40/07; [2007] VSC 357

SUPREME COURT OF VICTORIA

NATHAN v ESANDA FINANCE CORP

Harper J

17, 18 September 2007

CIVIL PROCEEDINGS – HIRE PURCHASE AGREEMENT – DEFAULT BY HIRER – ACTION TO BE TAKEN BY PERSON REPOSSESSING GOODS – WHETHER FORMAL ASSESSMENT OF GOODS TO BE UNDERTAKEN – WHETHER AN ALLOWANCE OR ADJUSTMENT TO BE MADE IN CALCULATING THE AMOUNT OWING BY HIRER.

1. Where pursuant to a hire purchase agreement a hirer was in default of instalments and a Notice of Termination was served on the hirer, a formal assessment of the value of the goods should be made and a determination made whether there was a contractual basis for making an allowance or adjustment for their value in calculating the amount owing by the hirer.

2. Given that the person must take into account the value of goods repossessed or capable of being repossessed, it is for that person to introduce evidence that *prima facie* establishes what the value is if it appears that the goods are capable of repossession. If the goods are so capable, in those circumstances it is incumbent upon that person to introduce evidence as to their value. Once that evidence is introduced then, if the hirer seeks to contradict it, the hirer would have the evidentiary burden of negating the *prima facie* position. The hirer could not simply sit back without any evidence and impugn the value put forward by the person repossessing once that person gave evidence that had the *prima facie* point.

HARPER J:

1. By an agreement made on 25 March 2002, the present appellant Kailai Nathan acquired on hire purchase from the respondent, Esanda Finance Corporation Limited, 237 new cinema chairs. By the terms of the agreement the appellant was to pay the respondent instalments of $565.71 per month for 48 months. The appellant failed to pay more than eight such instalments. I interpolate that 11 payments were made but three were dishonoured.

2. The respondent therefore issued proceedings in the Magistrates' Court at Sunshine, claiming the balance it alleged was owing to it. The magistrate found for the respondent. In her reasons for decision she referred to the pleadings then before her. These included an allegation in the defence that the chairs in question were valued at $201 each. No evidence was called to substantiate that allegation.

3. Her Honour also referred to the appellant's evidence as given before her. According to that evidence the appellant was, early in 2003, locked out of the cinema by his landlord. Before being locked out, however, he contacted the respondent and told it that he no longer required the goods. Her Honour's reasons then state that the appellant, "claimed that the respondent failed to mitigate its loss by not taking the chairs for sale by auction."

4. In my opinion, it is plain from the account I have thus far given of the proceedings in the Magistrates' Court, that the alleged failure of the respondent to mitigate its loss by not appropriately taking the value of the chairs into account when calculating that loss, was an issue of importance with which the magistrate was required to deal.

5. Under the terms of the agreement the appellant is, by Clause 8, required immediately on receipt by him of a Notice of Termination, to deliver up the chairs to the respondent. It is not in dispute that no notice was served, and no delivery was made. On the other hand it does appear that the respondent, whether directly or by an agent, entered the premises in which the chairs were then located and made an assessment of their value.

6. According to an affidavit sworn on 29 March 2006 by Simon Peter Matters, a barrister

who appeared for the respondent in the proceedings in the Magistrates' Court, the magistrate asked one of the respondent's witnesses why the respondent had not repossessed the chairs. The response from the witness was that she, the witness, had been advised that the costs of removing the chairs, and transporting them, exceeded their value. She produced a copy of a letter to that effect.

7. The affidavit does not reveal whether the letter was used as a basis of further oral evidence given by the witness in question. The deponent, Mr Matters, does swear that to the best of his recollection the letter itself was not tendered in evidence. The letter is now before me as Exhibit "SPM 7" to Mr Matters' affidavit. It is dated 1 February 2006 and is in the form of a memorandum from a Mr John Wood, the managing director of Dominion Group (Vic) Pty Limited, a company apparently acting as an agent for the respondent; and it is addressed to a Mr Rod Gordon of the respondent.

8. It is headed, "Nathan, Kailai, Cinema-Melton". It then reads:

> In relation to our discussion about the above cinema I can advise as follows:
> 1. Dominion undertook a site inspection at 43 McKenzie Street, Melton, during December 2002.
>
> 2. The site inspection was undertaken by Mr Trent Seamons.
>
> 3. Mr Seamons valued the chairs in the cinema at between $1 and $2 per chair. There were other chairs in a storeroom at the premises which were not in good condition, the highest value of all the chairs at auction would have been around $400.
>
> 4. Dominion estimated the costs of transport of the chairs to be around $800 to $1,000 to bring them to the Dominion rooms.
>
> 5. Dominion did not provide a formal valuation to Esanda because of the low value of the assets. Please note that this is only an estimated value and not a formal valuation. If a formal valuation is required then Dominion will need to undertake a re-assessment and issue formal documentation.

9. I reiterate that it is not known whether that letter was placed before the magistrate, whether formally as a document tendered in evidence, or informally as a document that was relied upon by the witness called for the respondent, but not itself tendered in evidence.

10. No matter what the position in relation to the particular contents of that letter it seems to me that the magistrate had before her evidence that the respondent was in a position, had it wished to do so, to repossess the chairs in question. The respondent was therefore in a position to make a formal assessment of the value of the chairs and to determine appropriately whether there was a contractual basis for making an allowance or adjustment for their value in calculating the amount owing by the appellant to the respondent.

11. In this context it is appropriate to turn to the terms of the agreement governing the relationship between the respondent and the appellant. By Clause 8 of that agreement (a clause headed "Default") if the hirer/appellant receives a notice of termination from the respondent he must immediately deliver up to the respondent the chairs in question in good condition, fair wear and tear excepted.

12. Then, in calculating the recoverable amount, the respondent by Clause 13 of the agreement is required to include the total rent and all other moneys payable for the full period of hire less, amongst other things, the value of the goods if they are in the respondent's possession; that value being the best wholesale price reasonably obtainable for the goods in the condition they were in at the time of repossession, less the relevant costs.

13. In very able and helpful submissions put to me on behalf of the respondent, Mr Carew has submitted that the evidence before the magistrate was such as to support the proposition that no discount was to be taken into account by the respondent in relation to the chairs because their value was so low as to be exceeded by the cost of realising that value.

14. It is possible that, in the end, after giving appropriate consideration to this point, the magistrate might agree with the position thus taken by the respondent before me. For present

purposes, however, I am faced with a written judgment by the magistrate which does not cover the issue in question. It seems to me that the failure of the magistrate to address the issue in her written reasons for decision is one that now must result in the matter going back to the Magistrates' Court so that the issue can be dealt with properly.

15. I may be wrong in my suspicion that the issue of the proper value of the chairs was not appropriately explored in the Magistrates' Court. In any event the appellant is, it seems to me, entitled to a judgment that deals with what is necessarily a very important issue in the case. The magistrate's judgment does not do that. The appellant has therefore been deprived of a judgment that appropriately deals with the issues between the parties; and that is an omission which the appellant is entitled to have redressed. For these reasons it seems to me that the appeal should be allowed and the matter should be remitted to the Magistrates' Court for further determination in accordance with law.

16. I do not want the magistrate to be faced with another somewhat shambolic hearing where whoever is the magistrate is given inadequate assistance in working out how appropriately and finally to deal with the remaining issue between the parties of the role of the chairs in assessing the quantum of the appellant's indebtedness to the plaintiff.

17. It may be necessary for the respondent to call evidence about the value of the chairs. It does seem to me that, because the burden of proof rests upon the respondent as plaintiff, it must do more to establish the value than simply have a non-expert such as Ms Schultz assert on a basis that remains quite uncertain that the chairs were only worth one to two dollars.

18. I accept Mr Carew's proposition that these were specialised chairs. At least on the face of it one would expect them to be specialised for purposes of seating the audience at a cinema. Nevertheless a value of $1 to $2 does seem to be extraordinarily low, and one which, as I have mentioned to Mr Carew in argument, if I were the magistrate I would not accept without more as discharging the plaintiff's burden of proof as to that value.

19. Given that the plaintiff must take into account the value of goods repossessed or capable of being repossessed, it is for the plaintiff/respondent to introduce evidence that *prima facie* establishes what the value is if it appears that the goods are capable of repossession. It seems to me that these goods were so capable, and in those circumstances it was incumbent upon the respondent to introduce evidence as to their value. Once that evidence was introduced then, if the appellant sought to contradict it, he would have the evidentiary burden of negating the prima facie position. He could not simply sit back without any evidence and impugn the value put forward by the plaintiff once the plaintiff's evidence had, as I say, reached the *prima facie* point.

20. Whatever evidence the magistrate had before her, she was not in a position, as far as I can tell, to conclude that the respondent had discharged its burden in establishing a value as low as one or two dollars per chair; but in any event the magistrate ought to have considered and discussed this matter in her reasons for judgment. The fact that she did not is fundamentally the reason why I think the matter must go back for rehearing on the question whether the value of the chairs should properly be brought into account in calculating the amount (if any) owing by the appellant to the respondent. The appellant's costs of this appeal and of the hearing below should be paid by the respondent. I will grant the respondent a certificate under the *Appeal Costs Act*.

APPEARANCES: For the appellant Nathan: Mr K Nathan in person. For the respondent Esanda Finance Corp: Mr B Carew, counsel. Jones King Lawyers.
