13/05; [2005] VSC 91

SUPREME COURT OF VICTORIA

NATIONAL EXCHANGE PTY LTD v HODDER

Teague J

2 February, 4 April 2005

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES FOR BREACH OF CONTRACT – OFFER AND ACCEPTANCE – FORM PREPARED FOR COMPANY SHARES TO BE TRANSFERRED TO WIDOW – SHARES TRANSFERRED TO SON BY MISTAKE – OFFER TO BUY SHARES SENT TO SON – FORM SIGNED BY SON AND SENT TO OFFEROR – WHEN FURTHER FORM SENT TO SON FOR FURTHER INFORMATION ERROR REALISED BY SON – ATTEMPT BY SON TO EXPLAIN TO OFFEROR HOW ERROR CAME TO BE MADE – CLAIM BY OFFEROR PURSUANT TO SIGNED TRANSFER OF SHARES FORM – CLAIM DISMISSED BY MAGISTRATE – FINDING THAT SON DID NOT HAVE LEGAL OR BENEFICIAL INTEREST IN SHARES AT TIME OF SIGNING TRANSFER FORM – WHETHER MAGISTRATE IN ERROR.

H., a beneficiary under his father's will, mistakenly received shares which should have been transferred into the name of his mother. H. agreed to rectify the error, however, he received an offer from NEP/L to buy the shares. Said to be in a confused state, H. signed the transfer form and sent it to NEP/L. When NEP/L requested that H. provide his shareholder registration number H. realised that he had made an error. He made efforts to contact NEP/L without success. Later, NEP/L took proceedings against H. claiming the value of the shares for breach of contract. At the hearing, evidence was given as to the circumstances surrounding H's acquisition of the shares and as to his confused state. The magistrate found that H. had no title to the shares and that he had no intention to enter into a contract to sell the shares. Accordingly, the claim was dismissed. Upon appeal—

HELD: Appeal dismissed.
Should a person who signs and returns a transfer of shares form, which is an apparent act of acceptance, be able to get out of the apparent contract thus formed? It is likely rarely to be the case. However, in the present case, once H. explained his position, this could be seen to be such a rare case. The Magistrate was entitled to find that the facts were as claimed by H., and that there was no contract, because there was no title and no intention to contract. In those circumstances, the magistrate was not in error in dismissing the claim.

TEAGUE J:

1. These are my reasons for concluding that I should dismiss an appeal from an order of a Master dismissing a proceeding taken by way of an appeal from an order of a Magistrate dismissing a complaint brought by the appellant.

2. On 3 October 2003, a complaint was filed in the Magistrates' Court at Melbourne. The Plaintiff was National Exchange Pty Ltd ("the appellant") and the Defendant was Clive Gerard Hodder. I will refer to him at times by his full name to distinguish him from his father, Clive Maxwell Hodder, but otherwise generally as "Mr Hodder". The appellant, by a complaint lodged in the Magistrates' Court, claimed from Mr Hodder $2,171.19 for breach of contract. On 4 October 2004, following a hearing by way of arbitration before Magistrate Smith, the Magistrate made an order dismissing the complaint. On 3 November 2004, the appellant brought the proceeding in this court appealing against the order of the Magistrate. On 17 December 2004, Master Wheeler dismissed the proceeding. In the formal Court record, there is stated under "Other Matters": "I accept that the Magistrate did not in terms hold that exhibit "DT-15" was attached to "DT7" however it was open to the Magistrate on the evidence to dismiss the proceeding. Therefore, I find there is no question of law to be decided." On 22 December 2004, the appellant filed its notice of appeal against that order.

3. Order 77 of the Supreme Court Rules provides that an appeal from an order of a Master shall be by re-hearing *de novo* of the application to the Master. Part 3 of Order 58 of the Supreme Court Rules contains the provisions governing the process for dealing with an appeal from the Magistrates' Court under s109 of the *Magistrates' Court Act* 1989. On 1 October 2004, a new Part 3 was substituted. Rule 58.10(8) provides:

"The Master may dismiss the appeal if satisfied that—
(a) the notice of appeal does not identify sufficiently or at all a question of law on which the appeal may be brought;

(b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or

(c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the Court."

4. Before me, Mr Waller for the appellant submitted that the Master and Magistrate had erred. Mr Hurley for Mr Hodder submitted that neither had erred and that the appeal should be dismissed. It is necessary to outline both the events which gave rise to the proceedings in the Magistrates' Court and the course of those proceedings.

5. As to the appellant, the only substantial focus was on two forms. One form was a transfer form signed by Mr Hodder on 14 February 2003, and sent to the appellant on or about that day. The other was the letter dated 10 February 2003 addressed to Mr Hodder in which the unsigned transfer form was enclosed, and which indicated the terms on which the appellant offered to buy the 796 shares in IAG which, according to IAG's register of members, Mr Hodder owned. The appellant's position was that Mr Hodder had, by signing and returning the transfer form, accepted its offer, that there was a contract for the sale and purchase of the shares, and that the appellant was entitled to judgment for damages for the breach of that contract.

6. As to the other side of the story, I have essentially summarised the evidence given by or for Mr Hodder before the Magistrate. Clive Gerard Hodder is one of three sons of Clive Maxwell Hodder, to whom I will generally refer after this as "the deceased". The Hodders live in New South Wales. Both Clive Maxwell Hodder and Clive Gerard Hodder had shares in NRMA Insurance Ltd, which had its origins in the National Roads and Motorists' Association, which has a significant presence in New South Wales. At the time that NRMA Insurance Ltd demutualised in 2000, Clive Gerard Hodder sold his shares. The deceased did not sell his shares, and received shares in NRMA Insurance Group Limited. That company later changed its name to Insurance Australia Group Ltd ("IAG"). In November 2001, the deceased died. Under his 1988 will, his wife ("Eileen Hodder") and three sons were executors and trustees, his wife had a life interest and the three sons were the remaindermen. A form was prepared to transfer the deceased's shares in IAG. The plan was to have the shares transferred into the name of Eileen Hodder. By mistake, the shares were transferred into the name of Clive Gerard Hodder. Eileen Hodder learned of this mistake. She asked that the shares be transferred into her name. Her son, Clive Gerard Hodder, agreed that this was appropriate.

7. Some time after he had so agreed, Mr Hodder received the letter of 10 February 2003 from the appellant. He expressed himself as then being confused, and in that confused state, having erred in thinking that the form related to the planned transfer of the shares into the name of his mother, he had signed the transfer form and had sent it off. When he received the follow up letter from the appellant, asking him to provide his Shareholder Registration Number ("SRN"), he realised that he had erred. He set out to explain to the appellant how the error had been made. That proved to be a difficult exercise, even though the appellants letter bore an address and a telephone number. Mr Hodder enlisted the help of his partner, Lorraine Ratcliffe, to make it known to the appellant that there had been a mistake. She telephoned the number given in the letter from the appellant. She got only a recorded message. She then typed up a letter from Mr Hodder to the appellant. She sent it by fax to the appellant.

8. At the hearing before the Magistrate, evidence on behalf of the appellant was given by Mr David Tweed, a director of National Exchange Pty Ltd. He was asked whether the appellant had received the letter which Ms Ratcliffe had faxed. Mr Tweed said first that he had never seen the letter, that it was not on the file, that it was not relevant because the appellant had already purchased the shares and that the letter may have been put in the bin. He modified that a little later to say that he may have received it, and he may have thought it not relevant as the share had already been purchased, and he would have put it in the bin.

9. At the hearing before the Magistrate, the appellant was represented by a lawyer, Mr Griffin. Mr Hodder was not represented. The hearing took the form of an arbitration under s102 of the

Magistrates' Court Act 1989. This had implications, including as to discovery, pleadings, and the rules of evidence, that were adverted to more than once by the Magistrate. Under s103 of that Act, the Magistrate is bound by the rules of natural justice, but not by rules of evidence.

10. A taped record was made of what was said at the hearing. An affidavit was sworn by David Tweed and filed in this court. To that affidavit, was exhibited a copy of a transcript, referred to as a copy of a transcript made of the hearing on 4 October 2004. This is one of four occasions within the last year that I have encountered a practice as to such a transcript that I find troubling. It is of producing a transcript made from a tape of what was recorded, but without any indication whether a person present at the time the recording was made has checked the accuracy of the transcript, or otherwise sought to have it revised, whether by the magistrate or otherwise. Even more troubling to me is that there is no indication whether the magistrate has been asked for a written statement of reasons to clarify the short final summation that he made. It seems that the assumption has been made that a later reviewer of the transcript can and should be left to interpret the transcript doing the best that he or she can. At times, there can be a need to interpret matters transcribed in a way that is not clear. The problem is amplified in a situation such as occurred here. On my reading of the transcript, the Magistrate did not give detailed oral reasons, but merely a short final summation consequent upon a lengthy hearing of submissions, in which the Magistrate took a very active part. Hence, in reviewing the transcript including the final summation, one object of the review must necessarily be to assess whether a preliminary position stated by the Magistrate is appropriately to be taken as forming part of the final reasoning. In any such situation, the disposition of a reviewer is likely to be to interpret what has been said in earlier discussion in a way that is consistent with the final conclusion and summation, unless the contrary is apparent. The result of that approach may be that it is likely to be more difficult to satisfy the reviewer of error where the claimed error may be seen to be in a proposition which is inconsistent with the conclusion.

11. I have noted that there were no formally delivered oral reasons, but what I would refer to as a final summation, in an exchange in these terms:

> Mr Griffin: "You're led to believe Your Honour that four trustees made a mistake, mother, two brothers and this person. It's in Your Honour's hands."
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> His Honour: "It is part of the father's estate, there's no doubt about that, that's not put in issue therefore it's covered by the will is it not and the will makes it absolutely clear what should happen to all of the estate except for an occasion where there was a resolution by all the trustees to advance part of the estate to a potential beneficiary or a named beneficiary in the will. And that's the evidence both of the witness the defendant and the mother whom both of them are trustees. Therefore regardless of how it came to stand otherwise by way of mistake, negligence or silliness or even greed, in the name of a single trustee on a share registry it seems to me that the balance of the evidence is that this particular defendant at the time he signed that share transfer did not have either the legal or beneficial interest in these shares. Therefore he could not have sold them to National Exchange. He had nothing to sell."
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> Mr Griffin: "If that's Your Honour's determination."
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> His Honour: "Yes. Right the claim will be dismissed thank you."

12. That summation had followed a lively exchange of positions between the Magistrate and Mr Griffin. The exchange consisted partly of submissions by Mr Griffin, partly of the stating of preliminary positions by the Magistrate, and partly of questions and answers between the two. In the circumstance of this case, Mr Hodder could have been expected to contribute little, and that was what happened. The exchange was the sort of exchange not infrequently encountered in the Practice Court in this court. Mostly, that kind of process produces, and can be seen to produce, a more satisfying result than one where the judicial officer simply listens without comment. However, there is the added difficulty when reviewing that process that such an exchange must be subjected to a close scrutiny in order to assess whether preliminary positions can appropriately be seen as forming part of the final reasoning of the decision-maker.

13. What was said at the end can only be seen in the context of all that went before. So one must return to the start. When the hearing started, there was a preliminary discussion involving the Magistrate, Mr Griffin and Mr Hodder. In the course of that discussion, a number of matters

were said which, on my review of what was said, pointed clearly to Mr Hodder being a person prone to being disorganised, vague and readily confused. A number of events and statements later in the hearing only served to confirm that assessment. There was also apparent, a significant level of dependency of Mr Hodder upon his partner, Lorraine Ratcliffe. She was with him during the hearing, and ultimately gave evidence on his call. After the preliminary discussion, oral testimony was given of behalf of the appellant by Mr Tweed. There was then further discussion, before oral testimony was given by each of Mr Hodder and Ms Ratcliffe. There was then the lengthy exchange between the Magistrate and Mr Griffin, which ultimately led to the passage that I have set out above. In the course of that discussion, the matter was stood down, while steps were taken to obtain a copy of the will of the deceased.

14. There were a significant number of documents before the Magistrate. They included a copy of the will of the deceased, a statutory declaration of Eileen Hodder, the letter and transfer form sent to, and signed and returned by Mr Hodder, and copies of later letters. Some objections were taken by Mr Griffin to the Magistrate receiving some documents. There was not a formal ruling as to any objection. There were matters said by the Magistrate that warranted my inferring that the objections were not sustained for reasons that included that the hearing was proceeding by way of arbitration according to the provisions referred to above.

15. Mr Griffin raised the issue of an alternative basis or bases upon which the appellant might succeed if the Magistrate found that Mr Hodder had any one of: no capacity to contract to sell the IAG shares; no title to the share; or, no intention to sell the shares. The alternative basis or bases were not precisely articulated at any stage. There was reference at times to "misrepresentation" and to "breach of warranty of authority" and to other possible heads. When those alternative bases were discussed, not only was there a lack of precision in articulation, there was also a query by the Magistrate as to whether it was too late to raise such an alternative. That would have been a particular concern given that Mr Hodder was not legally represented. There were other significant obstacles to any alternative claim. One lay in the promptness in the claimed communicating by or on behalf of Mr Hodder to the appellant of the nature of Mr Hodder's error as to his not being the owner of the shares. Mr Waller, before me, argued that comments made by the Magistrate pointed to his not having found that there was such communications as claimed. On my review of what was said by the Magistrate, I was much more disposed to infer that he had found, although he had not expressly said so, that there had been the communications as claimed.

16. I have noted above that there were a number of indications of the relative vagueness of Mr Hodder, and of his apparent strong dependency upon Ms Ratcliffe. He also indicated that he also has poor sight. On the other hand, he has a university degree, and is a music and science teacher. The transcript reveals that there were many issues raised by Mr Griffin with the Magistrate as to the credibility of the evidence given by Mr Hodder. Mr Griffin argued that there were many aspects of his account that were scarcely credible. They included: that there had been unsatisfactorily explained reasons why the shares in his father's estate had been transferred into the name of Mr Hodder; that at one time he had stated that his and his father's name were identical whereas the true position was that they were only substantially similar; that at one time he had said that his mother inherited all of his father's estate, whereas the true position was that she got a life interest; that there had been a long delay between the time of his mother telling him to have the share ownership changed over to her and the time of the receipt of the appellant's letter; that he had been in a state of confusion when he signed and sent back the form with the appellant's letter; and, that he had acted promptly in getting Ms Ratcliffe to try to communicate with the appellant by telephone and fax. The inference that I would draw from reading all of the transcript is that, while the Magistrate did have reservations about the respondent for the reasons advanced by Mr Griffin, the Magistrate nonetheless accepted the substance of the evidence of the respondent.

17. Mr Waller submitted to me that each of the Magistrate and the Master had erred. He put to me that, insofar as the Magistrate had made comments that could be interpreted as his having found that Mr Hodder had nothing to sell, and that he had made a mistake in signing and returning the appellant's form, such findings were contrary to the evidence. Further, he put to me that the magistrate had made an error in law in that he had treated the mistake of Mr Hodder as entitling the latter to withdraw from a binding contract. He took me to passages in *Macrae v Commonwealth Disposals Commission* [1951] HCA 79; (1951) 84 CLR 377; [1951] ALR 771; (1951) 25 ALJR 425 and *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422; 45 ALR 265;

(1983) 57 ALJR 197 as support for the proposition that such a mistake cannot be so relied on. He put to me that the Magistrate made comments that should be interpreted as reflecting his having found that the fax which Mr Hodder claimed to have had sent to the appellant was not sent. He referred critically to two alternative submissions advanced by Mr Hurley. One of the two submissions was based on the decision of Osborn J in *National Exchange Pty Ltd v Vane* [2003] VSC 361. There it was decided, put shortly, that a Magistrate faced with a comparable situation could find otherwise than that the offer to buy shares had been accepted. The other submission was that the appeal from the Magistrate was properly dismissed as frivolous or vexatious. Mr Waller argued that *National Exchange Pty Ltd v Vane* was distinguishable, having regard to what he claimed was a fundamental difference in the way that the offer to buy shares was framed. He argued that this could not be treated as a frivolous or vexatious case.

18. There is a fundamental problem underlying the principal submissions. It stems from the quite different assessment of the reasons of the Magistrate argued for by Mr Waller, than that made by me after reviewing the whole of the transcript. In my assessment, the Magistrate can be treated as having made findings of fact that Mr Hodder had no title to the IAG shares, and that Mr Hodder had no intention to enter into a contract to sell the shares. There was no mistake of the kind which might attract the application of the proposition laid down in *Macrae*. The Magistrate having made those findings, there was not identified a question of law on which the appeal may be brought. For the same reason, the appellant does not have an arguable case on appeal. As no alternative claim had been made, or at least satisfactorily made, to the Magistrate, it did not have to be addressed.

19. It is not necessary to address the possible applicability of either the argument based on the propositions articulated in *National Exchange Pty Ltd v Vane,* or the argument as to the appeal being frivolous. I would simply note that, as to the first, I would not have been disposed to treat the change in the wording of the offer as fundamental. It may have made a material difference, but I have my reservations. That there was a need for Mr Hodder to provide his SRN before the appellant could become registered is apparent from the further letters sent by the appellant. As to the second, I would not have been disposed to treat the appeal as frivolous, vexatious or otherwise an abuse of the process of the Court. On the one hand, the amount claimed was relatively small. It had been boosted by an increase in the value of the shares after February 2003. There also was, or appeared to be, a relative disproportion as between the disorganised and unrepresented Mr Hodder and the organised and represented corporate appellant. On the other hand, until Mr Hodder told his story, there could have been seen to be a principle at stake. Should a person who signs and returns a transfer of shares form, which is an apparent act of acceptance, be able to get out of the apparent contract thus formed? It is likely rarely to be the case. But once Mr Hodder explained his position, this could be seen to be such a rare case. The Magistrate was entitled to find that the facts were as claimed by Mr Hodder, and that there was no contract, because there was no title and no intention to contract.

20. The appeal should be dismissed with the appellant to pay the costs of the respondent to be taxed if not agreed.

APPEARANCES: For the Appellant National Exchange Pty Ltd: Mr IG Waller, counsel. Wilmoth Field Warne, solicitors. For the Respondent Hodder: Mr T Hurley, counsel. Shayne Daley & Associates, solicitors.
