18/08; [2008] VSC 55

SUPREME COURT OF VICTORIA

TSAPEPAS v RHINO STRATEGIC COMMUNICATIONS

Coghlan J

5 February, 3 March 2008

CIVIL PROCEEDINGS – MONIES ADVANCED TO CORPORATE ENTITIES IN TWO AMOUNTS – MONIES NOT REPAID – CLAIM FOR REPAYMENT OF MONIES – PART PAYMENT MADE – WHETHER MONIES WERE LOANS OR GIFTS – FINDING BY MAGISTRATE THAT THE TWO ADVANCES WERE LOANS – ACCORDINGLY THE CLAIMS FOR REPAYMENT WERE NOT STATUTE BARRED – TREATMENT OF THE REPAYMENT – WHETHER IN REDUCTION OF THE OLDEST DEBT – APPLICABILITY OF *CLAYTON'S CASE* – NOT APPLICABLE AS ONGOING OR RUNNING ACCOUNT NOT INVOLVED – FINDING BY MAGISTRATE THAT AS BOTH DEBTS WERE SOUGHT TO BE PAID BY ONE DEMAND, PAYMENT RELATED TO BOTH DEBTS – WHETHER MAGISTRATE IN ERROR: *LIMITATION OF ACTIONS ACT* 1958 S26(6).

1. Where a magistrate found that two sums of money advanced to a party were loans and payment in part was made, the magistrate was not in error in finding that because both debts were sought to be recovered by one demand the payment was against both debts and accordingly, the claim was not statute barred.

2. The principle in *Clayton's Case* (*Devayne v Noble*) (1816) 1 Mer 572 is that where there is an ongoing or running account with a number of debts and a number of payments over time, any amount paid should be applied to the oldest of the debts. In the present case, *Clayton's Case* did not apply because the circumstances did not involve an ongoing or running account.

COGHLAN J:

1. This is an appeal from a decision of the Magistrates' Court of Victoria by which the appellant was found liable to repay two loans to the respondent company. Orders for interest and costs were also made.

2. The appeal is brought pursuant to s109 of the *Magistrates' Court Act* on the basis of an error of law. The ground of appeal is:

> "1. That a deemed repayment of the debt by operation of law cannot constitute payment under s26(6) of the *Limitation of Actions Act* 1958 (Vic)".

Factual background

3. The respondent had advanced (to use a neutral word) the sums of $50,000 and $10,000 to the appellant. The $50,000 had been paid on 8 December 1998 and the $10,000 on 9 August 2001. The payments were made to corporate entities operated by the appellant. The appellant had nominated the entities to which payment was to be made.

4. The nature of the transactions was in dispute between the parties. The respondent (through its principal shareholder, Mr George Tomeski) gave evidence that the two advances were loans. The appellant, on the other hand, asserted that the advances were gifts and that he was not under any legal obligation to make repayment. Alternatively, he said that the advances were to corporate entities which were now in liquidation.

5. A separate consideration arose in relation to the $50,000 advance.

6. It was common ground that the proceedings to recover the $50,000 were issued outside the six year limitation period, unless there was some basis for the operation of s26(6) of the *Limitation of Actions Act* 1958 (Vic) ("the Act").

7. It was also common ground that on or about 7 November 2003, the appellant drew a cheque on the account of the Telephony Group Pty Ltd ("Group") in the sum of $5,000 payable to

George Tomeski. The cheque was delivered to Mr Tomeski's place of business. The appellant said that he made the payment as an "ex gratia" payment because he believed that Mr Tomeski was in financial trouble. He also asserted that he had been threatened by "partners" of the respondent.

8. The respondent took action in the Magistrates' Court to recover both amounts. He particularised the matter as two distinct loans and treated the $5,000 as having been applied to reduction of the $50,000 loan.

Findings

9. The learned Magistrate found that the two advances were in fact loans. He found that the $50,000 was a loan payable on demand and that the $10,000 was a loan repayable 14 days after it was given (9 August 2001).

10. His Honour found that the loans were made personally to the appellant. He further found that since the two payments had been made by cheque drawn on the account of Rhino Strategic Communications ACN 081352785 (a company operated by Mr Tomeski), the debts were owed to the company.

11. It followed that his Honour found that the $5,000 paid in November 2003 was a repayment of the loans.

12. Since his Honour had found the nature of the transactions were loans, the question arose as to whether or not recovery of the $50,000 was statute barred.

13. The question which next arose was whether s24(3) of the Act would operate. The relevant parts of that sub-section are:

> "s24(3) Where—
> (a) any right of action has accrued to recover any debt or other liquidated pecuniary claim ...; and
>
> (b) the person liable or accountable thereafter acknowledges the claim or makes any payment in respect thereof—
> the right shall be deemed to have accrued on and not before the date of acknowledgment or the last payment".

14. The learned Magistrate rejected the evidence of the appellant on both issues of relevance, i.e., that the advances were not loans and the payment was an *ex gratia* payment.

15. It follows that the payment of $5,000 must be a payment with respect to the loans. There are two loans and the question arises as to whether or not the payment can be applied to any loan in particular.

16. It was argued on behalf of the respondent below that the payment of the cheque of $5,000 constituted an "acknowledgment of the debt" within the sub-section. His Honour rejected that argument principally on the basis that the "acknowledgment" could not be said to be "in writing and signed by the person making the acknowledgment" (see s25(1) of the Act).

17. In rejecting the appellant's evidence, his Honour necessarily found that the appellant was making payment with respect to the amount or amounts found by his Honour to be owing.

18. The argument advanced by the appellant was in three parts.

19. First, it is submitted that the payment was made by the Group and was not a part payment for the purposes of 24, 25 and 26(6) of the Act. There is an immediate difficulty with that argument. His Honour found (Exhibit "IGH-2" to affidavit of Ian George Hone of 23 January 2007, p273):

> "The only remaining question, though, is whether this payment made by Mr Tsapepas, or for that matter any other defendant, can acknowledge the debt or make a payment of a debt. On any view, the Group was not a debtor of either the firstnamed plaintiff or Rhino.
>
> I am troubled by this, but in the circumstances of this entire case, I am satisfied to find that the real position here is that Mr Tsapepas was paying this money, he just chose to take it and borrow it from the Group, and instead of writing out a number of cheques, he wrote out a Group cheque".

20. In the circumstances, on the unchallenged finding of his Honour, the payment was made by the appellant, using a Group cheque for the purpose.

21. In those circumstances, s26(6) of the Act has no operation. His Honour found that the liability was personal and the payment was personal. *Cheethams v Remington* [1999] VSC 150; [1999] 3 VR 258 is not relevant to any issue which needs to be decided here.

22. In one sense that conclusion would seem to dispose of the ground of appeal as expressed. Two other matters were urged on appeal and the ground of appeal may be just wide enough to encompass them.

23. Second, it was argued that if payment had been made, it was not possible to say that the payment related to the $50,000 debt which would otherwise be statute barred.

24. Third, or as part of the preceding argument, that the learned Magistrate had erred in his application of the principle in *Clayton's Case* (*Devayne v Noble*) [1815] EngR 77; [1814-23] All ER 1; (1816) 1 Mer 572; 35 ER 781; see also *Airservices Australia v Ferrier* [1996] HCA 54; (1996) 185 CLR 483).

25. It is convenient to deal with those arguments together. The learned Magistrate did purport to dispose of the case by the application of *Clayton's Case* (*supra*). He applied the principle that where an amount is paid against a number of debts, then the amount received should be applied to the oldest of them. The difficulty about the application of *Clayton's Case* is that the principle in that case arose in circumstances of an ongoing or running account (at p572). That is not the position in this case. These were two distinct loans and the proceedings in the Magistrates' Court dealt with each of them, although within the one summons, separately. (See also *Re Footman Bower and Co Ltd* [1961] 2 All ER 161, 164H).

26. There was no challenge to the proposition that the creditor may apply any amount received from the debtor in circumstances such as these to either loan. (See *Re Footman Bower and Co Ltd supra*). That would not, however, bind the debtor in a way which would treat the payment as a payment for the purposes of s23(4).

27. The question which is important is, what did the debtor intend? Unless it can be shown that he was intending to pay a particular debt, then the mere fact that the creditor applied it in a particular way will not prevail. (See *Re Footman Bower and Co Ltd* (*supra*) 164E).

28. In this case, what was intended? The learned Magistrate found that the principle in *Clayton's Case* would operate to deem the payment a payment in reduction of the $50,000 debt.

29. I assume *Clayton's Case* fell to be considered because there was little doubt that the demands being made were demands for the whole amount and in that sense the respondent had treated the two original transactions as having merged into one debt. In my view, the principle in *Clayton's Case* arose because the Court, in that case, had to deal with the concept of a number of debts and a number of payments over a period of time.

30. I am satisfied that the appellant's submission that the principle in *Clayton's Case* could not operate in this case is correct.

31. It was further submitted that although it was good law that the creditor could apply the payment to whatever debt he wished, that did not bind the debtor. It did not bind the debtor for the purposes of making a particular payment a payment within the meaning of s23(4) of the Act.

32. The evidence was clear that the respondent had applied the $5,000 in reduction of the $50,000. The respondent had pleaded his case seeking to recover $45,000 on the first loan and $10,000 on the second.

33. It was conceded by the appellant that he could not resist a judgment in the sum of $10,000 after the Magistrate found that the amount was a loan.

34. In addition to what he said about the operation of *Clayton's Case*, the Magistrate made an alternative finding. It is of benefit to set out the whole of the relevant passage:

> "What is argued here, and in an argument which I accept, leaving aside perhaps one other obstacle, is that the cases which suggest that you cannot appropriate payments against a statute barred debt in order to revive or start the time again, do not apply where the payment is made before the statute runs its course.
>
> In such a case where the parties do not themselves appropriate the payment, the law will do so for them, and the law will appropriate the payment to the oldest debt.
>
> For that to happen is not to create a clash or tension with the *Statute of Limitations* because the Statute has nothing to say at that point of time. The Statute is not operating at that point of time to bar any debt at that point of time. At that point of time both debts can be sued for and the Statute is not available as a defence.
>
> So that a combination of those two propositions, namely a payment which is not tagged to be the payment of one of a number of debts means that – and the principle of *Clayton's case* that I have just referred to means that the payment then is appropriated to the earliest debt. Alternatively, it is a payment against both debts, in my opinion. Because both debts are asked and sought to be paid by the one demand".

35. The oral reasons were somewhat excursive. I am satisfied that the Magistrate looked at the matter in the alternative. He established the order of the payment by applying the principle in Clayton's Case. That is, he deemed the payment to be a payment against the earlier, now statute barred debt, of $50,000. Since the payment was made before the expiration of the limitation period, it was a payment for the purposes of s24(3) and s26(6) of the Act.

36. As I have already said, I find that the principle in *Clayton's Case* could not be applied in this case because this was not a case of a running account.

37. His Honour did find an alternative basis for judgment for the plaintiff (respondent). He said:

> "Alternatively, it is payment against both debts, in my opinion, because both debts are asked and sought to be paid by one demand".

38. It was argued on behalf of the appellant that that was not a true alternative basis for his judgment, but merely an alternative way of expressing what had been done by the respondent in applying the debt. It did not, as the argument ran, provide an acknowledgment of the debt in the general sense or, in particular, the whole debt.

39. I am not convinced by that argument. The juxtaposition being dealt with by His Honour was a clear one. If the principle in *Clayton's Case* applied, then the payment was to be applied to the earlier debt. In the alternative, his Honour then found the payment related to both debts. Some of the reasoning of His Honour when dealing with the operation of *Clayton's Case* was equally appropriate to the alternative.

40. At the time of the payment, neither of the debts were statute barred. In that sense it could not have mattered to the appellant in any legal sense which debt with respect to which he was paying the amount. The appellant gave evidence that neither of the advances to him were loans. He was therefore under no obligation to pay. He made the payment as an *ex gratia* payment. He did not assert that the payment was in relation to one amount rather than the other amount. If he did not regard the advances as loans, even if they were loans as a matter of law, then there was no basis on which he would have made any distinction between the advances or intended that the payment be with respect to one and not the other.

41. The Magistrate found that the advances were loans. The payment, therefore, was a payment off the loans. The amount which the respondent sought to recover was the total amount as his Honour observed "because both debts are asked and sought to be paid by the one demand".

42. The alternative finding was open on the evidence and was strongly supported by the

circumstances. It was entirely logical. I am satisfied that the alternative finding by the Magistrate supports the judgment in favour of the respondent.

43. It follows I would dismiss the appeal. The respondent argued before me that the matter which gave rise to the ground of appeal had not been argued in the Magistrates' Court. In particular, Mr Harrison, who appeared for the respondent, submitted that it had not been put to the Magistrate that *Clayton's Case* was not of application in the present case.

44. In a purely technical sense, that may have been so, but when the submissions below are looked at as a whole, I am not satisfied that the matter was not raised. Since I have dealt with the appeal in the way that I have, it is not necessary for me to express a concluded view on the matter.

45. The appeal is dismissed.

APPEARANCES: For the appellant Tsapepas: Mr L Watts, counsel. Ian G Hone, solicitors. For the respondent Rhino Strategic Communications: Mr DC Harrison, counsel. Anderson Rice Lawyers.
