23/00; [2000] VSC 57

SUPREME COURT OF VICTORIA

TALBOT BIRNER MORLEY PTY LTD v ZARITSKI

Balmford J

15, 16 February, 2 March 2000

CIVIL PROCEEDINGS – PURCHASE OF LAND – RELIANCE BY PURCHASERS ON STATEMENTS MADE BY ESTATE AGENT AS TO SQUARAGE OF PROPERTY – PROPERTY PURCHASED – LATER FOUND TO BE LESSER SQUARAGE THAN STATED – CLAIM FOR DAMAGES - DIFFERENCE BETWEEN PRICE PAID AND TRUE VALUE – MAGISTRATE ACCEPTED EVIDENCE OF PURCHASERS – WHETHER OPEN – MEASURE OF DAMAGES FOUND MY MAGISTRATE – AVERAGE OF VALUATIONS – WHETHER MAGISTRATE IN ERROR.

Z. agreed to buy a residential unit for $285,000. Prior to the sale, discussions had taken place between Z. and a representative from TBM P/L (estate agents) as to the squarage of the property. Z. said they were told by the representative that the property was 17 squares plus a double garage whereas the actual squarage was 14.77 plus a double garage. Z. later issued proceedings claiming, *inter alia*, damages in negligence. The measure of damages was claimed to be the difference between the price paid for the property and its true value. At the hearing, the magistrate accepted the evidence of Z. rather than the representative as to the statements as to squarage. The magistrate indicated that Z. would have had a more precise recollection of the communications and referred to the fact that this was the first transaction of this kind by Z. in Australia whereas the representative had had hundreds of conversations with prospective purchasers. The magistrate found that Z. were induced to enter the agreement because of the negligent misstatements as to squarage made to them by the representative. In relation to quantum, three valuations were tendered to the magistrate. The valuations ranged from $250,000 to $295,000. The magistrate found that the market value of the property as at the date of sale was $270,000 and accordingly, made an order against TBM P/L for that amount. On appeal—

HELD: Appeal dismissed.

1. In was not unreasonable for the magistrate to hold the view that in a transaction between two parties, such as estate agent and house purchaser, doctor and patient or lawyer and client (to name only a few examples) where the transaction in question is routine for one party but for the other party is something which happens once in a lifetime, it is likely that the latter party's recollection of a conversation would be the more precise. This was a proper matter for the magistrate to have regard to in performing the difficult task of reaching a finding on conflicting evidence.

2. Having found for the purchasers on the claim in negligence, it was necessary for the magistrate, in order to assess damages, to make a finding as to the market value of the property. The principle of law is that a court will not interfere with any question of valuation unless it were satisfied that the magistrate acted on some wrong principle of law or that the value was entirely erroneous. There was evidence upon which the magistrate acting reasonably was entitled to find that Z. had proved on the balance of probabilities that the market value of the property as at the date of sale was $270,000.

***Commissioners of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* [1947] HCA 10; (1947) 74 CLR 358; [1947] ALR 240, applied.**

BALMFORD J:

Introduction

1. These two proceedings are respectively an appeal and a cross-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 appeals was made on 12 August 1999 by the Magistrates' Court at Dandenong, constituted by Ms Harding, Magistrate. There was no appearance for the third respondent to the appeal (first respondent to the cross-appeal).

2. In the Magistrates' Court the plaintiffs were Joseph and Natalia Zaritski ("the purchasers"), the first and second respondents/appellants in these appeals. The defendant was Michael Gorelik ("the vendor"), the third respondent/first respondent in these appeals. The third party was Talbot Birner Morley Pty Ltd, ("the agent") the appellant/second respondent in these appeals.

3. The evidence before me was contained in two affidavits of Mr Czarny and Mr Furnell, the solicitors for the purchasers and the agent respectively and I was assured by counsel that there was no significant difference between the two accounts of the proceeding before the Magistrate.

4. The complaint of the purchasers, issued on 22 January 1998, claimed $35,000 being damages for breach of contract, negligence, and misleading and deceptive conduct in connection with the purchase by them from the vendor of a unit in South Caulfield ("the property"). The measure of damages was claimed, in effect, as the difference between the price paid by them for the property and its true value, the actual words used being "by reason of the aforementioned matters the premises was [sic] worth considerably less than the amount the plaintiffs paid for them and the plaintiffs have thereby suffered loss and damage". The Magistrate dismissed the claim for breach of contract and the claim under the *Fair Trading Act* 1985 in respect of misleading and deceptive conduct. She found for the purchasers on the claim in negligence.

5. The initial decision of the Magistrate, made on 23 December 1998, reads as follows, so far as relevant to these proceedings:

> This claim arises in relation to the sale of a residential unit at 1/30 Saturn Street, South Caulfield on or about 7th October 1997. Settlement occurred on or about 9th January 1998.
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> I am persuaded on balance of probabilities that the evidence given by Mr Zaritski and Mrs Zaritski (the Plaintiffs) as to statements as to squarage made to them by Ms Tanya Jarrel (a real estate agent employed by the Third Party who acted as agent for the Defendant) is more likely than not correct as to 28/9/97, 1/10/97 and 5/10/97. I am also persuaded on balance of probabilities that a similar statement was made on 7/10/97. However I accept the evidence of the defendant, Mr Gorelik, that he did not hear it. Ms Jarrel denied ever making any statement as to squarage. There was nothing in the way that the plaintiffs, Ms Jarrel or Mr Gorelik gave their evidence to suggest that they were deliberately misleading the court. However, in my view, it is more likely that the plaintiffs would have a more precise recollection of the communications with Ms Jarrel than Ms Jarrel would have. On the evidence Ms Jarrel has had hundreds of conversations with prospective purchasers whereas this was the first transaction of this kind by the Plaintiffs in Australia.
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> I accept that Ms Jarrel stated that the property was 17 squares plus double garage. I accept that the actual squarage is 14.77 squares plus double garage, this not being disputed in evidence by the Defendant or Third Party.
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> I am also persuaded on balance of probabilities that Mr Morley, a managing director of Talbot Birner Morley, the Third Party, made a verbal offer over the telephone to Mr Czarny, the Plaintiffs' solicitor in the presence of Mr Gorelik to the effect that the parties could agree to call the agreement off and the Zaritskis' money would be returned. I accept that Mr and Mrs Zaritski were never made aware of this offer. It is agreed that this offer was never made in writing and never followed up. In my view in order to break the causal chain an offer would need to be made in writing given that it relates to an agreement for the sale of land, a sale note having been signed by the parties and part payment having been made by the Plaintiffs, including a substantial amount over and above the deposit moneys In any event, on the evidence, the offer was never communicated to the Plaintiffs.
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> It is clear on the evidence that the Plaintiffs originally paid $15,000 in cash to the Defendant. The contract of sale states $270,000 as the sale price. The contract of sale reflects the actual price of $285,000. [It is clear from other material before the Court that the expression "contract of sale" where second appearing in this paragraph is an error for "transfer"].
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> In my view the Plaintiffs cannot succeed under breach of contract in that in my view, the written contract of sale must be taken to reflect all the fundamental terms of the agreement between the parties …
> However, I am persuaded that the Plaintiffs were induced to enter the agreement because of the negligent misstatements made to them by Ms Jarrel as to squarage.

6. The decision of the Magistrate as to quantum was made on 12 August 1999. She concluded:

> Taking into account all the evidence as to valuations, including the evidence as to variables such as exact location, quality of construction, size, whether the property has a garage, Council values and prices paid for comparable properties, I have formed the view that, on balance of probabilities, the true market value for the property at October 1997 can fairly be fixed at $270,000.

7. The terms of the final order which is the subject of the appeal and cross-appeal were:

> (1) Order for the Plaintiff on the claim against the Defendant in the sum of $15,000 reduced by the Plaintiff's contribution [sic] negligence apportioned at 30% to $10,500 together with interest in the sum of $1,937.20 and costs in the sum of $9,518.00.
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> (2) Order the Third Party to indemnify the Defendant as to the Defendant's liability on the order on the claim with the interest and costs payable to the Plaintiff.
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> (3) Order the Third Party to pay the Defendant's costs of the proceeding being $10,047.80.
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> (4) Stay of one month.

The cross-appeal

8. It is convenient to deal first with the cross-appeal. In the Order of Master Wheeler made on 13 September 1999, four questions of law were found to be raised on the cross-appeal. However, question (d) was expressly abandoned in running. Questions (a), (b) and (c) read:

> (a) Whether the Magistrate erred in reducing damages by virtue of the Appellants' alleged negligence in circumstances where it had never been raised by the Defendant?
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> (b) Were the Appellants denied natural justice in that they had no opportunity to make submissions as to contributory negligence prior to the Magistrate making her finding?
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> (c) Whether the Magistrate erred in holding "the Plaintiffs cannot succeed under breach of contract in that in my view, the written contract of sale must be taken to reflect all the fundamental terms of the agreement between the parties"?

No submissions were made by counsel for the purchasers in support of question (c). Counsel for the agent conceded questions (a) and (b) and agreed that, if the Court found that damages were payable, no allowance should be made for contributory negligence. Accordingly, it is not necessary to consider the cross-appeal further.

The appeal

9. The questions of law found in the Order of Master Wheeler made on 10 September 1999 as shown by the appellant to be raised on the appeal were:

> (1) The Magistrate having found that she was "unable on the demeanour of the witness or the content of their evidence" was she entitled, in deciding to prefer the evidence of the Respondents to have regard to extraneous consideration to wit that the First and Secondnamed Respondents had a more precise recollection of the communications than the Appellant by reason of the fact that the Appellant has had hundreds of conversations with prospective purchasers whereas this was the first transaction of this kind by the First and Secondnamed Respondents in Australia.
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> (2) Upon it being found by the Magistrate that the Thirdnamed Respondent through its agent the Appellant, had offered, prior to settlement, to abandon the contract and return the deposit to the First and Secondnamed Respondents, could it be said that the facts that the property was not 17 squares in size as allegedly represented by the Thirdnamed Respondent, caused the loss suffered by the First and Secondnamed Respondents.
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> (3) Whether there was any evidence upon which a Magistrate acting reasonably was entitled to find that the Plaintiffs had proved on the balance of probabilities that the market value of the property as at the date of sale was $270,000.00 (the average of the evidence given by the valuers called by the parties) and not the price paid of $285,000.00;
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> (4) Whether the Magistrate erred in failing to give reasons in support of her finding that the market value of the property as at the date of sale was $270,000.00.

The first question

10. In the framing of the first question of law, I note that the language used does not accurately represent the words used by the Magistrate in the second paragraph in the extract in paragraph 4 above. It is appropriate to consider that question as if it read (with the alterations underlined):

The Magistrate having found that <u>there was nothing in the way that the plaintiffs, Ms Jarrel or</u>

Mr Gorelik gave their evidence to suggest that they were deliberately misleading the court, was she entitled, in deciding to prefer the evidence of the Respondents to have regard to extraneous consideration to wit that it was more likely that the First and Secondnamed Respondents would have a more precise recollection of the communications than the Appellant by reason of the fact that the Appellant has had hundreds of conversations with prospective purchasers whereas this was the first transaction of this kind by the First and Secondnamed Respondents in Australia.

11. This question was argued before me as if it were a general attack on the Magistrate's finding that the evidence of the purchasers was to be preferred to that of Ms Jarrel. But that is not the issue raised by the question. The question is simply whether the Magistrate was entitled, in reaching that finding, to have regard to a specific consideration. I see no reason to answer that question otherwise than in the affirmative. No authority on the point was cited before me. It is not unreasonable to hold the view that in a transaction between two parties, such as estate agent and house purchaser, doctor and patient, or lawyer and client (to name only a few examples), where the transaction in question is routine for one party, but for the other party is something which happens perhaps once in a lifetime, it is likely that the latter party's recollection of a conversation would be the more precise. That is not an unreasonable view to hold, and is a proper matter to have regard to in performing the difficult task of reaching a finding on conflicting evidence. Accordingly the answer to the first question will be Yes

The second question

12. This question is a challenge to the finding of the Magistrate that the offer described in the fourth paragraph of the extract in paragraph 5 above was not such as, in her words, to "break the causal chain" between the negligent misstatements which she found to have been made by Ms Jarrel and the loss suffered by the purchasers in buying a property which she found to be worth $15,000 less than they had paid for it.

13. Whether the chain of causation between the tort and the loss has been broken is a question of fact, and the Magistrate's finding that the chain was not broken is a finding of fact. (See *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095.) Again, on this question there was a conflict in the evidence as to whether that offer had been made.

14. In *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351; (1961) 19 LGRA 232 the Full Court held that on an appeal from a Magistrate the Supreme Court should

> ... with regard to any question of fact, act according to long established practice, and treat the matter in the same way as an appeal from the verdict of a jury. ... it is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witnesses. This Court has merely to see whether there was evidence upon which the Magistrate might, as a reasonable man, come to the conclusion to which he did come.

15. I am satisfied that there was evidence before the Magistrate on which she, as a reasonable person, might come to the conclusion to which she did come, namely that the offer had been made, but the circumstances of the making of that offer were not such as to break the chain of causation. Her consideration of the effect of section 126 of the *Instruments Act* 1958 is not essential to that conclusion. I would refer to paragraphs 88-91 and 266-269 of the affidavit of Mr Furnell and paragraphs 71-74 and 157-160 of the affidavit of Mr Czarny. Not all of the matters appearing from that evidence were referred to by the Magistrate. However, the judgment of Barwick CJ in *Kentucky Fried Chicken v Gantidis* [1979] HCA 20; (1979) 140 CLR 675 at 679-680; (1979) 24 ALR 161; (1979) 40 LGRA 132; (1979) 53 ALJR 478 is authority for the proposition that failure to mention a relevant matter in reasons for a decision does not necessarily mean that that matter had not been taken into account. Accordingly the answer to the second question will be Yes.

The third and fourth questions

16. These two questions were argued on the basis that they raised essentially the same issue.

17. In *Emerald Quarry Industries Pty Ltd v Commissioner of Highways* [1979] HCA 17; (1979) 142 CLR 351; (1979) 24 ALR 37; 11 FLC 90-616; (1979) 43 LGRA 316; 5 Fam LR 1; 53 ALJR 359 (1979) 43 LGRA 316, Gibbs J said at LGRA 319-320 (CLR at 355):

> An appellant who seeks to disturb the assessment of compensation made by a court in a case of compulsory acquisition will not succeed merely by showing that one of the valuations on which the assessment was based contained some errors, particularly when it has not been shown either precisely what effect those errors had on the valuation, or that the errors were repeated by the court in making the assessment. The principles to be applied by an appellate court in such a case were discussed by Dixon J in *Commonwealth v Reeve* [1949] HCA 22; (1949) 78 CLR 410 at p423 as follows:
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> > In *Commissioners of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* [1947] HCA 10; (1947) 74 CLR 358, at p367; [1947] ALR 240, the following passage occurs in the judgment of Latham CJ, Rich and Williams JJ:
> > It would not be proper for this Court on an appeal of this nature to substitute its own opinion for that of the court below unless it were satisfied that the court below acted on some wrong principle of law, or that the value was entirely erroneous.
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> Their Honours then refer to the statement of Lord Buckmaster in *Charan Das v Amir Khan* [1920] UKPC 65; AIR 1921 PC 50; (1920) LR 47 Ind Apps 255, at p264 that the:
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> ... Board will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound.
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> The rule thus laid down is almost indispensable to the administration of justice in compensation cases. For the estimation of a money sum is usually so much a result of judgment and sound discretion and so little the product of analytical reasoning, that, were it otherwise, every appeal would mean an assessment of compensation *de novo*, without any assignment of error in the reasoning or conclusions of the court appealed from.

That principle is equally relevant to a valuation of land which, as in this case, is unrelated to compensation for compulsory acquisition, and it is consistent with the rule in *Taylor v Armour* which is cited in paragraph 14 above.

18. Having found for the purchasers on the claim in negligence, it was necessary for the Magistrate, in order to assess damages, to make a finding as to the market value of the property. She had before her three valuations, by Mr Cooper for the purchasers, and by Messrs Orr and Bainbridge respectively for the agent. Mr Cooper, in his formal valuation, valued the property at $250,000, Mr Orr at $285,000, and Mr Bainbridge at $295,000. Each valuer gave oral evidence and was extensively cross-examined. I did not understand either counsel to challenge the qualifications, experience or ability of any of those witnesses.

19. In *March v City of Frankston* [1969] VicRp 44; [1969] VR 350; (1968) 19 LGRA 285, Barber J was concerned with the assessment of compensation for the acquisition of land. His Honour said at 360-361:

> Mr Storey, in support of his argument, submitted, quite rightly, that there is no "issue" between the parties in this jurisdiction as there is in civil actions. The question for determination by the Court is not, "is the amount of the claim correct, or the authority's offer the right amount", but "what is the proper amount of compensation having regard to the value of the land and the other factors to be considered".
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> This principle has been stated frequently in the cases. For example, Pike J, in *Mobbs v Valuer-General* (1922) 6 LGR 73 at p78, said:
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> I have repeatedly pointed out there is no issue in this Court in the strict sense of the word — one side puts forward one value, and the other side another value. I have not got to determine whether the value put on by one side is correct, or whether the value put on by the other side is correct; I have to determine what is the correct value.
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> See also per O'Bryan J in *Cordell v Housing Commission* [1948] VicLawRp 43; [1948] VLR 257 at p259; 2 ALR 85.

That principle is of equal relevance in a valuation unrelated to a claim for compensation for the acquisition of land, as is apparent from the fact that one side here has, as is not uncommon in valuation cases, "put forward" more than one valuation.

20. The Magistrate gave reasons, albeit brief reasons, for her decision on the valuation point, and there was evidence before her on which she might, as a reasonable person, have come to the conclusion to which she did come. The answers to the third and fourth questions are accordingly Yes and No respectively.

21. For these reasons there will be orders dismissing the appeal of the agent and allowing the cross-appeal of the purchasers on grounds (a) and (b). The final order of the Magistrate will be varied by the deletion of all reference to contributory negligence, with a consequential recalculation of the interest. Counsel may wish to make submissions as to costs.

APPEARANCES: For the appellant Talbot Birner Morley Pty Ltd: Mr MS Osborne, counsel. Connery & Partners, solicitors. For the first and second respondents: Mr SA Rowland, counsel. Norman Czarny & Associates, solicitors.
