39/01; [2001] VSC 468

SUPREME COURT OF VICTORIA

EICKMEYER v TJ BOARD & SONS PTY LTD

Balmford J

15 November, 5 December 2001

CIVIL PROCEEDINGS – CLAIM FOR COMMISSION DUE ON SALE OF PROPERTY - PLEADINGS – NO REFERENCE IN CLAIM TO A CLAIM OF EQUITABLE ESTOPPEL – SUCH CLAIM MADE AT HEARING OF CLAIM FOR COMMISSION – NO APPLICATION MADE FOR ADJOURNMENT OF HEARING – NO APPLICATION MADE TO RE-OPEN CASE – CLAIM OF EQUITABLE ESTOPPEL UPHELD – WHETHER MAGISTRATE IN ERROR.

Board, an estate agent, sued E. for commission due on a contract of sale. The claim made no mention of a claim of equitable estoppel and unconscionability. At the hearing, Board submitted that if it was found that Board had no entitlement to commission under the agreement then it could rely on the existence of an equitable estoppel in that Board had acted to its detriment by continuing to work towards earning its commission on the basis of false assumptions known to and encouraged by E. The magistrate ruled that Board had no entitlement to commission under the agreement but upheld the submission in relation to equitable estoppel and made an order for the amount claimed. Upon appeal—

HELD: Appeal dismissed.
The issue on which the magistrate based his decision was raised fairly, albeit late in the hearing. There were steps open to counsel for E. to take, which he abstained from taking. The circumstances of the case allowed Board to pursue its case and obtain judgment notwithstanding the failure to comply with pleadings requirements.

BALMFORD J:

1. This is an appeal pursuant to section 109 of the *Magistrates' Court Act* 1989, which provides that a party to a civil proceeding in the Magistrates' Court may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding. The final order the subject of the appeal was made on 21 May 2001 by the Magistrates' Court at Melbourne, constituted by Mr Mealy, Magistrate, whereby judgment was ordered against the appellants in the sum of $25,000 in respect of commission due on a contract of sale of a hotel property.

2. On 5 July 2001 Master Wheeler ordered that two questions of law were raised by the appeal, namely:

> (a) Did the learned Magistrate err in allowing the [respondent] to add a new cause of action after the close of the [appellants'] case without requiring an amendment to the statement of claim and permitting the appellants to re-open their case for the purpose of either further cross-examination of the respondent's witnesses and/or calling evidence themselves?
>
> (b) Did the learned Magistrate err in basing his decision on issues not pleaded or disclosed in the statement of claim or defence?

Both questions in effect deal with the same issue.

3. The respondent brought the proceeding before the Magistrate seeking commission in respect of the sale of the freehold occupied by a hotel in Bright, pursuant to an agreement entered into between the respondent and the appellants which is described further in [4] and [5] below. The facts appear from the reasons for decision of the Magistrate ("the reasons"). The appellants owned the hotel, which they wished to sell, and the respondent carried on business as a real estate agent. Towards the end of 1996 the respondent, as agent for the appellants, sold the hotel business to M & S Whelan Investments Pty Ltd ("Whelan") for $285,000. A lease of the freehold from the appellants to Whelan ("the first lease") was entered into, for a period of two years expiring on 10 December 1998. The first lease contained nine options for renewal, each for a further term of two years, and to be exercised not less than three months before the end of the relevant two

year term. Clause 47 of the first lease included an option for the lessee to purchase the freehold, at a price of $915,000, exercisable at any time prior to the expiration of the two year term, with the proviso that "the option shall not be available for exercise by the Lessee during any renewal of this Lease or overholding tenancy".

4. Commission payable to the respondent in respect of the sale of the business would have been $20,000. However, an agreement as to the commission was entered into between the appellants and the respondent. In a letter of 21 October 1996 from Rogers & Gaylard, the solicitors for the appellants ("the solicitors"), the terms of the agreement were said to be that the respondent agreed to accept a commission of $15,000, on the basis that should Whelan or a purchaser associated with Whelan exercise the option to purchase for $915,000 contained in the first lease, the commission on that sale would be $25,000.

5. The respondent took issue on one point, and by a letter of 13 December 1996 the solicitors indicated that if the option was exercised at $915,000 the commission would be $25,000, and if at a lesser amount, the commission would be 3% of the price. The Magistrate found that the terms of the agreement were as set out in the letter of 21 October, but clarified, on the issue of price, by the later correspondence.

6. By a letter dated 22 April 1998 the solicitors informed Whelan that the appellants agreed to extend the period for exercise of the option to purchase by twelve months, that is, to 10 December 1999. By a letter of 20 October 1998 to the respondent they informed it of this extension, and continued:

> We suggest that given the wording of clause 44 [apparently an error for 47] that you secure a confirmation to confirm that, in the event of a sale to [Whelan], your Commission is secured until the end of next year.

They referred to the matter again in a letter to the respondent of 8 December 1998, which read, omitting formal parts:

> We refer to our letter of 20 October, 1998 and your subsequent telephone conversation with the writer regarding the Eickmeyer's agreement to extend the date by which [Whelan] can exercise its option to purchase the freehold of the Hotel for $915,000 to 10 December 1999. The agreement whereby our clients will pay your Company a commission of $25,000 if the option is exercised is not recorded in clause 44 [apparently an error for 47] of the Lease but is secured by our letter of 13 December, 1996.
>
> Notwithstanding that clause 44 of the Lease provides that "... the option shall not be available for exercise by the Lessee during any renewal of this Lease or overholding tenancy" by agreeing to extend the period during which the option to purchase may be exercised into the first term of renewal (which is in writing) renders [*sic*] this part of clause 44 inoperative. In any event, irrespective of any variation to the Lease, your Commission is payable if [Whelan] exercises its "option to purchase the freehold for $915,000 or any lesser amount" as our letter of 13 December, 1996 records.
>
> Provided the option is exercised in accordance with the terms of the Lease (as varied) the $25,000 commission would appear payable. The exercise of the option gives rise to the payment of the Commission.

7. The option to renew the first lease was not exercised within the time provided in that lease. However, a new lease of the hotel freehold ("the second lease") was entered into between the same parties on 18 May 1999, some five months after the expiry of the first lease.

8. The second lease contained an option to purchase the freehold, exercisable within a period of two years expiring on 10 December 2000. That option was exercised at a date before 10 December 1999, thus within what the correspondence referred to in [6] above described as the period of extension of the option, and the sale was completed. In the proceeding before the Magistrate, as has been said, the respondent sought payment of commission in respect of that sale, pursuant to its agreement with the appellants.

9. Evidence before the Magistrate was given for the respondent by Mr Board, as to whom see [13] below, and Mr Johnson, formerly in the employ of the solicitors. No evidence was called for the appellants.

10. The Magistrate found as a fact that there was no extension of the period for the exercise of the option to purchase contained in the first lease, as an extension would have required a written agreement between the appellants and Whelan, and apparently no such written agreement had been made. He therefore found that the option to purchase expired on 10 December 1998, that is, before Whelan purported to exercise it.

11. Mr Ribbands, for the appellants, submitted that the Magistrate need have gone no further than this in his findings. Those findings led inevitably to the conclusion that the option contained in the first lease had not been exercised within the time provided, and thus the respondent had no entitlement to commission under the agreement.

12. However, the Magistrate went on to refer to a submission by counsel for the respondent, relying on the existence of an equitable estoppel as enunciated by the High Court in *Waltons Stores (Interstate) Ltd v Maher*[1] The submission was that the respondent had acted to its detriment by continuing to work towards earning its commission on the basis of a false assumption, which was known to and encouraged by the appellants.

13. In considering this submission, the Magistrate relied on evidence given for the respondent by Mr Board. It would appear that the Magistrate proceeded on the basis that Mr Board's mind was the directing mind of the respondent, although there was no specific evidence or finding on this point. He found that, by virtue of the letters of 20 October 1998 and 8 December 1998, referred to in [6] above, Mr Board was, at least by the time the respondent received the letter of 8 December 1998, under the impression that there had been a valid extension of the option to 10 December 1999, and that accordingly the respondent had an additional twelve months in which to earn its commission. The letter of 8 December 1998 had been sent on the instructions of the appellants. The Magistrate found that the appellants were aware of continued efforts made by the respondent after 10 December 1998 to bring about a purchase of the freehold, by assisting Whelan to obtain finance for the purchase. He found that in Mr Board's mind, such a purchase would have been effected by exercise of the option to purchase contained in the first lease, on the basis that, as Mr Board understood the position, the period for the exercise of that option had been extended.

14. The Magistrate went on to find that it would be unconscionable for the appellants to now deny that the option to purchase contained in the first lease was extended in circumstances which also extended the period during which the respondent would be entitled to commission. He was satisfied that the option to purchase was exercised by Whelan during the period of the supposed extension. On this basis he gave judgment for the respondent in the sum claimed, together with interest and costs.

15. Mr Ribbands, who had also appeared for the appellants in the Magistrates' Court, relied on the absence of any reference to a case founded on equitable estoppel and unconscionability from the complaint and statement of claim filed by the respondent. The sole ground there relied on by the respondent was breach of the terms of the agreement between the parties as to the payment of commission. The appellants had run their case on the assumption that that was the whole of the case against them. On that assumption they had not considered it necessary to call any evidence, and Mr Ribbands said that he had made this clear at the outset of the proceeding before the Magistrate. He indicated that if the appellants had been aware that the submission as to equitable estoppel would be made, their case would have been run differently.

16. Mr Ribbands relied on a passage from the judgment of Nathan J in *Zambelis v Nahas*:[2]

> Magistrates' courts have now their own rules of procedures enacted as subordinate legislation in Statutory Rule no. 199 of 1989. They commenced operation on the 1st September 1990. They replace the former rules of 1980. However, an examination of them reveals sharp and distinct differences. The present *Magistrates' Court Civil Procedure Rules* are a reflection, very largely, of the *Supreme Court Rules*. They are set out by way of order and sub-rule and parts. An examination of them *in toto* indicates that Magistrates' Courts in their civil aspect have become courts of pleading. There is a statutory requirement in a claim that it be particularised in a way which brings to the defendant the substance of the claim enabling him to file a defence, as he must, together with particulars of it if the claim is to be joined.

17. In *Intrac (Sales) Pty Ltd v Riverside Plumbing & Gas Fitting Pty Ltd*[3] Eames J said, after referring to the passage from the judgment of Nathan J cited in the preceding paragraph:

> ... the variation in the wording between the Supreme Court Rule and the Magistrates' Court Rule suggests that it was not intended that the complaint document in the Magistrates' Court should be invested with all of the features of a Supreme Court pleading. The change in format led Nathan J to conclude that the Magistrates' Court has become a court of pleading. I do not, with respect, disagree with that conclusion insofar as the new Rules may be said to place a greater emphasis than hitherto upon the principles which lay behind the pleadings rules, namely that they cast an obligation on a plaintiff to identify his case, and, subject to amendment, to limit the evidence in a case to that which relates to those facts pleaded as relevant to the cause of action of the claim: *Bell v Lever Bros Ltd* [1931] UKHL 2; [1932] AC 161 at 216; [1931] All ER 1. However, the strictness of the pleadings requirements in the Magistrates' Court may well be less that that applied in superior courts. The wording of the Rules suggests as much and, notwithstanding the ever increasing limit of the Magistrates Court jurisdiction, a less strict approach would be in keeping with a jurisdiction where unrepresented parties will often appear. I respectfully agree, therefore, with the learned author of Williams "Supreme Court Practice", Vol 3 par MC 9.01.25, that the primary purpose of the requirements in the Rules is to inform the other side of the case to be answered at trial, but that a less strict application of pleading rules would be appropriate in the Magistrates' Court given the fact that it adjudicates claims at the smaller end of the money scale, and is necessarily a less formal court than higher courts.

18. Mr Ribbands referred to the transcript of the proceeding before the Magistrate, indicating that in reply he had submitted, relying on the pleadings, that he had come prepared to argue a case in contract, and did not have to respond to the submission as to equitable estoppel, which had not been pleaded. Counsel for the respondent had not at any stage applied to amend the pleadings in order to introduce such a claim. In any case, had he done so, Mr Ribbands submitted, such an amendment would have had to have been refused in the interests of finality because it would have required an adjournment and in effect a complete rerun of the case.

19. Mr Messer, for the respondent, distinguished the decision of Eames J in *Intrac* principally on the ground that that case related to a claim under section 52 of the *Trade Practices Act* 1974 which turned on the necessity of pleading in precise terms the false representation on which the plaintiff relies. However, he drew attention to the conclusions of his Honour[4], reached after examination of the authorities, which read, so far as here relevant:

> (b) The pleading obligation (ie the obligation to plead any representation which is to be relied upon for judgment) applies in the Magistrates' Court, although the strictness of the application of pleading rules which is adopted in superior courts may not be the case in the Magistrates' Court.
>
> (c) Circumstances may arise in the Magistrates' Court which would permit a party to pursue its case, and obtain judgment in its favour, notwithstanding failure to comply with pleadings requirements.

20. I note that his Honour went on to say:

> In my opinion, however, it can not automatically follow that Intrac must obtain judgment in its favour because of the failure to amend the pleadings. Pleadings rules, even in superior courts, where they are applied with greater stringency, cannot be applied where to do so would be to create an injustice which might have been avoided.

That passage is consistent with the point made by Dawson, Gaudron and McHugh JJ in *State of Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 155; (1997) 141 ALR 353; 71 ALJR 294 as to the importance of litigating an issue which is fairly arguable. I would, with respect, adopt the view of Eames J set out in [17], [19] and [20] above as to the manner of application of pleadings rules in the Magistrates' Court.

21. Mr Messer submitted that the present case fell within paragraph (c) cited in [19] above from the judgment of Eames J. The true nature of the appellants' complaint was that they had been taken by surprise in the court below. He relied on the judgment of Jordan CJ, with whom Davidson and Halse Rogers JJ agreed, in *Preston v Green* (1944) 61 WN (NSW) 204; 44 SR (NSW) 404, where his Honour said, (with paragraphing here inserted for ease of reading) as to a claim for a new trial on the basis that the plaintiff had been taken by surprise:

> Where surprise is the ground, the questions are, first, did the case in fact take a turn which the applicant could not reasonably be expected to have anticipated, and did this in fact catch him unawares?
>
> Secondly, was the unexpected turn of the case likely to have had a material effect on the jury's verdict?
>
> Thirdly, did the applicant, before the conclusion of the trial, have a reasonable opportunity of realising the significance and importance of the new development?
>
> Fourthly, did he apply for an adjournment, or failing that, a non-suit, or did he refrain from doing so and elect to go on and take his chance notwithstanding the new development?
>
> Fifthly, what is the nature of the additional evidence which the applicant intends to adduce if a new trial is directed, and is it likely to be an important factor in the new trial?

22. Not having been present at the hearing below, Mr Messer, in his submissions relating to the fourth and fifth questions posed by Jordan CJ, referred to the transcript as indicating that Mr Ribbands had not raised any objection during the making of the submission as to equitable estoppel; and had made no request for an amendment of the particulars of claim or for an adjournment of the hearing. He submitted that an application for an adjournment would have been allowed by the Magistrate in the interests of justice.

23. He pointed out that no submission had been made in the present appeal challenging the correctness of the Magistrate's finding that the appellants were estopped from denying the entitlement of the respondent to a commission; nor was there any material before this Court to indicate the nature of any evidence which would have been called in rebuttal to that submission had it been included in the statement of claim.

24. Accordingly, he submitted, there was no error of law in the decision of the Magistrate and the appellants were not entitled to succeed in this appeal. In any case, in the absence of any indication as to any evidence which would have been called in rebuttal, there was nothing to suggest that there was any substantial miscarriage of justice in the decision of the Magistrate.

25. In terms of the first three questions posed in *Preston v Green*, it is difficult to say whether counsel for the appellants "could not reasonably be expected to have anticipated" the submission as to equitable estoppel. Clearly that submission was likely to have a material effect on the decision. It is apparent from Mr Ribbands' submissions in reply that he had at the time realised the significance of the new development.

26. Applying the questions posed in *Preston v Green* to the circumstances of this case, I find that the answer to the second question in the Master's order must be No. The issue on which the Magistrate based his decision was raised fairly, albeit late in the hearing. There were steps open to counsel for the appellants to take, which he abstained from taking. This is, in my view, as Mr Messer submitted, one of those cases which fall within paragraph (c) of the conclusions of Eames J in *Intrac,* cited in [19] above.

27. As to the first question in the Master's order, the same considerations apply. Further, it is clear that no application was made to the Magistrate for an amendment to the statement of claim, and no request put to him that the appellants be permitted to re-open their case. That being so, he can hardly be said to have erred in not making orders to that effect, and the answer to the first question must be No.

28. For the reasons which I have stated, the appeal will be dismissed with costs.

---

[1] [1988] HCA 7; (1988) 164 CLR 387; (1988) 76 ALR 513; (1988) 62 ALJR 110; [1988] ANZ Conv R 98.
[2] (1991) V Conv R 54-396 at 64,826.
[3] (1997) ATPR 41-572 at 43,941 - 43,942.
[4] at 43,948.

APPEARANCES: For the appellants Eickmeyer: Mr JA Ribbands, counsel. Rogers & Gaylard, solicitors. For the Respondent TJ Board & Sons Pty Ltd: Mr TR Messer, counsel. Maurice Blackburn Cashman, solicitors.