06/06; [2006] VSC 16

SUPREME COURT OF VICTORIA

RASDON GROUP PTY LTD v LEMAS NOMINEES PTY LTD & ANOR

Harper J

10, 11, 13 October 2005; 2 February 2006

CIVIL PROCEEDINGS – PRINCIPAL AND AGENT – ALLEGED FACTORING ARRANGEMENT – FAILURE TO DISCLOSE ANY AGENCY – NO EVIDENCE OF RELATIONSHIP BETWEEN CONTRACTING PARTIES – FINDING BY MAGISTRATE THAT RELATIONSHIP EXISTED – WHETHER MAGISTRATE IN ERROR.

RGP/L traded as motor vehicle repairers. They needed finance so they approached a company which traded under the business name of NRA Recovery. An agreement was reached between the parties for finance to be supplied to RGP/L. There was no suggestion that NRA Recovery acted as an agent. The debt remained unpaid and subsequently a company LNP/L took proceedings to recover the sum of $2443.00 from RGP/L. At the hearing there was no direct evidence to the effect that NRA Recovery was acting as an agent in the transaction which gave rise to the claim. Nor was there any evidence about the terms of the relationship between NRA Recovery and LNP/L. The magistrate found that NRA Recovery acted as agent for LNP/L and made an order for the amount sought. Upon appeal—

HELD: Appeal allowed. Judgement set aside. Claim dismissed.

1. When the hearing below came to its end, the first question for the magistrate to answer was whether there existed at the material time a relationship of principal and agent between LNP/L as principals and NRA Recovery as agent. In the absence of that relationship, LNP/L were not parties to the contract upon which they relied. Therefore, unless the magistrate were satisfied on the balance of probabilities that such a relationship existed, LNP/L must fail: with a few exceptions, none of which are presently relevant, the rule is that only a party to a contract can sue on it.

2. Even if a principal/agent relationship existed, that would not have been the end of the matter. LNP/L would still fail unless they established on the balance of probabilities that RGP/L either knew that NRA Recovery was acting as an agent (or were willing or led NRA Recovery to believe that they were willing) to treat as a party to the contract anyone on whose behalf NRA Recovery may have been authorised to contract.

3. There was no evidence of either the requisite willingness or of the agent being led to believe that such willingness had been displayed. The evidence called before the magistrate was insufficient to allow him to find that LNP/L were parties to the contract with RGP/L. Accordingly, it was not open to the magistrate to find for LNP/L and make an order on the claim.

HARPER J:

1. The respondents are financiers. They claim that they contracted to provide finance to the first appellant, and that any resultant indebtedness was guaranteed by the second appellant. Finance was made available accordingly. Yet the debt remains unpaid. Proceedings for its recovery were brought in the Magistrates' Court. The respondents obtained judgment in the sum of $2,443.00. It was left to the parties to agree on interest and costs.

2. The appellants have appealed to this Court. The principal ground argued before me was that the respondents were not parties to the relevant agreement; or, more accurately, that the evidence called before the court below was not sufficient to enable the magistrate properly to conclude that, on the balance of probabilities, the respondents were contracting parties. The respondents assert in response that they were what they claimed to be – financiers who through their agent contracted to provide financial accommodation to the first appellant – albeit that their identity was not disclosed to either appellant, and the terms of their relationship with the agent not fully disclosed, if disclosed at all, to the Court. In the circumstances, the magistrate was nevertheless entitled to find that the appellants were indebted to them.

3. The first appellant is the holding company of a group of three companies, two of which (the two subsidiaries of the first appellant) trade, or at material times traded, as motor vehicle repairers. Obtaining timely payment for this work is often difficult: either insurers take time to

decide whether to accept liability, or clients (or third parties) who are uninsured have difficulty procuring the necessary funds, or for some other reason payment to the repairer is delayed.

4. The consequence is that motor vehicle repairers frequently need financial accommodation. So it was with the repairers with which this appeal is concerned. The magistrate, in a finding that was contested before him but not called into question before me, held that it was not either of the two subsidiaries, but the first appellant, which sought finance by means of a factoring arrangement. It approached for this purpose a company called Danemark Pty Ltd. That company traded under the business name "NRA Recovery" or "National Repairers Association Recovery". It was not a party to the proceedings.

5. An agreement was reached. Insofar as it is in writing, it is to be found in a document headed "Authority" and dated 25 October 2002; and in a letter dated 28 February 2003 under the letterhead of "NRA Recovery". Neither document refers, whether directly or indirectly, to either respondent. Each is couched in terms that are consistent with the conclusion that NRA Recovery for the one part and the appellants for the other are the only principal contracting parties. No hint that NRA Recovery acts as an agent is to be found in either document, save for the financier's signature clause, which consists of the expression "For NRA Recovery, and on behalf of the Factorer: LPL Factoring". None of the witnesses called before the magistrate could identify any entity trading under the latter name. Moreover, none of the evidence then before the Court suggested that the appellants understood that those words, or anything else in the relationship with NRA Recovery, indicated that that entity acted as an agent for anyone, let alone either respondent. Nor did the magistrate find that the appellants or either of them were aware that NRA Recovery was at the material times acting as an agent. He proceeded, it seems, on the mere assumption that there was evidence of a relationship of principal and agency between the respondents on the one hand, and NRA Recovery on the other, that that evidence established the fact, and that that was enough to bind the appellants to a contract the other parties to which were, unbeknown to them, the respondents.

6. In truth, the Magistrates' Court proceedings paid little attention to the laws of evidence, and neither case was coherently presented. Statements of fact were made from the bar table. Documents were tendered, but not formally received into evidence. If objection was taken to a particular tender, the hearing moved on without any resolution of that issue; and the status of the tendered document was therefore difficult, if not impossible, to ascertain. Questions were dealt with as if they, as much or more than the answers, were the evidence. The magistrate, who gave no reasons for judgment, did not identify the evidence upon which he was prepared to act. One consequence is that a reading of the transcript does not permit of a clear picture of the material upon the basis of which the magistrate formulated his conclusions. At best for the respondents, however, it could be argued that the evidence disclosed that the sum alleged to constitute the amount provided (by cheque drawn on the trust account of NRA Recovery) to the motor vehicle repair business as financial accommodation was, unbeknown to the appellants, sourced in part from one respondent and in larger part from the other. Necessarily, therefore, some connection between the respondents and NRA Recovery had been established.

7. I should first examine the evidence in a little more detail. The document headed "Authority" states in clause 1 that "The repairer … applies for credit *from NRA Recovery* ('NRA') and agrees to NRA's terms of credit and of any factoring … The terms … may be changed by NRA from time to time … ". Clause 2 allows NRA, in its complete discretion, to decide whether or not to provide credit. Moreover, by clause 4, the relationship may be determined at any time by NRA. By clause 5, any director of a corporate repairer guarantees *to NRA* the repayment *to that entity* of the liabilities of the corporation, and seeks to make the director a principal debtor *to NRA*. The repairer, by clause 7, agrees to repay to NRA "any monies due and owing by way of a shortfall should the factored vehicle be re-assessed after factoring payment has been received by the repairer and there is a shortfall difference…". Clause 8 provides that the repairer is to repay to NRA, immediately upon request, "all monies due and owing should any third party claim be denied". Finally, clause 9 expresses the repairer's agreement to the payment of commission fees "for any rollovers of factoring … as agreed between the repairer and NRA".

8. Two other forms were tendered with the form of Authority in the Magistrates' Court. One is headed "NRA Recovery Confidential Credit Application." It does not suggest that the financier

is acting in any capacity other than that of principal. The second form is headed "NRA Recovery – Client Details". It likewise contains no hint that the financier is an agent.

9. The letter of 28 February 2003 is, as I have noted, written on the letterhead of "NRA Recovery". It gives its address as "National Repairers Assoc. [sic] Recovery, Level 1, 493 Little Bourke Street Melbourne". It provides among other things, that recovery fees "will be paid to NRA Recovery". Apart from the ambiguous signatory clause, which could be (but probably is not) a reference to another business name under which Danemark Pty Ltd trades, and in fact is a reference which no witness could explain, there is, again, no hint that the transaction was one entered into by NRA Recovery as an agent for anybody.

10. The plaintiffs/respondents called two witnesses in the proceedings in the Magistrates' Court. One was an employee of NRA Recovery. The period of her employment did not extend back as far as the time when the relevant contract was made. Her evidence is irrelevant to the issues before me.

11. The second witness called by the plaintiffs was Mr Issac Brott. He is a solicitor and, as he described himself in cross-examination, "effectively the owner of ... NRA Recovery." He said in his evidence in chief that the second appellant, Mr Green, approached him on many occasions to "obtain factoring monies on repair jobs." If, on assessment of an application, it in Mr Brott's words, "stands up", "then we shop around for the money". He added that "there's two kinds of money. The money we've got already and the money that has to be brought in depending on the particular job and the state of the factoring balances at the time."

12. The second appellant (then the second defendant) was called to give evidence before the magistrate. He was asked by his counsel whether he had ever had dealings with either plaintiff (respondent). He swore that he had not. He was not cross-examined about this, or about whether the first defendant was in any different position.

13. When the hearing below came to its end, the first question for the magistrate to answer was whether there existed at the material time a relationship of principal and agent between the respondents as principals and NRA Recovery as agent. In the absence of that relationship, the respondents were not parties to the contract upon which they relied. Unless, therefore, the magistrate were satisfied on the balance of probabilities that such a relationship existed, the plaintiffs/respondents must fail: with a few exceptions, none of which are presently relevant, the rule is that only a party to a contract can sue on it.

14. There was no direct evidence to the effect that NRA Recovery was acting as an agent in the transaction which gave rise to the claim. The direct evidence was to the contrary. There was, it is true, the elliptical reference to "LPL Factoring"; but nothing in the evidence suggested that either defendant/appellant noticed that reference, let alone saw it as revealing NRA Recovery's status as a mere agent. Looked at not subjectively, but objectively, the phrase in question was not, in my opinion, sufficient to alert the appellants to the fact (even assuming it were the fact) that NRA Recovery was a mere agent for the parties, and not itself the party, with whom they were contracting. If it matters, there was also no evidence that either defendant/appellant had ever previously done business with either plaintiff/respondent.

15. An important circumstance is that there was no evidence before his Honour about the terms of the relationship between the respondents and NRA Recovery. In the absence of such evidence, it was not possible to find on the balance of probabilities that the relationship was that of principal and agent. It is at least as likely that NRA Recovery agreed *as principal* with the first appellant to factor the debt owed to the repairer by the owner of the particular vehicle being repaired. When it could, it drew on its own funds for this purpose; but if those funds were insufficient, it shopped around for a re-financier. On this occasion, it refinanced the transaction by resort to the respondents. As I read the evidence of Mr Brott, this is precisely what he was saying. If that were indeed the position, then of course it follows not only that the relationship between the respondents and NRA Recovery was *not* one of principal and agent, but also that it was one as between principals: financier (NRA Recovery) and re-financiers (the respondents). If it was, the respondents were not and are not parties to the contract upon which is founded their putative cause of action against the appellants.

16. His Honour's judgment depended on the principal/agent relationship having been established. Yet, in the circumstances described above, the evidence did not allow the magistrate to find on the balance of probabilities that NRA Recovery acted as agent for the respondents. There being no evidence of the terms of the relationship between them, the magistrate was wrong to assume (no explicit finding was ever made) that it was one of principal and agent. Some other relationship was, for all the evidence disclosed, not simply equally open, but indeed more likely. Without giving the issue sufficient consideration, and with little if any assistance from counsel, or from the pleadings, the magistrate apparently proceeded simply on the basis that because there was some sort of connection between NRA Recovery and the respondents (and therefore between the respondents and the appellants) the principal/agent relationship was made out. But, apart from making the easy assumption that the first relationship was that of principal and agent, no-one took the trouble to analyse what hard evidence there was about that connection, and what its true nature might be.

17. The existence of the principal/agent relationship was thus a necessary element in the plaintiffs' cause of action. Because it was not proved on the balance of probabilities, it was not open to the magistrate to find for the respondents. But even if it had been proved, that would not have been the end of the matter. Although a necessary element in the cause of action, the relationship of principal and agent was not sufficient. The respondents would still fail unless they established on the balance of probabilities that the defendants/appellants either knew that NRA Recovery was acting as an agent, or were willing (or led NRA Recovery to believe that they were willing) to treat as a party to the contract anyone on whose behalf NRA may have been authorised to contract.

18. The evidence is clear that neither appellant knew of any agency. They dealt with NRA Recovery as if it were a principal party to their contractual arrangements. Had the appellants been willing, or had either led NRA Recovery (on this hypothesis, the agent) to believe that it or he was willing, to treat as a party to the transaction anyone on whose behalf the agent may have been authorised to enter into the deal, then it would not matter that the identity of the respondents was not disclosed, or even that the appellants remained in ignorance of the existence of a principal/agency relationship.[1] But in this case, there is a total absence of any evidence of either the requisite willingness or of the agent being led to believe that such willingness had been displayed.

19. The absence of evidence is in some instances not a problem. There is authority for the proposition that, in the case of an ordinary commercial contract, willingness may be assumed by the agent unless the other party manifests his unwillingness, or there are other circumstances which should lead the agent to realise that the other party was not so willing.[2] But this was no ordinary commercial contract. It was, on the respondents' own case, a factoring arrangement; and one side intended, without giving the other any notice, to split the provision of the relevant funds – and presumably the original (i.e. factored) debt – between two of the entities (the respondents) on that side, and in such proportions as those two privately agreed. If this could be done, the appellants would at some stage suddenly be faced (as they were) with two putative providers of finance, each claiming a share of the monies said to be owing. The appellants had then to attempt to work out how, if at all, the two claims corresponded with the total of their indebtedness, assuming they were indebted at all. Their willingness to allow themselves to be caught up in such an arrangement, especially given the nature of a factored debt, cannot be assumed. And, as senior counsel for the respondents said in the course of his submissions to me, the issue was not explored in the Court below: "That point was not made and it was not a point which arose in the case in any event."

20. On appeal, the respondents sought to rely on certain documents which, it was submitted on their behalf, were received into evidence during the hearing below. There is no doubt that the respondents sought to tender them. As far as one can gather, the respondents put them forward as bearing upon the relationship between the respondents and NRA Recovery. To the extent that they did so, their relevance was obvious. But objection was taken to that tender, on the ground that the documents, being copies, were not the best evidence.

21. The objection had force, even though there was no suggestion that the copies were not genuine. They were copy letters from NRA Recovery to one or other of the respondents. The latter ought therefore to have had the originals in their possession. No attempt was made to explain why it was that copies from the NRA Recovery file were produced in lieu. Be that as it may, the

hearing proceeded without the magistrate ruling on the objection at all.

22. The respondents submitted, in effect, that the appellants had later waived any previous objection they had to the tender of the letters because in cross-examination counsel for the then defendants directed several questions about them to the first of the then plaintiffs' witnesses. In my opinion this is a valid point, although one contrary argument could be that cross-examining counsel was understandably confused by the magistrate's failure properly to rule on the earlier objection.

23. Even assuming that the correspondence in question thereby became part of the evidence, however, it does not advance the case of the respondents. True, each letter speaks of NRA Recovery's confirmation "that we will be seeking the following factoring facility for you". Each, however, then goes on to refer to "[t]he terms of this factoring agreement"; and those terms are *not* the terms of the agreement upon which the respondents base their claim against the appellants. The latter contract provided for an "[a]mount to be factored" of $8,443.64. One of the letters provided for an "[a]mount to be factored" of $6,200.00; the other for an amount of $2,243.64. There were other, material, differences as well.

24. Those with an eye for figures and a touch of genius for mental arithmetic will observe that $6,200.00 and $2,243.64, when added together, total $8,443.64. If the mathematician is a lawyer as well, he or she – having studied the particulars of claim filed in the Magistrates' Court – will also have observed that the two former amounts are there referred to as "[t]he amount factored as a principal sum". In each case, that amount then forms the base against which the total sum claimed to be owing is calculated. But this looks much more like an ordinary claim for repayment of a loan than a claim arising from a factoring agreement. The latter is defined in Butterworths *Australian Legal Dictionary* as "An arrangement for the selling of trade debts ... Usually the seller sells its receivables at a discount to a factor in return for immediate cash." This appears to coincide with, or – more accurately – describe, the contract between the appellants and NRA Recovery. It does not appear to describe the contract upon which the respondents sue.

25. The respondents' position is therefore an impossible one. They allege that NRA Recovery acted as their agent in effecting a single contract with the appellants. They put that contract into evidence. They follow this by seeking to put into evidence, as their adoption of what their "agent" has done on their behalf, not one, but two, "contracts"; and these are, in addition, internally inconsistent with what they say is their agreement with the appellants, an agreement allegedly negotiated on their behalf by their agent.

26. It follows that, even if the respondents were in truth principals, albeit undisclosed, the evidence called before the magistrate was as a matter of law insufficient to allow him to find that they were parties to the contract with the appellants. It also follows that, as a matter of law, they had no standing as plaintiffs in this proceeding. The appeal must be allowed, the judgment below set aside, and in lieu thereof there must be judgment for the appellants.

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[1] *Teheran-Europe Co. Ltd. v S.T. Belton (Tractors) Ltd.* [1968] 2 QB 545 at 555 per Diplock LJ.
[2] Ibid.

APPEARANCES: For the appellant Rasdon Group Pty Ltd: Mr P Hayes QC with Mr T Sullivan, counsel. Moorhouse Perks, solicitors. For the respondents Lemas Nominees Pty Ltd: Mr G Uren QC with Mr J Levine, counsel. Isaac Brott & Co, solicitors.
