26/97

SUPREME COURT OF VICTORIA

SCHIERHOLTER v CIM RESOURCES LTD

Hampel J

4, 18 February 1997

CIVIL PROCEEDINGS – CONTRACT – PROSPECTUS INVITING APPLICATIONS FOR SHARE OPTIONS – ACCEPTED – PAYMENT BY CHEQUE SUBSEQUENTLY DISHONOURED – OPTIONS CERTIFICATE ISSUED – WHETHER OFFER ACCEPTED – WHETHER CONTRACT COMPLETE – DAMAGES – HOW ASSESSED.

S. accepted an offer in CIM's prospectus for options to acquire fully paid shares. S. sent the acceptance form together with a personal cheque which was later dishonoured. Notwithstanding the dishonour of the cheque, S. was issued with a certificate which enabled S. to trade the options. Subsequently, when S. instructed his stock broker to sell the options, the broker was later advised that S's options certificate had been cancelled. This caused a loss to the broker and also to S., who then claimed damages for breach of contract from CIM. S's claim was later dismissed by a Magistrate. Upon appeal—

HELD: Appeal allowed.
1. The reference to payment in full in the prospectus was a reference to payment of the full amount not to the honouring of the cheque. The payment by cheque was not a conditional acceptance of the contract. The contract was concluded when the delivery of the form and the cheque was made. Accordingly, CIM was liable to S. for damages for breach of contract.

2. In relation to the question of damages, the loss was the difference between the price S. was required to pay under the contract and the price at which he could have obtained substitute options on the open market when the contract was breached.

HAMPEL J: **[1]** This is an appeal from the decision of a Magistrate who dismissed the plaintiff's (appellant's) claim for damages for breach of contract. The essential facts are as follows. On 29 October 1993 the respondent company issued a prospectus to all its shareholders inviting applications for options to acquire fully paid shares at an issue price of three cents per option. The prospectus specified the offer expired on 3 December 1993. On or about 5 December 1993, the appellant spoke with the Managing Director of the respondent to ascertain whether it was possible still to apply for these options. When he was told that he could, the appellant forwarded the acceptance form attached to the prospectus on or about 7 December 1993. He nominated 70,000 options and enclosed a cheque for $2,100 drawn on his wife's Commonwealth Bank account. The form and the cheque were sent to the respondent's Share Registry in Perth. An option certificate for 70,000 options dated 6 December 1993 was then received by the appellant in late December 1993 or early January 1994. On or about 6 January 1994, the options were listed and started trading at around six cents. In the interim, the appellant's cheque was presented and dishonoured on two occasions.

A letter dated 7 January 1994 was sent by the respondent's Share Registry to the appellant. It was received by him on 13 January 1994. The letter indicated that the cheque had been dishonoured and that the options had been marked not be traded. The letter requested an immediate replacement cheque for $2,100 and $8.30 in bank fees from the appellant.

On 13 January 1994 the respondent's company secretary, Mr Rule, spoke with the appellant on the telephone. At this time, Mr Rule knew that the cheque had been dishonoured on two occasions and that the letter of 7 January 1994 had been sent. Mr Rule told the appellant to disregard this letter and said that the options should never have been issued to him and they would be cancelled. The appellant had intended to send the respondent a cheque in accordance with their request, and told **[2]** Mr Rule of his intention. He was told not to bother as it would be returned. The appellant did in fact send a bank cheque for $2,108.50 dated 14 January 1994. The cheque was never banked by the respondent. During January 1994, the options were trading at about 15 cents. Mr Rule instructed the Share Registry to allocate the appellant's options to the underwriter. On 27 January 1994, solicitors on behalf of the appellant wrote to the respondent's Share Registry seeking removal of a "stop order" on the options. In May 1995, the appellant instructed his stock broker to sell the options at 25 cents per option. The sale took place and the appellant received $17,272.50, being the net proceeds of the sale. The appellant's broker was later advised that the appellant's options certificate had been cancelled, and the broker was then required to purchase 70,000 options for $24,500 to complete the transaction. The broker then brought proceedings and obtained judgment against the appellant for that sum. The broker also brought bankruptcy proceedings against the appellant. These proceedings were settled when the appellant agreed to pay the broker $10,000.

At the outset of the proceedings before me, it was conceded by Mr Moshinsky for the respondent that the prospectus contained an offer to shareholders that was capable of acceptance by them, as distinct from an invitation to treat. The main issue upon which this appeal turns is whether or not the appellant accepted the respondent's offer by sending the acceptance form and the personal cheque, and as a result, whether a contract was then concluded between the parties despite subsequent events. It is therefore necessary to examine the relevant acceptance procedure contained in the prospectus which is as follows:

> "Entitlement and Acceptance...
> (a) To Take Up Your Entitlement In Full
> If you wish to take up your entitlement IN FULL the completed Entitlement and Acceptance form, together with the full amount payable, should be mailed to reach (the Share Register) BEFORE 5.00 p.m. WST, Friday, 3 December 1993....
>
> **[3]** Payment for Options
> The price for each Option is payable in full on acceptance by a payment of 3 cents per Option. Payment will be accepted only in Australian dollars by cheque or bank draft, drawn on, and payable at, any Australian bank. Cheques or drafts should be made payable to 'Centenary International Mining Ltd' and crossed 'not negotiable'. Participants are asked not to forward cash. Receipts for payment will not be issued. Personal cheques drawn on overseas banks in Australia or foreign currency will not be accepted. These will be returned and the application deemed invalid."

The fact that the appellant's acceptance came after the expiration of the time limit is irrelevant, as the Managing Director of the respondent had agreed to extend the time for acceptance. The question is whether the prospectus required payment in full by the appellant in the sense that the cheque be honoured before there was an unconditional acceptance.

Mr Houghton QC who with Mr Fox appeared for the appellant submitted that the appellant returned the acceptance form and a cheque in Australian dollars as he was required to do in accordance with the prospectus. He submitted that the respondent, by using the words it did in the prospectus, took the risk that a personal cheque might not be honoured. When the appellant's cheque was dishonoured, Mr Houghton submitted, the respondent was entitled to demand payment, but the appellant's acceptance was not conditional. If the respondent intended that acceptance be complete only after such time as the funds had cleared, it would need to use clear words in the prospectus to this effect. No such wording is used in this case. Mr Houghton observed that it would be unworkable if the market had to wait for personal cheques to be cleared. A shareholder is issued with a certificate after the acceptance procedure has been followed. It is a matter for the individual company to ensure that the certificate is issued when it is satisfied that it is appropriate to do so, as it was in this case. The option certificate was dated 6 December 1993 and the appellant received it in late December or early January. From that time, the appellant was able to trade the options. Mr Houghton submitted that the option certificate is a **[4]** statement to the world at large, and in particular to potential purchasers, that the person certified as the holder of the security is entitled to the security. It is a statement intended by the company to be acted upon (*Balkis Consolidated Company Ltd v Tomkinson* [1893] AC 396).

Mr Houghton argued that what occurred after the cheque was dishonoured is significant. The respondent had two options at this time: it could have repudiated the contract or required the appellant to perform his obligation to pay. The letter of 7 January 1994 shows the respondent elected to adopt the latter course, and thereby affirmed the contract. This election could not then be withdrawn (*Sargent v ASL Developments Ltd* [1974] HCA 40; (1974) 131 CLR 634; 4 ALR 257; 48 ALJR 410). The contract had been affirmed by this time, the options had been issued, the respondent had made a demand for their payment and the appellant then fulfilled his obligation to pay by sending the bank cheque.

Mr Moshinsky submitted that the wording of the prospectus required clearance of the appellant's cheque before there was unconditional acceptance and a concluded contract. "Payment in full" occurs when the cheque is cleared and the funds are available. Mr Moshinsky submitted that payment by cheque, as a matter of general principle, is a conditional payment, and accordingly, where there is a payment by cheque in cases such as this, there is conditional acceptance. He referred to *Roberts v IAC (Finance) Pty Ltd* [1967] VicRp 26; [1967] VR 231 which dealt with a chattel mortgage. In that case it was held that the plaintiff did not have property in a chattel until the cheque used to pay for it had cleared.

In relation to the subsequent conduct of the respondent, Mr Moshinsky submitted that it was not absolutely clear whether the telephone conversation on 13 January 1994 took place before or after the letter of 7 January 1994 was received by the appellant. In any event, the telephone conversation constituted an election by the respondent to terminate the contract or alternatively, an election to accept the appellant's repudiation of the contract which was constituted by his cheque being dishonoured. This termination or acceptance of repudiation occurred before the appellant sent the bank cheque to the respondent.

[5] I agree with Mr Houghton's primary submission that the proper construction of the acceptance procedure contained in the prospectus is that the appellant, in order to accept the offer and thereby complete the contract, was required to complete and return the acceptance form together with a cheque in Australian dollars. He did precisely this. The reference to payment in full in the prospectus is a reference to payment of the full amount not to the honouring of the cheque. In this case, we are concerned with the concept of acceptance in contract law, not the discharge of a debt. The appellant complied with the procedure which prescribed a specific mode of acceptance. The wording of the prospectus does not require the respondent to wait for the cheque to clear and in my view the contract was concluded when the delivery of the form and the cheque was made. In choosing this procedure, the company took the risk that the cheque could be dishonoured. It chose not to require a bank cheque. It did not want payment by cash. It chose not to specify that funds must be cleared before the process is complete. It chose not to wait until the cheque had cleared before issuing the option certificate. The respondent then chose to give the appellant a second opportunity to make payment. By so doing, the respondent confirmed that there had been acceptance of their offer.

I turn now to the question of damages. I accept Mr Moshinsky's submissions in relation to quantum, namely that the correct assessment of the loss is the difference between the price the appellant would have to pay under the contract and the price at which he could have obtained substitute options on the open market, at the time the contract was breached. Mr Moshinsky used the example of a sale of goods to illustrate his argument. In this case, had the appellant bought the options on the open market, at the time of the breach, the options were trading at 15 cents. The appellant would therefore have had to pay $10,500 for 70,000 options at this time. If the price the appellant would have paid under the contract, but for the breach ($2,100), is deducted from the figure of $10,500 the difference is $8,400. The parties agreed the amount of [6] legal costs incurred in the proceeding brought against the appellant by the broker was $1,400.

Order: The appeal is allowed. The respondent is to pay $9,800 damages to the appellant and the costs of the appeal.

APPEARANCES: For the Appellant: Mr W Houghton QC with Mr P Fox, counsel. Testart Robinson & Pitts, Solicitors. For the Respondent: Mr M Moshinsky, counsel. Foster Hart, Solicitors.

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