28/13; [2013] VSC 297

SUPREME COURT OF VICTORIA

HELOU v SHAYA

Beach J

7, 11 June 2013

CIVIL PROCEEDINGS – CONTRACT – LOAN AGREEMENT – WHETHER FINDINGS OF FACT OPEN – WHETHER MAGISTRATE CONSTRAINED BY FINDINGS OF CREDIBILITY TO CONCLUDE THAT THE RESPONDENT HAD NOT PROVED HIS CASE – REASONS FOR JUDGMENT – WHETHER REASONS INADEQUATE: *MAGISTRATES' COURT ACT* 1989, S109.

HELD: Appeal dismissed.
1. Nothing prevented the Magistrate from concluding, as a matter of fact, that on the evidence given by the respondent, there was a $15,000 loan which was repayable and which had not been repaid. No point of law arose. The question was entirely factual. The Magistrate was entitled to make the conclusions of fact that were made in the reasons for judgment.

2. Reasons can almost always be more perfectly expressed. This is particularly so in a busy court like the Magistrates' Court with a large press of business. Undoubtedly, the reasons in the present case could have been more explicit. That said, the reasons disclosed a sufficient and adequate path of reasoning.

3. Any suggestion that the Magistrate somehow improperly entered the arena and became an advocate must be rejected. At worst, the transcript disclosed that the Magistrate was endeavouring to make the conduct of the trial before him more efficient by hastening counsel towards the issues that were disclosed in the material put before him. In modern trial management, such an approach was to be lauded.

BEACH J: Introduction

1. In September 2010, Munir Shaya, the respondent, commenced a Magistrates' Court proceeding against Michael Helou, the appellant, claiming $33,000, together with interest and costs. The claim for $33,000 was made up as follows:

(a) $12,000 being money allegedly lent by the respondent to the appellant in July 2007;
(b) $15,000 being money allegedly lent by the respondent to the appellant in June 2008; and
(c) $6,000 being money allegedly owed by the appellant to the respondent in respect of the purchase of a kitchen and four antique fireplaces.

2. By his defence in the Magistrates' Court proceeding, the appellant:

(a) admitted borrowing $12,000 but said that that amount had been repaid pursuant to a subsequent agreement between the parties;
(b) denied that the respondent ever lent him $15,000; and
(c) denied the respondent's claim in respect of the sale of the kitchen and fireplaces.

3. On 11 May 2012, the Magistrates' Court proceeding came on for hearing before M. Smith M. On 30 July 2012, his Honour upheld the respondent's claims in respect of the $12,000 loan and $15,000 loan – but rejected the respondent's claim in respect of the alleged sale of the kitchen and fireplaces. Accordingly, on that day, his Honour entered judgment for the respondent in the sum of $27,000, together with interest in the sum of $5,211.74 and costs in the sum of $7,007.20.

4. Pursuant to s109 of the *Magistrates' Court Act* 1989, the appellant appeals to this Court, on a question of law,[1] from the orders made on 30 July 2012. The appeal relates to the Magistrate's findings and conclusions with respect to the $15,000 loan. The appellant seeks to have the orders made on 30 July 2012 set aside and in lieu thereof an order that the appellant pay the respondent the sum of $12,000 (the amount of the first loan). This is the hearing of the appellant's appeal.

The grounds of appeal

5. As set out in his amended notice of appeal, the appellant's grounds of appeal are as follows:

1. The learned Magistrate was constrained by his findings of credibility at paragraphs [6] and [12] of the judgment to find that the Plaintiff/Respondent had not proved his case in relation to the $15,000 on the balance of probabilities.

2. There was no evidence upon which the learned Magistrate was able to conclude at paragraph [21] that the $15,000 was to be 'factored into the varied agreement concerning the payments to be made to the Bank of Queensland' as that proposition was advanced by the Magistrate and not the Plaintiff/Respondent.

3. The learned Magistrate did not provide adequate reasons for concluding that the Appellant/Defendant owed the Respondent/Plaintiff $15,000.

4. The learned Magistrate did not provide adequate reasons for concluding at [21] that the $15,000 was to be 'factored into the varied agreement concerning the payments to be made to the Bank of Queensland'.

The parties' cases below

6. At trial, only two witnesses were called. The respondent gave evidence in support of his alleged causes of action, and then the appellant gave evidence in support of his defence. Each side tendered documents in support of their respective cases.[2] While some assistance was to be gained from some of the exhibits tendered,[3] essentially the case at trial was one of word against word.

7. The respondent gave evidence that he lent $12,000 to the appellant; he had asked on repeated occasions for the money to be repaid; and the money was never repaid. The appellant admitted the existence of this loan, but said there was an agreement between the parties that the appellant would pay the respondent's share of loan repayments to be made, in respect of a borrowing from the Bank of Queensland, between September 2008 and January 2009, so as to extinguish the amount of the debt. The respondent admitted that there was an agreement between the parties whereby the appellant would pay the respondent's share of these loan repayments until the debt was extinguished. However, the respondent said that the appellant ultimately did not honour that repayment agreement.

8. So far as the $15,000 loan was concerned, the respondent gave evidence that he lent that amount to the appellant; he sought repayment on a number of occasions; and the amount was never repaid. The appellant denied ever being lent the sum of $15,000. Further, the appellant gave evidence that in fact he lent the respondent $15,000, which the respondent repaid with interest in the sum of $60.

The facts in more detail

9. On the respondent's case, he lent the appellant the sum of $12,000 on 23 July 2007, and the sum of $15,000 on 5 June 2008. The appellant never repaid these amounts.

10. On the appellant's case, there was no loan of $15,000. Instead, the appellant contended that he lent the sum of $15,000 to the respondent on 16 April 2008, and that the respondent repaid $15,060 on 9 May 2008.

11. As to the repayment of the $12,000, both sides agreed that this was to be done by the appellant paying the respondent's share of loan payments, between September 2008 and January 2009, in respect of a loan taken out with the Bank of Queensland in August 2008.

12. The circumstances of this repayment agreement were summarised by his Honour in findings that are not the subject of attack in this proceeding as follows:

> It is relevant at this stage to set out briefly some relevant commercial dealings between the parties. In 2008 the plaintiff [respondent] and defendant [appellant] were in a partnership or joint venture for the purchase and development of certain real estate. The lengthy and somewhat complicated dealings between the parties and the parties and other individuals in respect to this particular project are not particularly pertinent. There is no doubt that as at 22 August 2008 agreement between the parties was in place as to the funding of the project.
>
> *Inter alia*, the defendant [appellant] was to obtain a loan of $430,000 from the Bank of Queensland.

> It was agreed between the parties that two thirds of the interest payments were to be made by the plaintiff [respondent] and one third by the defendant [appellant]. Allowing for interest rate fluctuations, the monthly repayment on this loan was in the vicinity of $4800.
>
> There is also no dispute between the parties, at least in respect to the $12,000 loan, that the defendant [appellant] was to discharge his obligation by paying the plaintiff's [respondent's] one third (scil two thirds) contribution to the Bank of Queensland, until such time as the debt had been extinguished. It is clear that for the first three or four months of the currency of the repayments to the bank, the defendant [appellant] assumed sole responsibility to meet that obligation. It seems that the first payments made by the plaintiff [respondent] in that respect were in about January 2009. The system in place was that the defendant [appellant] would make the payments to the Bank of Queensland, and the plaintiff [respondent] was to pay his share to the defendant [appellant] by cheque. In about March or April 2010 the plaintiff [respondent] became concerned, for reasons it is unnecessary to dwell upon, that the defendant [appellant] was not honouring the agreement and properly maintaining the loan payments to the Bank of Queensland. It is common ground that between about January 2009 and March or April 2010 the plaintiff [respondent] paid the sum of at least $67,400 to the defendant [appellant] on account of the loan obligations to the Bank of Queensland.
>
> Figures tendered by the parties and extracted from the transaction histories of the Bank of Queensland loan establish clearly that the figure paid by the plaintiff [respondent] to the defendant [appellant] was significantly in excess of his obligation to pay two thirds in accordance with the primary agreement.[4]

The Magistrate's reasons

13. In relation to the respondent's claim for $6,000 for the alleged sale of the kitchen and fireplaces, the Magistrate said that on the evidence it was "not possible to determine to the required degree of probability the terms of any agreement between the parties concerning these items".[5] His Honour went on in paragraph [6] (a paragraph referred to in ground one of the notice of appeal):

> That being so, the defendant [appellant] is the party in possession of the items; the defendant [appellant] is liable upon the demand of the plaintiff [respondent] to deliver up the items to the plaintiff [respondent] as being the party with best title, and aside from that I do not propose to make any order in respect of that part of the plaintiff's [respondent's] claim.

14. In relation to the existence or otherwise of the $15,000 loan, the Magistrate noted that on the appellant's version, the appellant lent $15,000 to the respondent when the appellant owed the respondent the sum of $12,000 (lent some eight months earlier). Further, on the appellant's version, the respondent repaid the sum of $15,000 plus interest at a time when the respondent was still owed $12,000. As it was put by his Honour:

> There was no satisfactory explanation as to why, if at the time these particular $15,000 transactions took place, the defendant [appellant] was admittedly indebted to the plaintiff [respondent] in the sum of $12,000, the plaintiff [respondent] did not simply subtract that amount when repaying the defendant [appellant] in May 2008.[6]

15. At paragraph [12] of his Honour's reasons (again, referred to in ground one of the notice of appeal), his Honour said:

> These events took place some time ago, and the absence of further formal documentary evidence of the loans can be explained by the fact that at the time the parties were on good terms. That being so it has to be said, however, that neither party impressed in their evidence as being particularly reliable historians.

16. Having concluded (in a finding which is not the subject of any challenge in this appeal) that the respondent paid more than the two thirds of the Bank of Queensland loan agreement repayments, his Honour went on to say that "[m]anifestly therefore [the respondent's payments were] significantly in excess of the figure of two thirds less either $12,000 on account of the undisputed loan, or $27,000 if both loan claims of the plaintiff [respondent] are accepted".[7]

17. Next, after dealing with a submission made by the appellant, his Honour went on to conclude that "the agreement as to the repayment by way of one third to the defendant [appellant] and two thirds to the plaintiff [respondent] was an agreement which was expressly varied by the agreement to take account of loan moneys owed to the plaintiff [respondent]".[8] His Honour then

went on to say that the Bank of Queensland loan ran for sufficient time up to March or April 2010 which would have enabled the appellant to pay off his indebtedness – be it $12,000 or $27,000.

18. After these conclusions, his Honour then turned specifically to the alleged $15,000 loan and said:

> Having carefully considered the matter, I am satisfied that a loan of $15,000 was made by the plaintiff [respondent] to the defendant [appellant] in June 2008. I also find that the payment of this amount was to be factored into the varied agreement concerning the payments to be made to the Bank of Queensland. Manifestly, the defendant [appellant] has not repaid that amount within the currency of the loan facility extended by the bank, or at all.[9]

Grounds one and three

19. In ground one, complaint is made that the Magistrate was constrained by his findings of credibility to conclude that the respondent had not proved his case in relation to the $15,000 loan claim. In ground three, the appellant asserts that the Magistrate did not provide adequate reasons for concluding that the appellant owed the sum of $15,000. There is no substance in these grounds.

20. The first point to be made is that the Magistrate was well entitled to accept the evidence of the respondent that he had lent the sum of $15,000; that it was repayable; that there had been a demand for the payment; and that the appellant had not repaid the sum of $15,000. Indeed, having regard to the way the case was run at trial, the only issue really in dispute so far as the $15,000 loan claim was concerned at first instance was the question of whether the amount of $15,000 had been lent by the respondent to the appellant. The respondent was not challenged in cross-examination in relation to his evidence that he had demanded repayment and that there had been no repayment.

21. The second point to be made is that the Magistrate was entitled to express the view that "neither party impressed in their evidence as being particularly reliable historians". Further, the Magistrate was entitled to conclude that the claim in respect of the kitchen and the fireplaces was not proved by the respondent. However, none of this prevented the Magistrate from concluding, as a matter of fact, that on the evidence given by the respondent, there was a $15,000 loan which was repayable and which had not been repaid. No point of law arose. The question was entirely factual. His Honour was entitled to make the conclusions of fact that were made in the reasons for judgment.

22. It follows from what I have said above that this not a "no evidence" case. Further, the mere non-acceptance of one part of a party's claim does not mandate (as a matter of law or otherwise) the conclusion that another claim made in the same proceeding must be dismissed. A magistrate (like any other trier of fact) is entitled to accept the evidence of a witness on one point and not accept the evidence of the same witness on another point. Further, to the extent that the appellant's arguments in this appeal[10] was premised on the proposition that the non-acceptance of the respondent's evidence on a particular topic, or actual evidence given by the respondent inconsistent with the Court's findings, mandated as a matter of law, a conclusion in favour of the defendant, those arguments must be rejected.[11]

23. I turn now to the complaint made concerning the adequacy of the Magistrate's reasons concerning the $15,000 loan agreement. Much has been written recently about the principles for determining the adequacy of reasons. In *Transport Accident Commission v Kamel*,[12] Kyrou AJA[13] said:

> This Court has repeatedly emphasised, including in appeals from decisions of the County Court under s93(4)(d) of the Act, that judicial reasons for decision must sufficiently explain the basis for any findings that are made in reaching that decision. It has been said that the reasons must disclose 'the route that led to the answer', 'how or why the conclusion was reached', 'the process of reasoning' or 'the path of reasoning'.
>
> Thus, for example, in *Franklin v Ubaldi Foods Pty Ltd* – which involved an appeal from a decision of the County Court made under s134AB(16)(b) of the *Accident Compensation Act* 1985 – Ashley JA, with whom Warren CJ and Nettle JA agreed, said:
>
> "Reasons must be such as reveal – although in a particular case it may be by necessary inference – the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect,

> they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law."

Similarly, in *Rodda v Transport Accident Commission* – which involved an appeal from a decision of the County Court under s93(4)(d) of the Act – Hargrave AJA, with whom Ashley and Dodds-Streeton JJA agreed, said:

> "it is established that adequate reasons will provide an intelligible explanation of the process or path of reasoning which has led to the conclusion reached, and that a judge is required to consider and give adequate reasons in determining each of the substantial issues which have been raised for determination in the proceeding. Where there is a conflict on the evidence, and one version is accepted and the other rejected, the judge must [advert] to and assign reasons for preferring one version of the evidence over another."

In general, the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is insufficient to disclose a path of reasoning.[14]

24. Whether reasons will be sufficient in the particular case will, of course, be influenced by the ambit of the dispute at trial.[15] Further, as was said by Kyrou J in *Secretary to the Department of Justice v Yee*:[16]

> Reasons for decision have to be read fairly and particular parts have to be read in the context of the reasons as a whole and the manner in which the parties conducted the proceeding. Reasons can be adequate by a combination of what is expressly stated and the inferences that necessarily arise from what is expressly stated.[17]

25. Reasons can almost always be more perfectly expressed. This is particularly so in a busy court like the Magistrates' Court with a large press of business. Undoubtedly, the reasons in the present case could have been more explicit. That said, in my view, the reasons disclose a sufficient and adequate path of reasoning.

26. The Magistrate was, perhaps understandably, less than completely impressed with both witnesses. However, it is clear from his reasons, when read as a whole, that he accepted less of the appellant's evidence than the respondent's evidence. Further, in dealing with the alleged $15,000 loan, the Magistrate noted the improbability of the appellant's version, which would have had the respondent paying the sum of $15,060 to a person who, at that time, owed him $12,000.

27. When one reads the reasons as a whole, it is plain that the Magistrate preferred the evidence of the respondent on the issue of the $15,000 loan – it being the more likely scenario having regard to the admitted existence of the $12,000 loan as at June 2008.

28. Grounds one and three must be rejected.

Grounds two and four

29. Grounds two and four make complaint about the Magistrate's conclusion that there was an agreement between the parties that the $15,000 loan would be repaid by the appellant continuing to pay the respondent's share of the loan payments to the Bank of Queensland. The appellant complains that:

> (a) there was no evidence to support this conclusion;
>
> (b) the existence of this repayment agreement was not advanced by the parties – but rather was the creation of the Magistrate;
>
> (c) the reasons for his Honour's conclusion on this issue are inadequate; and
>
> (d) in advancing this issue during the course of the trial, the Magistrate improperly assumed the role of an advocate.

30. In support of this last complaint, the appellant relied upon an often cited passage in the judgment of Denning LJ in *Jones v National Coal Board*,[18] as follows:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses

> when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well.[19]

31. There is nothing in any of the appellant's complaints. First, the conclusion that the $15,000 loan was to be repaid by the appellant continuing to pay the respondent's share of the loan payments to the Bank of Queensland was unnecessary in the determination of the proceeding below. This is so because the parties conducted the proceeding below on the footing that the only issue in dispute about the $15,000 loan was its existence. The appellant did not run the alternative argument (either in cross-examination of the respondent or in submissions) that if there was a $15,000 loan, then it was not then due.[20] Nor did he run any argument that the $15,000 loan had been otherwise repaid. The parties, no doubt conscious of their overarching obligations under the *Civil Procedure Act* 2010, ran the proceeding below in respect of the $15,000 loan simply on the issue as to whether the loan was in fact made by the respondent to the appellant. In those circumstances, it was sufficient for the Magistrate, having concluded in favour of the respondent that the loan existed, to enter judgment on the basis that the loan was repayable and had not been repaid by the appellant.

32. Secondly, it is not correct to say that the issue was somehow invented by the Magistrate. The issue arose during the cross-examination of the respondent. The respondent was taken to an affidavit he swore on 29 November 2010.[21] Paragraphs 16 and 17 of that affidavit provided: It was also agreed that the applicant [appellant] was to pay additional interest on the $430,000 loan. This was due to the fact that I [the respondent] advanced him $12,000 on 23 July 2007 and a further $15,000 on 5 June 2008 which remains unpaid. The applicant did in fact pay for four months. The applicant then reneged on our agreement by asking me to help him out. He asked me to make payments on his behalf and that when he receives some money he would pay me back. In 2008 the agreement was that the Bank of Queensland monthly interest loan be paid one third by the applicant [appellant] and two thirds by myself. The applicant [appellant] started with his monthly payments without me paying him my two thirds. The reason was that we agreed from day one that I will deduct my two thirds from the loans I made to him, ie the $12,000 and the $15,000.

33. Ultimately, this affidavit (sworn by the respondent) was tendered by the appellant at trial.[22]

34. Thirdly, the Magistrate's path of reasoning in respect of his conclusions about the agreement to repay the $15,000 loan adequately disclose a path of reasoning. The Magistrate accepted the respondent's evidence. It is not to the point for the appellant now to highlight some evidence given by the respondent at trial that is not consistent with the Magistrate's conclusion. Necessarily, the Magistrate, as he was entitled to, rejected such evidence as was given by the appellant that was inconsistent with the version sworn in the appellant's affidavit. The Magistrate, as I have said above, was entitled to do this having regard to the evidence given by the respondent at trial.[23]

35. Fourthly, any suggestion that the Magistrate somehow improperly entered the arena and became an advocate must be rejected. At worst, the transcript discloses that the Magistrate was endeavouring to make the conduct of the trial before him more efficient by hastening counsel towards the issues that were disclosed in the material put before him. In modern trial management, such an approach is to be lauded.

36. Further, the absence of any complaint by counsel for the appellant, during the trial, about his Honour's interventions (or indeed his Honour's conduct of the trial generally) tells against the complaint now being made. One would have expected that if the Magistrate had somehow improperly assumed the role of an advocate for the respondent, then the appellant would have made the appropriate bias application. This was not done. And no doubt for the very good reason that there would have been no basis for any such application. In any event, it is now too late to make this complaint.

37. Grounds two and four must be rejected.

Conclusion

38. The appeal must be dismissed.

[1] In his amended notice of appeal, the appellant identifies the questions of law upon which the appeal is brought as follows:

"(1) The learned Magistrate's finding that the appellant owed the respondent $15,000 was contrary to law as the finding was not reasonably open on the evidence.

(2) The learned Magistrate erred in law by failing to provide adequate reasons for finding that the appellant owed the respondent $15,000.

(3) The learned Magistrate erred by introducing a proposition that was not put into evidence by the plaintiff/respondent."

[2] The respondent's exhibits are Exhibit AH6 to the appellant's affidavit sworn 3 September 2012 (see paragraph [53] of that affidavit). The appellant's exhibits are Exhibit AH7 to the same affidavit (see paragraph [68]).

[3] As the Magistrate noted, the respondent tendered a cheque drawn in the sum of $12,000, being the loan moneys which were not in dispute; and secondly, a Visa statement showing that on 5 June 2008 he obtained a cash advance of $15,000 – while the appellant tendered a cash advance voucher of the Bank of Queensland dated 16 April 2008 in the sum of $15,000 and a Visa statement showing a credit into his account on 9 May 2008 of $15,060.

[4] Reasons below [13]–[16].

[5] Reasons for judgment [5].

[6] Reasons below [10].

[7] Reasons below [16].

[8] Reasons below [18].

[9] Reasons below [21].

[10] The grounds presently being considered or grounds two and four.

[11] See generally, *Krum v Malaysian Airline Systems Berhad* [2004] VSC 185; *Malaysian Airline Systems Berhad v Krum* [2005] VSCA 232; *Husson v Keppel Prince Engineering Pty Ltd* [2006] VSC 412; *Alcoa Portland Aluminium Pty Ltd v Husson & Anor* [2007] VSCA 209; (2007) 18 VR 112. See further, *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436, 460 [58] ; (1998) 28 MVR 327; (1998) 14 VAR 189 (Callaway JA); *Thales Australia Ltd v The Coroners Court & Ors* [2011] VSC 133 [60].

[12] [2011] VSCA 110.

[13] With whom Warren CJ and Ashley JA agreed.

[14] [2011] VSCA 110, [70]-[73] (citations omitted).

[15] *Murray Goulburn Co-op Co Limited v Filliponi* [2012] VSCA 230, [28] (Neave JA and Beach AJA).

[16] [2012] VSC 47.

[17] Ibid [94] (citations omitted).

[18] [1957] EWCA Civ 3; [1957] 2 QB 55, 64; [1957] 2 All ER 155; [1957] 2 WLR 760.

[19] See further, *Yuill v Yuill* [1945] P 15, 20; [1945] 1 All ER 183; 61 TLR 176; *Galea v Galea* (1990) 19 NSWLR 263, 280.

[20] In evidence-in-chief, the respondent gave evidence of multiple requests he made to the appellant for repayment of the $15,000 loan (T34.21 – T35.28). This evidence was not challenged in cross-examination; nor was it challenged during the course of the appellant's evidence. Again, this was no doubt because that was not the battleground upon which the case was fought.

[21] In a proceeding at VCAT between the same parties.

[22] Appellant's affidavit sworn 3 September 2012, paragraph [68].

[23] See for example the evidence given by the respondent at T56.14 - .18:

"But what is being suggested to you here is you did make an agreement about getting your $27,000 back and the agreement was that he would pay additional interest on the loan?---Yes.

Until he paid an extra $27,000?---Yeah, yeah."

APPEARANCES: For the appellant Helou: Mr TWJ Greenway, counsel. Antony Sdrinis & Co, solicitors. For the respondent Shaya: Mr MA Black, counsel. Bullards, solicitors.
