

41/12; [2012] VSC 584

SUPREME COURT OF VICTORIA

**GUSS v BOROONDARA CITY COUNCIL**

Kyrou J

29 November, 3 December 2012

LOCAL GOVERNMENT – RATE NOTICE ISSUED REQUIRING RATEPAYER TO PAY ARREARS OF RATES – RATES NOTICE INCLUDED ARREARS OUTSTANDING PLUS NEW CHARGES AND LEGAL COSTS – NOTICE STATED THAT PAYMENT IN FULL WAS REQUIRED BY 15 FEBRUARY 2012 – COMPLAINT ISSUED BY COUNCIL TO RECOVER ARREARS OF RATES – DEFENCE FILED THAT THE ISSUING OF THE RATE NOTICE HAD THE EFFECT OF EXTENDING THE DUE DATE FOR THE PAYMENT OF THE ARREARS – FINDING BY MAGISTRATE THAT RATEPAYER LIABLE TO PAY THE ARREARS TOGETHER WITH INTEREST AND COSTS – WHETHER MAGISTRATE IN ERROR.

**HELD:** Appeal by ratepayer dismissed.

1. Although the initial details in the Rate Notice might have suggested that the current rates and arrears were payable in full by 15 February 2012 or by the designated instalments, the Rate Notice contained a number of statements which made it clear that the amount of the arrears remained immediately due and payable. The second page of the Rate Notice drew a distinction between rates for the current year and arrears. It stated that '[t]he current rates and charges due are required to be paid on or before 15 February 2012' and that '[a]ny arrears ... are due immediately to avoid further interest'. The Rate Notice stated more than once that arrears that were not paid immediately would continue to accrue interest and may be subject to legal action without further notice.

2. Read as a whole, the Rate Notice did not contain any ambiguity about the ratepayer's obligations in relation to the payment of arrears. Any arrears that were due for payment prior to the issuing of the Rate Notice continued to be due and payable and continued to accrue interest, and nothing in the Rate Notice affected the ratepayer's obligations in relation to the arrears.

3. Once the Magistrate correctly rejected the contention based on the effect of the Rate Notice, he was obliged to find on the evidence that the arrears were due and payable as at the date of the filing of the Complaint and as at the date of the making of the order. Accordingly, the Magistrate did not err in law in ordering the ratepayer to pay to the Council the amount of \$5,833.14 in respect of arrears.

4. The Magistrate was entitled to determine the Complaint on the basis that the sole issue in dispute between the parties was whether the Rate Notice had the effect of extending the due date for payment of the arrears. Having correctly concluded that the Rate Notice did not have this effect, the Magistrate was not required to consider whether the *Local Government Act 1989* had been complied with or to make any finding in respect of this.

**KYROU J:**

**Introduction and summary**

1. This is an appeal under s109 of the *Magistrates' Court Act 1989* against an order of a Magistrate made on 8 June 2012 requiring the appellant to pay to the respondent the amount of \$5,833.14 in respect of arrears for local council rates, together with interest and costs.

2. At the hearing before the Magistrate, the case for the appellant was that the issuing of a rate notice by the respondent to the appellant after the respondent had filed a complaint seeking recovery of arrears in rates had the effect of extending the due date for the payment of the arrears. The Magistrate rejected this contention.

3. In this Court, the appellant submitted that the Magistrate erred in rejecting the above contention on the following grounds:

- (a) The Magistrate misconstrued the effect of the rate notice.

(b) The respondent had failed to prove that it had complied with the provisions of the *Local Government Act 1989* ('Act') relating to the validity of rate notices.

(c) The respondent was estopped from recovering the arrears.

4. For the reasons that follow, the Magistrate did not err in law. Accordingly, the appeal will be dismissed.

### Facts

5. The appellant is the registered proprietor of a residential property in Glen Iris, Victoria ('Property') which is located within the respondent's local government area.

6. On 4 July 2011, the respondent filed a complaint in the Magistrates' Court against the appellant seeking recovery of the amount of \$5,833.14 which was said to represent arrears in rates payable on the Property ('Complaint'). Paragraphs 1 and 2 of the statement of claim alleged that the respondent is a council under the Act and that the Property is the property on which rates are due and payable. The statement of claim relevantly continued:

3. The [appellant] is ... the owner or occupant of the [P]roperty and is ... indebted to the [respondent] for outstanding rates and other charges on the [P]roperty.

4. On or about 30/06/2011, the [respondent] issued rate notices to the [appellant] for the sum of \$5833.14.

5. Despite requests for payment by the [respondent], the [appellant] has ... refused and or neglected to pay the amount due to the [respondent] and continues to refuse and/or neglect to pay the amount due of \$5833.14 ...

7. Prior to the Complaint being served on the appellant, on 1 August 2011, the respondent issued an Annual Valuation and Rate Notice for the 2011/2012 period ('Rate Notice'), which claimed the following rates and charges:

Arrears outstanding \$5,833.14  
120 Ltr Bin Service Fee \$272 Per Bin \$272.00  
General Rate .1557 c / \$ on CIV \$2,039.65  
Legal Charge Costs \$671.60  
**TOTAL AMOUNT DUE \$8,816.39**

8. The first page of the Rate Notice set out three payment options:

(a) 'Payment in Full', which required payment of \$8,816.39 by 15 February 2012;

(b) 'Payment in Four Instalments', which required payment of \$6,578.39 by 30 September 2011, \$746 by 30 November 2011, \$746 by 29 February 2012 and \$746 by 31 May 2012; or

(c) 'Payment by Direct Debit', which required payment of \$6,134.39 on 31 August 2011, followed by the amount of \$298 on each of 30 September 2011, 31 October 2011, 30 November 2011, 31 December 2011, 31 January 2012, 29 February 2012, 31 March 2012, 30 April 2012 and 31 May 2012.

9. The first page of the Rate Notice also stated:

**ARREARS** Any arrears or interest, if shown, are due immediately to avoid further interest. Arrears not paid immediately will continue to accrue further interest and may be subject to legal action without further notice.

10. The second page of the Rate Notice relevantly provided:

### PAYMENT OF RATES AND CHARGES

You may pay this account by one of the following options:

**1. Payment in full:** The current rates and charges due are required to be paid on or before 15 February 2012. Any arrears, if shown, are due immediately to avoid further interest. Arrears not paid immediately will continue to accrue interest and may be subject to legal action without further notice.

**2. Four equal instalments:** The instalment due dates are:

- 1<sup>st</sup> instalment 30 September, 2011
- 2<sup>nd</sup> instalment 30 November, 2011
- 3<sup>rd</sup> instalment 29 February, 2012
- 4<sup>th</sup> instalment 31 May, 2012 ...

**3. Ten monthly instalments:** This option is only available if you pay by Direct Debit. ...

Payment of any rates and charges will be allocated as follows:

- 1. Legal costs owing, if any; 4. Separate rates owing, if any;
- 2. Interest owing if any; 5. Garbage charge owing, if any;
- 3. Arrears owing, if any; 6. Current rates owing. ...

#### **PENALTY INTEREST**

Penalty interest on any arrears of rates and charges will continue to accrue until full payment of the outstanding amount and interest accrued to the date of payment is received.

11. On 21 February 2012, the appellant filed particulars of defence in which she admitted the allegations in paras 1 and 2 of the statement of claim set out at [6] above. The particulars of defence relevantly continued:

In respect to paragraph 3 [of the statement of claim], the [appellant] admits that she is the registered proprietor of the [P]roperty ... but otherwise denies the allegations therein contained.

The [appellant] denies the allegations contained in paragraph 4 [of the statement of claim].

The [appellant] denies the allegations contained in paragraph 5 [of the statement of claim] and says further that:

(a) The [respondent's] claim herein is excessive having regard to amounts paid to the [respondent] in respect to rates in the past.

(b) Even if the sum claimed by the [respondent] herein was correct (which is denied) by notice dated 1 August 2011 issued by the [respondent] the said claim (or any sum ultimately found to be due thereunder) was not payable until 15 February 2012 and accordingly the issue of the Complaint herein on 4 July 2012 was premature and should be dismissed.

#### **The Magistrates' Court hearing**

##### **Evidence and submissions before the Magistrate**

12. On 8 June 2012, the hearing of the Complaint took place in the Melbourne Magistrates' Court ('Magistrates' Court hearing'). The respondent was represented by Mr Adam Coote of counsel and the appellant was represented by Mr Tim Greenway of counsel. On the appeal, Mr Coote represented the respondent and Mr Joseph Guss, solicitor, represented the appellant.

13. On the appeal, the respondent tendered a CD containing an audio recording of the Magistrates' Court hearing ('Audio Recording'). Mr Guss tendered an affidavit sworn by Mr Greenway setting out his recollection of what transpired at the Magistrates' Court hearing. Unfortunately, there is a gap in the Audio Recording. The parties agreed that, insofar as Mr Greenway's affidavit describes events during the break in the Audio Recording, it is accurate. The summaries of the Magistrates' Court hearing and the Magistrate's Decision at [14] to [19] below are based on the Audio Recording and Mr Greenway's affidavit.

14. At the Magistrates' Court hearing, Mr John Lorkin, the respondent's Coordinator of Revenue and Property, gave the following evidence:

(a) In 2010 and 2011, the appellant was in arrears in her payment of rates.

(b) The appellant entered into a payment plan with the respondent to pay off the arrears at a rate of \$300 per month.

(c) In approximately February 2011, the appellant defaulted on the payment plan. The respondent wrote several letters to the appellant requesting payment of the arrears and stating that it would commence legal proceedings if payment was not made.

(d) On 4 July 2011, the respondent filed the Complaint claiming \$5,833.14.

(e) On 1 August 2011, the respondent issued the Rate Notice.

(f) The respondent had not received any payment from the appellant since approximately February 2011.

15. According to the Audio Recording, a large number of documents were tendered through Mr Lorkin without objection. They included the Rate Notice (exhibit K), a rate notice for the period 1 July 2010 to 30 June 2011 (exhibit B) and a transaction payment summary (exhibit A) which set out how the amount of \$5,833.14 was calculated. Only the Rate Notice was exhibited to the affidavits tendered at the hearing of the appeal.

16. In his cross-examination of Mr Lorkin, Mr Greenway did not suggest that the amount of \$5,833.14 in arrears of rates was not owing, that the amount was excessive, that the appellant had not entered into a payment plan or that she had fully complied with the payment plan. The cross-examination focused on the contents of the Rate Notice and whether it had the effect of extending the time for payment of the arrears until 15 February 2012. Mr Lorkin denied that the Rate Notice had this effect, pointing to the statements in the Rate Notice about payment of arrears.

17. The appellant did not call any evidence.

18. In his closing address, Mr Greenway submitted that the Rate Notice had the effect of extending the time for payment of the arrears until 15 February 2012, that the arrears were not payable at the time that the Complaint was issued on 4 July 2011, that the respondent's claim was premature, and that the Complaint should be dismissed. Mr Greenway did not submit that the rate notices upon which the amount of the arrears was based were invalid for any reason or that the principles of estoppel applied.

### **The Magistrate's decision**

19. At the conclusion of the Magistrates' Court hearing, the Magistrate made an order that the appellant pay to the respondent the amount of \$5,833.14, interest of \$572.21 and costs of \$3,985.60. His Honour delivered *ex tempore* reasons to the following effect:

(a) It was common ground that the appellant's Property was within the respondent's local jurisdiction and so the respondent was entitled to levy rates against the Property.

(b) The parties entered into an agreement under which the appellant agreed to pay outstanding arrears at the rate of \$300 per month and also agreed that, if any payments were missed, the full amount of the arrears would become due and payable.

(c) The appellant paid some instalments but she did not make any payments after 17 February 2011.

(d) Between 17 March 2011 and 10 June 2011, the respondent sent to the appellant a final notice, a final demand and a standard form seeking payment of outstanding arrears.

(e) By law, the respondent is required to send out yearly rate notices that provide payment options, including an instalments option.

(f) The inclusion of the arrears figure in the Rate Notice was nothing more than a mistake by the respondent and it did not have the effect of unilaterally extending the time for the arrears to become due and payable. The arrears were due and payable and the Rate Notice of 1 August 2011 did not affect the due date. The payment options in the Rate Notice are merely that. The appellant has not purported to follow the payment options and has not paid any amounts because of them.

### **Notice of appeal**

20. The appellant's notice of appeal, as amended, relevantly stated:

The learned Magistrate held that the inclusion of the said arrears amount of \$5,833.14 was a mistake by the respondent and did not have the effect of extending the time for payment of that amount to 15 February 2012 and further that the payment options in the respondent's said notice are merely that and in this case the appellant has not followed them or paid any amounts because of them.

4(A) There was no evidence that the provisions of S.158 and S.167 of the Local Government Act 1989 were complied with and accordingly that the rates claimed to be payable by the respondent in the complaint were payable as claimed or at all.

4(C) That as by its conduct in including the arrears claimed in the sum of \$5,833.14 in the rate notice the respondent is estopped from claiming that the said amount of \$5,833.14 was payable otherwise than in accordance with the rate notice, namely with the total rates and charges by instalments as therein set out, or in full on 15 February 2012.

The appellant contends that the learned Magistrate was wrong in law in finding as he did and accordingly making the order that he did in respect to the respondent's claim in the complaint.<sup>[1]</sup>

**First ground of appeal: The Magistrate misconstrued the effect of the Rate Notice**

21. Mr Guss submitted that, as the Rate Notice stated that the amount of the arrears of \$5,833.14 was payable by 15 February 2012, the only reasonable interpretation to be given to the notice was that the time for payment of the arrears was extended to that date. According to Mr Guss, this meant that the arrears were not payable as at the date of the filing of the Complaint on 4 July 2011 and that the Complaint was filed prematurely. Mr Guss contended that the Magistrate erred in law in finding that the inclusion of the arrears in the Rate Notice was a mistake and that this inclusion did not affect the appellant's obligations in respect of payment of the arrears.

22. In essence, Mr Guss repeated the submissions that were made by Mr Greenway at the Magistrates' Court hearing. Those submissions were devoid of any merit at first instance and gained no additional credibility when repeated in a more verbose manner on the appeal.

23. Although the initial details in the Rate Notice might have suggested that the current rates and arrears were payable in full by 15 February 2012 or by the designated instalments, the Rate Notice contained a number of statements which made it clear that the amount of the arrears remained immediately due and payable. The second page of the Rate Notice drew a distinction between rates for the current year and arrears. It stated that '[t]he current rates and charges due are required to be paid on or before 15 February 2012' and that '[a]ny arrears ... are due immediately to avoid further interest'. The Rate Notice stated more than once that arrears that were not paid immediately would continue to accrue interest and may be subject to legal action without further notice.

24. Read as a whole, the Rate Notice did not contain any ambiguity about the appellant's obligations in relation to the payment of arrears. Any arrears that were due for payment prior to the issuing of the Rate Notice continued to be due and payable and continued to accrue interest, and nothing in the Rate Notice affected the appellant's obligations in relation to the arrears.

25. The appellant's contention that the Complaint was 'premature' is difficult to understand. As the Rate Notice was issued after the filing of the Complaint, the Rate Notice could not render the Complaint 'premature'. Although the appellant was served with the Complaint after she received the Rate Notice, the issuing of proceedings to recover the arrears was entirely consistent with the respondent's previous correspondence with the appellant. It was also consistent with the Rate Notice which twice stated that the arrears were due immediately and may be the subject of legal action. The appellant could not possibly have been surprised by the Complaint.

26. Although the appellant's particulars of defence alleged that the arrears were 'excessive having regard to amounts paid ... in respect to rates in the past', the appellant did not give any evidence or make any submissions in support of this defence. In these circumstances, it would not have been open to the Magistrate to have upheld this defence.

27. On the basis of Mr Lorkin's oral evidence and the documents that were tendered through him, it was open to the Magistrate to find that the appellant owed the respondent the amount of \$5,833.14 in respect of arrears. Not only did the appellant not give any evidence to contradict Mr Lorkin's evidence, but Mr Greenway did not submit that the arrears were not owing; his submissions were directed solely to establishing that the Rate Notice had the effect of extending the time for payment of the arrears.

28. In these circumstances, once the Magistrate correctly rejected the contention based on the effect of the Rate Notice, he was obliged to find on the evidence that the arrears were due and payable as at the date of the filing of the Complaint and as at the date of the making of his Honour's order.



29. Accordingly, the Magistrate did not err in law in ordering the appellant to pay to the respondent the amount of \$5,833.14 in respect of arrears. There is no separate challenge to the amounts for interest and costs set out in the Magistrate's order.

30. I reject Mr Guss' submission that it was not open to the Magistrate to grant the relief sought in the Complaint because the Complaint relied on rate notices issued '[o]n or about 30/06/2011' which were not tendered at the Magistrates' Court hearing. Mr Lorkin's oral evidence and the exhibits tendered on behalf of the respondent<sup>[2]</sup> were sufficient to support the Magistrate's findings and order.

31. Even if it is assumed that the Magistrate erred in law in making a finding of fact that the arrears were included in the Rate Notice by mistake when there was no evidence for such a finding, such an error would not affect the validity of his Honour's order. Such an error would be in respect of a non-consequential strand in the Magistrate's reasoning. The operative finding was that the Rate Notice did not affect the appellant's obligations to pay the arrears, which was not affected by any legal error.

32. It follows that the appellant's principal ground of appeal must fail.

### **Second ground of appeal: Non-compliance with the Act**

33. Under cover of ground of appeal 4A, Mr Guss submitted that ss158 and 167 of the Act imposed conditions precedent for the validity of a rate notice and that, as the respondent had not led any evidence to establish that those conditions had been met, it was not open to the Magistrate to find that the appellant owed any amount to the respondent in respect of rates.

34. The short answer to this ground of appeal is that, at the Magistrates' Court hearing, the appellant did not take issue with the validity of any rate notice. Mr Greenway confined his cross-examination and submissions to the issue of the effect of the Rate Notice on the due date for payment of the arrears. No submission was made that any rate notice was invalid, whether for non-compliance with the Act or otherwise.

35. Mr Guss submitted that there was no evidence before the Magistrate that the appellant was the person who was liable to pay the rates and charges under s156 of the Act. This submission is disingenuous because the appellant admitted that she was the registered proprietor of the Property and that the Property was the property on which rates and charges were due and payable. The appellant's status as the ratepayer for the Property was not an issue before the Magistrate and cannot give rise to an appealable error of law.

36. Parties are bound by the manner in which they conduct their cases. If a defendant does not take issue with an aspect of a plaintiff's case, in the sense of pleading a defence, adducing evidence or making submissions in relation to it, the plaintiff can be justified in conducting its case on the basis that that aspect need not be the subject of evidence or submissions.<sup>[3]</sup>

37. In the present case, the Magistrate was entitled to determine the Complaint on the basis that the sole issue in dispute between the parties was whether the Rate Notice had the effect of extending the due date for payment of the arrears. Having correctly concluded that the Rate Notice did not have this effect, the Magistrate was not required to consider whether the Act had been complied with or to make any finding in respect of this.

38. As the Magistrate was not required to, and did not, make any finding on whether any rate notice upon which the arrears were based was invalid due to non-compliance with the Act, no error of law has been demonstrated.<sup>[4]</sup>

### **Third ground of appeal: Estoppel**

39. Under cover of ground 4C, Mr Guss submitted that, as the Rate Notice contained a representation that the amount of the arrears was payable on 15 February 2012, the respondent is estopped from asserting that the arrears were payable prior to that date.

40. This ground of appeal is unsustainable because estoppel was not pleaded in the particulars of defence and it was not the subject of any evidence by the appellant, any submissions by Mr

Greenway or any ruling by the Magistrate. In short, estoppel was not an issue before the Magistrate and therefore the Magistrate could not have possibly made any error in relation to it.

41. If estoppel had been raised by the appellant before the Magistrate, as a matter of law, his Honour would have been compelled to reject it. For the reasons discussed at [23] to [31] above, the Rate Notice did not contain any representation to the effect contended by Mr Guss. Even if such a representation were made, the absence of evidence from the appellant that she relied upon the representation inevitably meant that the estoppel argument would fail.

**Proposed order**

42. The appeal will be dismissed. I will hear from the parties on the precise form of the orders to be made by this Court and on the question of costs.

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<sup>[1]</sup> All errors are original. The notice of appeal does not contain a para 4(B).

<sup>[2]</sup> The exhibits included the Rate Notice and the rate notice for the period 1 July 2010 to 30 June 2011. See [15] above.

<sup>[3]</sup> *Carter v Walker* [2010] VSCA 340 (14 December 2010) [43].

<sup>[4]</sup> See also s179 of the Act, which provides that the invalidity of a rate is not a defence in any proceedings involving a claim for recovery of the rate unless the rate has been quashed in any other proceedings.

**APPEARANCES:** For the appellant Guss: Mr J Guss, solicitor. Joseph Guss, solicitor. For the respondent Boroondara City Council: Mr A Coote, counsel. Forbes Dowling, solicitors.

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