NOT CAPABLE OF BEING REMEDIED – MAGISTRATE IN ERROR AS TO ASSIGNMENT OF LEASE – NO REASONED EXPLANATION GIVEN BY MAGISTRATE THAT THE LEASE WAS IN DEFAULT – REQUIREMENT TO GIVE REASONS FOR DECISION – WHETHER MAGISTRATE IN ERROR IN FAILING TO GIVE REASONS.

1. In any case in which reasons are required, the necessary content will depend upon the circumstances of the particular matter. While reasons need not necessarily be lengthy or elaborate, there are three fundamental elements of a statement of reasons, as follows–

First, a judicial officer should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and is not referred to by the judicial officer, an appellate court may infer that the judicial officer overlooked the evidence or failed to give consideration to it. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.

Secondly, a judicial officer should set out any material findings of fact and any conclusions or ultimate findings of fact reached. Where findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the judicial officer should set out his/her findings as to how he/she came to accept the one over the other. Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance.

Thirdly, a judicial officer should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.

2. Accordingly, where a magistrate's finding that a party engaged in misleading and deceptive conduct in respect of a lease that was capable of being assigned was plainly wrong, and the magistrate gave no reasoned explanation for finding that a party was not informed that a lease was in default, these were errors of law which were sufficient to vitiate the Magistrate's decision.

JUDD J:

1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 against a decision in which CLB No. 2 Pty Ltd and Luke Fryer, as defendants, were ordered to pay the plaintiff, Maximum Business Pty Ltd, the sum of $7,500 together with interest and costs.

2. The trial took place on 13, 14 and 22 March 2007. The Magistrate delivered his judgment on 13 July 2007. The trial proceeded on pleadings. Maximum, a selling agent, sought damages from CLB and Fryer for breach of a written agency agreement dated 15 June 2006 for the sale of a business and for reliance loss pursuant to s82 of the *Trade Practices Act* 1974. It claimed to have been induced to enter into the agency agreement by conduct in breach of s52 of the *Trade Practices Act*. Maximum succeeded only on its claim for reliance loss.

3. Maximum was a licensed estate agent, trading as Maximum Business & Hospitality Brokers, which had been engaged by CLB as its exclusive agent to sell the fit-out in premises leased by CLB at Shop 3, 60-64 Fitzroy Street, St Kilda from which CLB operated a restaurant under the name

"Wagamama". Under the agency agreement, Maximum was to procure an assignee of the lease which required the approval of the lessor. The restaurant business carried on by CLB had not been successful and CLB wished to relocate its business. At the time of entering into the agency agreement CLB was in breach of the lease. Its defaults were unpaid rental, unpaid outgoings and failure to have provided security to the landlord in the form of a bank guarantee.

4. The lease, dated 1 September 2004, granted to CLB an initial term of five years and two renewal terms each of five years. The annual rental was $165,000 and was subject to review. CLB was also required to pay outgoings and provide security by way of a bank guarantee in a sum equal to three months rental and outgoings.

5. The precise amount of the unpaid rental and outgoings was a matter in dispute although it was common ground that there was a substantial amount owing. On 26 June 2006 Mr Murray of Fitzroys, the landlord's agent, wrote to CLB advising that it was in arrears in the sum of $22,314.76. CLB replied by email on 29 June 2006 disputing the amount, relying on an alleged rental rebate agreement but conceding that only half the June rent had been paid while seeking a suitable assignee and advising that it would only be able to pay half the July rent. Notwithstanding these events the landlord appeared ready to negotiate an assignment subject to security and repayment arrangements. It also appears that the landlord was willing to renegotiate rental to a suitable tenant. The restaurant name and goodwill were not for sale.

6. Under the agency agreement Maximum was entitled to a commission payable upon it introducing a purchaser who executed an unconditional contract for the purchase of the business which in reality meant an assignment of the lease and the purchase of the fit-out. The fit-out only had value to a purchaser who took an assignment of the lease. The agency agreement indicated a vendor's asking price of $150,000 and an agent's estimated selling price of $130,000. There was a base commission of $15,000 which would increase by 20% of the price obtained above $50,000 and up to $100,000 and 30% of any price realised above $100,000.

7. The practical effect of the agency agreement was that for Maximum to earn its commission it must procure a new tenant in circumstances where; (1) cooperation from the landlord was required because prospective tenants required a substantial reduction in rent; (2) much of the fit-out comprised fixtures; (3) the restaurant business conducted at the premises had not been successful; and (4) CLB was in default under the lease.

8. In support of the reliance loss claim under the *Trade Practices Act*, Maximum Business alleged that, prior to entering into the contract, Mr Fryer on behalf of CLB represented to it, (1) that there would be a lease capable of being assigned; and (2) that there would be assets capable of being sold. Maximum alleged that by making these representations, CLB and Fryer engaged in conduct that was misleading or deceptive because: (1) there was no lease capable of assignment and, (2) there were no assets capable of being sold. Maximum further alleged that CLB and Fryer engaged in conduct that was misleading or deceptive because they failed to inform Maximum that there was not a lease capable of being assigned and no chattels capable of being sold. Maximum apparently submitted in the Magistrates' Court that because CLB was in default there was no right of assignment and that had Maximum known of that fact it would not have entered into the agency agreement.

9. The grounds of appeal were extensive but in the course of submissions distilled to a contention that there were crucial findings of fact made by the Magistrate in circumstances where there was either no evidence to support the findings or, if there was some evidence, there was a material conflict which was not addressed by the Magistrate in his reasons. The particular findings of fact complained of are as follows:

> (a) Luke Fryer did not at any time indicate to Steve Makris, sole director of the Agent, that CLB was in default under the lease;
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> (b) there was no lease to assign;
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> (c) that the appellants did not have the capacity to remedy the default.

10. CLB and Fryer also contend that there was no evidence to support the award of damages in the sum of $7,500 and the reasons fail to disclose how the respondent's loss was quantified.

11. In my opinion the central conclusion of the Magistrate supporting the decision is found at p17 of the Reasons for Judgment where the Magistrate concludes,

> Considering all these matters, I find that the first defendant's conduct was misleading and deceptive or likely to mislead and deceive the plaintiff by representing that there was a lease capable of being assigned as at 15 June 2006 and by not apprising the plaintiff of the fact that it was in default under the lease for non-payment of rent and that it did not have the capacity to remedy the default.

12. The formulation at trial of the allegation of conduct was most unfortunate because, as Maximum conceded on appeal, there was plainly a lease capable of being assigned, albeit with the landlord's cooperation and there were items of fit-out capable of being sold to an assignee of the lease. This would seem to amount to a concession that the case as pleaded was misconceived and bound to fail.

13. In this appeal Maximum sought to recast the allegation of misleading or deceptive conduct into a failure of CLB and Fryer to inform Maximum, presumably at or before the time it entered into the agency agreement, that CLB was in default under the lease and was unable to remedy the default unless it could successfully sell the fit out. It alleged that CLB should have further informed Maximum that unless it remedied the default the landlord would not execute an assignment of lease. This reformulation seeks to translate the conduct from representations of fact into obligations to make disclosure of matters bearing upon a commercial risk to Maximum's opportunity to exploit the agency agreement. The risk was that the landlord might not agree to the new tenant or might re-enter.

14. The reformulation, however, misses the point. Maximum knew that in order to earn any commission it must procure a new tenant acceptable to the landlord on fundamentally different terms to the existing lease. It must be at a reduced rent. The landlords cooperation to vary a fundamental term was required before any sale of the fit-out could take place.

15. Maximum alleged that at the time the agency agreement was made CLB was in default of its obligation to pay outgoings and rent. It alleged that the amount unpaid was such that the default could not be remedied without access to the proceeds from the sale of the fit out. The conduct, as reformulated by Maximum, is quite different to that which was pleaded and, in my view, the basis upon which the trial was conducted in the Magistrates' Court. By reformulating the conduct, Maximum attempt to take advantage of the finding by the Magistrate referred to above in order to hold the judgment.

16. It is critical in most trials, as it was in this case, to carefully define conduct alleged to constitute misleading or deceptive conduct for the purpose of a claim made under the *Trade Practices Act*. The pleading of misleading or deceptive conduct not only defines the evidence concerning the conduct relied upon but is crucial to the issues of reliance and causation. In this case the Magistrate does not appear to have considered reliance or causation. Nor is it apparent that evidence was directed to those issues. While I accept that evidence of reliance is often formulaic and may be unhelpful, or even contrived, there are cases in which there is a real issue of reliance and causation, where evidence must be weighed and a decision made as to whether or not the conduct was relied upon (in this case to enter into the agency agreement) and caused the loss claimed. This is one such case.

17. Maximum submitted that on the basis of its reformulated case the court could readily conclude that had it been told the truth it would never have entered into the agency agreement because it would have been fruitless. I do not agree. There is evidence to suggest that Maximum had an ulterior purpose in entering into the agency agreement. In an email dated 11 July 2006 Maximum Business said,

> ... I took this job on for the possible future relationship I could establish with Wagamama, and that I would not be wasting my time and that I would be rewarded by my efforts.

18. More importantly, it is difficult to envisage much, if any, genuine reliance on information about default and the ability to remedy the default when in order to consummate the deal it was necessary for the landlord to agree to a lower rental to attract a tenant. In those circumstances, the significance of CLB's default and the technical requirement for the landlord's consent to an

assignment of the existing lease, are of little practical consequence. There was, of course, always a risk that the landlord would re-enter. In that regard, the evidence discloses that the landlord was for a time willing to negotiate a lower rental, but by mid-July the rent under offer was too low. By that time CLB was advertising its new premises and indicating its intention to move its business. It was the confluence of these events that seems to have precipitated re-entry by the landlord.

19. I am also of the view that Maximum suffered no loss as a consequence of entering into the agency agreement and the failure by CLB and Fryer to inform it of CLB's default and its inability to remedy the default – if indeed there was any such failure to inform. The agency agreement was very unusual. It referred to the sale of a business, but in truth was an agreement by Maximum to attempt to sell the fit-out to a new tenant where it knew that the cooperation of the landlord would be essential, because the prospective tenants were not prepared to pay the full rental under the lease. In my view the materiality of the default under the lease paled into insignificance when compared with the task undertaken by Maximum of obtaining the landlord's agreement to reduce the rent when the fit-out was substantially comprised of fixtures in a failed restaurant. The task confronting Maximum was daunting, if not impossible. The agency agreement lacked commercial sense.

20. In my opinion the Magistrate erred in his crucial finding that there was no lease capable of being assigned. There was a lease which might have been assigned. The lease remained on foot until the landlord re-entered on 24 July 2006. A default on the part of the lessee does not bring the lease to an end. Under the present lease an un-remedied default by the lessee relieves the lessor of the requirement that it not unreasonably withhold its consent. Thus, the landlord's cooperation would be required for an assignment. But, the landlord's cooperation was required in any event to reduce the rent. Even in the absence of any default the lessee did not have an unqualified right to assign the lease.[1] This erroneous finding by the Magistrate only goes to emphasise the significance at trial of the case as pleaded on behalf of Maximum.

21. As for the finding by the Magistrate that CLB did not inform Maximum of the fact that it was in default under the lease for non-payment of rent, the relevance and materiality of that conduct as founding a claim under ss52 and 82 of the *Trade Practices Act* loses its potency by the requirement that the landlord reduce its rent to attract a new tenant. There is also evidence that Maximum had been informed of default by CLB, but no explanation by the Magistrate as to why that evidence was rejected. For example, Mr Makris said in his evidence-in-chief that Mr Fryer had told him from the beginning that he had done a deal and that "they are paying half the rent and if a good tenant comes along they will be able to do a deal". Mr Fryer said that he told Mr Makris "that we had money owing and that there was a rebate in place and that we propose to get money from the sale of the fit-out and use money for rent". Mr Fryer also gave evidence that he had a discussion with Mr Makris on 15 June 2006, the day on which the agency agreement was made, in which there was a discussion regarding guarantees. Apparently, Mr Makris asked about the guarantee and Mr Fryer told him "we never gave personal guarantees and this was so here and no bank guarantee" to which Mr Makris responded "you've got nothing to worry about then".

22. That evidence indicates, in my opinion persuasively, that some attention was being given by Mr Fryer and Mr Makris in their discussions to the extent of the personal exposure of Mr Fryer to the landlord for CLB's obligations under the lease. To similar effect is an email dated 18 July 2006 from Mr Makris to an employee of CLB, Jane Verberne, in which Mr Makris said,

> According to Luke, I was informed that everything was installed by Wagamama at a cost in excess of $1.3 million and that there was no guarantee on the lease. Under those circumstances, I took the retainer on.

The significance of a reference to the existence of a guarantee is that it relates to a personal obligation of Mr Fryer which might be expected to arise as a topic in a conversation about the personal exposure of Mr Fryer for defaults under the lease. The email tends to corroborate some of Mr Fryer's evidence.

23. The evidence given by Mr Makris does not appear to be inconsistent with that given by Mr

Fryer, although there is difficulty occasioned by the fact that transcript for much of the evidence was not available and the only record is from notes taken by the instructing solicitors. Whilst the notes appear thorough they are no substitute for transcript. But it is all that is available. The inconsistencies identified by Maximum are subtle and sometimes open to different interpretations. That made it all the more important, in my opinion, that the Magistrate explain in his Reasons the basis for the finding which appears to me surprising having regard to the evidence which he regarded as central to his finding of misleading or deceptive conduct.

24. In *Fletcher Constructions Australia Ltd v Lines McFarlane & Marshall Pty Ltd (No2)* the Court of Appeal considered the nature and content of a judge's obligation to give reasons.[2] In their joint judgment, Charles, Buchanan and Chernov JJA said:

> In any case in which reasons are required, the necessary content will depend upon the circumstances of the particular matter. In *Beale*, Meagher J suggested[3] that while reasons need not necessarily be lengthy or elaborate, there were three fundamental elements of a statement of reasons, as follows–
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> > First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it ... Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
> >
> > Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached. ... [W]here findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. ... Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance ...
> >
> > Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.

25. The finding that CLB's conduct was misleading or deceptive because it represented that there was a lease capable of being assigned as at 15 June 2006 is plainly wrong. The finding that CLB did not inform Maximum that it was in default under the lease required, at the very least, a reasoned explanation. The absence of reasons explaining the basis for the finding constitutes an error of law. In my opinion, these errors of law are sufficient to vitiate the decision of the Magistrate. Consequently, I need not consider the other grounds relied upon by the appellants. The appeal is allowed and the order of the Magistrate made 13 July 2007 is set aside.

26. CLB and Fryer also seek orders dismissing the claim made by Maximum and an order for costs. Maximum did not submit that it should have the opportunity to relitigate a reformulated claim in the Magistrates' Court. Its position was confined to supporting the judgment on appeal.

27. In my opinion the *Trade Practices* case as pleaded in the Magistrates' Court was misconceived. A question arises as to whether Maximum should be given another opportunity to replead and relitigate its claim under s82 of the *Trade Practices Act*. In my opinion this dispute should not be relitigated.

28. It is not for this court to anticipate what might happen if this matter is remitted for rehearing by a different Magistrate. Leave to amend may be refused. As presently formulated, Maximum's case for damages under s82 of the *Trade Practices Act* must fail. I am also persuaded that even if leave were to be granted by a Magistrate and the case relitigated it would also fail. Having regard to the requirement for, in effect, a renegotiated lease, the conduct now relied upon by Maximum would not, even if proved, support a cause of action.

29. In my opinion, the lack of commerciality of the transaction also interrupts the causal connection between the alleged conduct, as reformulated, and any loss and damage.

30. It is in the interests of justice that this litigation be brought to an end. I dismiss the claim made by Maximum. I will hear the parties on costs.

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[1] Clause 7.22, 7.24, 7.25 and 7.26 of the lease.
[2] [2002] VSCA 189; (2002) 6 VR 1.
[3] (1997) 48 NSWLR 430 at 443-444; (1997) 25 MVR 373.

APPEARANCES: For the first and second appellants CLB No 2 Pty Ltd and Anor: Mr D McWilliams, counsel. Rigby Cooke, solicitors. For the respondent Maximum Business Pty Ltd: Mr C Harrison, counsel. Gary Prince Solicitors.
