

06/01; [2000] VSC 373

SUPREME COURT OF VICTORIA

CRANE DISTRIBUTION LTD v O'LOUGHLIN

Hedigan J

11, 21 September 2000

CIVIL JURISDICTION – EQUITABLE JURISDICTION OF MAGISTRATES' COURT – DEED OF AGREEMENT AND CHARGE EXECUTED BY PARTIES – GOODS SUPPLIED TO ONE PARTY – GOODS NOT PAID FOR BY OTHER PARTY – CLAIM FOR \$2752.89 FOR GOODS SOLD AND DELIVERED – FURTHER CLAIM THAT OTHER PARTY EXECUTE A MORTGAGE OVER THAT PARTY'S LAND THE VALUE OF WHICH WAS IN EXCESS OF COURT'S JURISDICTION – "VALUE OF THE RELIEF SOUGHT" – MEANING OF – FINDING THAT NO JURISDICTION IN MAGISTRATES' COURT TO MAKE ORDER SOUGHT – EQUITABLE RELIEF REFUSED – WHETHER MAGISTRATE IN ERROR: MAGISTRATES' COURT ACT 1989, S100.

CD and O'L executed a Deed of Agreement and Charge whereby in the event that O'L failed to pay for goods sold and delivered by CD, O'L could be ordered to sign all relevant and necessary documents to secure to CD the amount owing by delivering a mortgage in registrable form over O'L's property. When O'L failed to pay \$2752.89 for the goods delivered, CD issued a claim in the Magistrates' Court for payment together with a claim for equitable relief. The equitable relief sought was directed to compelling the execution of a mortgage over registered land owned by O'L the value of which was in excess of the Court's jurisdiction.

When the matter came on for hearing, the magistrate declined to make the orders for equitable relief. The magistrate concluded that although the debt in respect of which the security sought to be obtained was in an amount within the jurisdiction of the Magistrates' Court, there was no jurisdiction conferred by s100(1)(b) of the *Magistrates' Court Act* 1989 because the value of the property over which the security was sought exceeded the jurisdiction of the court. Upon appeal—

HELD: Appeal dismissed.

1. **The Magistrates' Court has jurisdiction to hear and determine any claim for equitable relief if the value of the relief sought is within the jurisdictional limit. The phrase "the value of (equitable) relief sought" melds together two different concepts. One, "value" in this context means commercial or monetary value and equitable relief, a legal concept neither easy to explain or confine. The use of the phrase "jurisdictional limit" clearly addresses the monetary limit of jurisdiction rather than the classes of proceedings that comprise the content of the jurisdiction.**

2. **In the present case, the relief sought was the recovery of a money debt from the proceeds of the sale of real property pursuant to the mortgagee's power of sale. This was sought to be achieved by means of a mandatory injunction – an order for specific performance or declaration. It hardly seems likely that Parliament intended that the Magistrates' Court would become the tribunal to which resort might be had to enforce rights claimed to arise under a mortgage which had never been executed.**

3. **The ultimate object in this case was to obtain a sum within the jurisdiction by securing a property the value of which was well beyond the jurisdiction. The magistrate, in refusing equitable relief, was correct in concluding that the relief sought was in respect of property the value of which was beyond the court's jurisdiction.**

HEDIGAN J:

1. This is an appeal from an order of the Magistrates' Court of Victoria made in the Magistrates' Court at Melbourne on 2nd February 2000. The respondents did not appear to contest the appeal either by lawyers or in person although they were served with all of the appeal documents including copies of the exhibits. This occasions no surprise as the defendants did not give any notice to Crane Distribution Ltd of their intention to defend the complaint at the Magistrates' Court. As a consequence the appellant made application to the Magistrates' Court pursuant to Rule 10.01 of the Rules for judgment in default. I will turn to the details of the statement of claim shortly but, in addition to the claim (\$2,752.89) for non-payment for goods sold and delivered, Crane Distribution claimed equitable relief. The affidavit of Louis Raymond Haigh, the Credit Manager of the appellant, sworn both in the Magistrates' Court on the original hearing and on this appeal verifies the facts of the matter.

2. The appellant conducts the business of supplying goods to the plumbing trade largely upon the basis of the grant of credit facilities. In this case, the defendants/respondents applied to the appellant in March 1998 to open a monthly credit account with the plaintiff in relation to the supply to them of plumbing goods. Their application was executed and as a consequence the defendants agreed to be bound by the terms and conditions contained in the application form ("the agreement"). The effect of the agreement was that the defendants/respondents, in consideration of the plaintiff's agreement to and supply of the plumbing goods, agreed to enter into a deed of agreement and a charge to pay the money which became due to the plaintiff by the defendants for all goods supplied to them. I should say that this was expressed in the form of a guarantee (which is clearly not applicable to this situation). This matters little because by clause 1(b) of the agreement the respondents charged all of their real property with the amount of their indebtedness to the plaintiff and further agreed that upon demand being made by the plaintiff they should sign all documents and do all things that the plaintiff may reasonably require to be signed and done to further secure to the plaintiff the amount of the debt. There are other clauses in the agreement which it is not necessary for me to here state concerning supply and interest and another.

3. The agreement annexed to the application is headed "Deed of Agreement and Charge". The relevant part of the first clause is as follows:

"1. In consideration of the Supplier selling goods to us on credit we hereby agree that:- (a) We jointly and each of us severally (and if the applicant or any guarantor is an incorporated body, then each incorporated body) do hereby charge all of our real property both present and future and wheresoever situate with the amount of our indebtedness to the Supplier from time to time and each of us shall immediately upon demand being made on us by the Supplier sign all documents and do all things that the Supplier may reasonably require to be signed and done to further secure to the Supplier the amount of such indebtedness to the Supplier including such guarantee and or indemnity instruments in such terms as are required by the Supplier before or after approval of credit by the Supplier and each of us hereby irrevocably appoint the Supplier, each successor of the Supplier, each assignee to the Supplier and each of them severally to be the duly constituted attorney of each of us to execute in our several names and as our several acts and deeds such consents to such caveats as the Supplier may wish to lodge against any dealings in any real property in any Titles Office. "Real Property" includes estates and interests including leasehold. (b) In consideration of the Supplier selling to us goods on credit we hereby grant to the Supplier a legal mortgage over all real property and/or land in the present and future owned by us and/or of which we are registered as proprietors to secure the repayment of all moneys due and owing by reason of the supply of the said goods by the supplier to us and we hereby agree and undertake when called upon to do so by the Supplier to execute a legal mortgage over all the said real property and/or the said land owned by us and/or of which we are registered as proprietors to secure the repayment of all our indebtedness to the Supplier for goods so supplied by the Supplier and to include in such a mortgage all clauses as may be reasonable for better securing the moneys for the time being due or which may become due to the Supplier in respect of the goods so supplied or to be supplied. And we further agree to permit the Supplier to lodge a caveat on the certificate of title over all real property owned by us and/or of which we are registered proprietors and we further agree and undertake not to object to the lodging of the said caveat and not take any steps to remove the said caveat."

4. Clause 1(a) and (b) address real property as a security. The essential submission of Mr R McInnes, who appeared for the appellant, was that the effect of clause 1(a) and (b), was that the respondents gave a charge over their real property and a mortgage over it which was to remain equitable until the appellant should require the execution of documents which were then capable of being used to convert the equitable interest into a legal interest by registration of the mortgage. The facts are that the respondents accumulated debts to the appellant and never paid them. At the time they entered into the agreement they were the registered proprietors of the land in Victoria registered in the Office of Titles. Some time after the contracting and non-payment of the debts, the appellant demanded the respondents execute a mortgage over the land to secure the debt owed to it. The respondents never did do this leading to the commencement of the proceeding to recover the debt and interest pursuant to clause 3(b) of the trading terms and conditions of sale.

5. The proceeding against these respondents was but one of a substantial group of cases brought by the appellant against various defaulters so that (as will appear) the decision of the magistrate has a wider effect of this case, the final disposition of some of the other cases being postponed pending the conclusion of this appeal.

6. The plaintiff's statement of claim claimed that it was entitled to a declaration and order

that the defendants sign all the relevant and necessary documents to secure to the plaintiff the amount of the indebtedness by delivering to the plaintiff a mortgage in registrable form over the property. It also sought a declaration from the Magistrates' Court that the defendants' right, title and interest in the property was charged with the payment of the outstanding debt. The specific plea of relief was for damages in the sum of \$2,752.89 plus interest, for costs in accordance with certain provisions in the agreement and for an order that the defendants sign all the necessary documents so as to give the plaintiff a mortgage in registrable form. This was in effect a claim for specific performance or a mandatory injunction. Counsel for the appellant so submitted. Thus the claim in the proceeding was both a claim for damages for breach of contract (or goods sold and delivered) and for equitable relief in the form described.

7. The appellant was critically concerned with the enforcement of its rights to obtain a mortgage in registrable form (as contrasted with the enforcement and execution process to recover a judgment debt) because of the effectiveness of the mortgage as a security. In effect it also sought a declaration that the real estate referred to was charged with the payment of the amount of the debt. In addition, on the assumption that the real estate constituted the domestic dwelling house, the threat of being sold up was likely to lead those defaulting in the payment of their debts to make strenuous efforts to raise the money, to pay by other means.

8. The claim for equitable relief immediately drew in for consideration s100 of the *Magistrates' Court Act 1989* which provides, so far as is relevant, as follows:

"(1) The Court has jurisdiction, subject to sub-section (2)—

... (b) to hear and determine any claim for equitable relief if the value of the relief sought is within the jurisdictional limit; ...

(3) For the purpose of determining in a proceeding involving property whether ... the value of the relief sought is within the jurisdictional limit, a certificate which purports to have been issued by a valuer and which purports to state the value of the property as at a particular date is admissible in evidence and, in the absence of evidence to the contrary, is proof of the value of the property as at that date."

9. The magistrate had the benefit of both written and oral submissions from counsel (counsel who appeared before me) on the issue of the effect of the claim for equitable relief. The issue might be put in simple terms, namely, whether or not, for the jurisdictional fact, the Court looks at the value of the whole of the property in respect of which equitable relief is sought or whether one looks at the amount in money terms which is sought to be gained through the claim for equitable relief, i.e. by sale of the property through the mortgage security. The jurisdictional limit of the Magistrates' Court is \$40,000 and there was no question that the value of the land sought to be charged did exceed the sum of \$40,000. The magistrate reserved his decision for nearly two months. (It involved consideration of the other cases as well). He referred (p12) to counsel's submissions that—

"The power of sale is incidental to the security: it is the means provided for its realisation. It, nor any of the other incidents of the mortgage, is not the security itself. For present purpose the distinction is important. What is secured is the amount owed. In exercising the powers given to the mortgagee (viz, the power of sale) a sum greater than the debt may be realised but the creditor is entitled to obtain no more than what is owed. The balance is returned to, or for the benefit for the mortgagor or others as provided. ... So the 'value of the relief sought' by the plaintiff is security for the amount owed. That amount is, in the present cases within the monetary limit of the Magistrates' Court. That the security carries with it incidental powers the exercise of which may involve property of the defendant worth more than the jurisdictional limit is irrelevant for determining whether or not the Court can grant the relief. The value of the declaration sought is the amount of the judgment debt. The land in question is charged only to that extent. It is when orders are sought that are aimed at the realisation of security that a more difficult question arises."

Having cited this passage from counsel's written submissions, the magistrate went on to say:

"To my mind it is a simple question. What do the plaintiffs want? The answer is the plaintiff want a declaration that the interests of the defendants in certain properties be charged and that the defendants sign all documents so as to get to the plaintiffs a mortgage in registrable form over the right title and interests of the defendant in land. The object of the order is that the land be charged. The side effect of the order will be that the plaintiff will have security for its debt. What is sought is

an order that the defendant specifically perform a contract to enter into a mortgage over a property the value of which exceeds the jurisdictional limit of the Magistrates' Court."

The magistrate then indicated he was not prepared to make orders for equitable relief. He gave no reasons other than the ones to which I have referred. I interpret the magistrate as concluding that, although the debt in respect of which this security is sought to be obtained was in an amount well within the jurisdiction of the Magistrates' Court, because the value of the property over which the security was sought exceeded the jurisdiction, there was no jurisdiction conferred by s100(1)(b).

10. This is the issue which the appellant has brought to this Court and the question of law formulated by Master Wheeler on 3 March 2000 raises the question "whether the magistrate was correct in construing the expression 'the value of the relief sought' ... to mean, in the circumstances of the case, the value of the land over which the appellant sought security, rather than the amount of the security sought". I should state that the appellant also appealed in respect of the costs allowed by the magistrate, contending that he fell into error in construing other terms. A question was formulated as to this and indeed some submissions were made. Ultimately, the appellant withdrew and abandoned its appeal in that respect and it is therefore not necessary for me to address it.

11. The appellant's submission as to jurisdiction fundamentally treats the key issue as being the proper understanding of the phrase "value of the relief sought" in the sub-section. It is argued that all that is to be secured by the mortgage is the debt owed, which is within the Magistrates' Court jurisdiction. The fact that the security is greater than \$40,000 is irrelevant, it is argued, because the mortgagee cannot retain, on exercising the power of sale, any sum greater than the amount of the debt and costs. The balance is to be applied in accordance with s77(3) of the *Transfer of Land Act* 1958. Thus, the submission is that it is not the value of the security that is the issue, but the amount or value of the debt in respect of which security is sought.

12. There is no doubt that the grant of a mortgage over Torrens land does not transfer the land to the mortgagee. It creates an interest in the land but no estate. It may also create a statutory charge but the mortgagor is not divested of title in such a situation until the mortgagee's power of sale is exercised. See *Transfer of Land Act* 1958 (s74) and the observations of Brooking J in *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd & Anor* (1994) 1 VR 672 at 674. Thus, it was put by counsel for the appellant that the value of the relief sought (which was the creation of the mortgage security) is the amount for which the mortgage is security. In my view, the conclusion argued for is not a necessary consequence of the language of the sub-section, any more than the contrary argument that once the value of the security against which the debt is sought be satisfied is more than \$40,000, then the value of the relief is beyond the jurisdiction. In *Abrahams & Anor v Wainwright Ryan* [1999] 1 VR 102 the Court of Appeal, in a costs context, considered some aspects of the Magistrates' Court jurisdiction in an easement case but did not have to address the meaning of the language "the value of the relief sought".

13. The problem is a consequence of the use of inappropriate language to denote jurisdiction. The phrase "the value of (equitable) relief sought" melds together two different concepts. One, "value" in this context meaning commercial or monetary value and equitable relief, a legal concept neither easy to explain nor confine. The use of the phrase "jurisdictional limit" clearly addresses the monetary limit of jurisdiction, rather than the classes of proceedings that comprise the content of the jurisdiction.

14. The enrichment of the Magistrates' Court jurisdiction by the conferring of equitable jurisdiction doubtless has proved to be efficacious from time to time although it could hardly be doubted that nearly all of the Court's civil work is of a different kind. It is not necessary for me, for the present purpose, to speculate whether, for example, an application for an injunction to restrain a threatened breach of a court order not involving property, or to restrain trespass, where the relief sought cannot have a monetary value measurable against the limit of the Court's jurisdiction, can be lawfully entertained by a Magistrates' Court. In the present case, the relief sought is the recovery of a money debt from the proceeds of the sale of real property pursuant to the mortgagee's power of sale. This is not capable of being directly achieved; it is sought to be achieved by means of mandatory injunction, an order for specific performance or declaration. It hardly seems likely that Parliament intended that the Magistrates' Court would become the tribunal

to which resort might be had to enforce rights claimed to arise under a mortgage which has never been executed. The Supreme Court of Victoria has generally been regarded as the proper tribunal to deal with issues connected with land under the *Transfer of Land Act*, and ancillary matters.

15. It would be an unhappy consequence if the view pressed by the appellant were correct. One finds it difficult to think that there would be any land worth less than \$40,000 these days. It would follow that any debt less than \$40,000 could be sought to be enforced, under an agreement of this kind, by calling upon the Magistrates' Court to compel execution of the unexecuted mortgage. This would be likely to lead to a proliferation not only of agreements with such a clause but actions for enforcement in the Magistrates' Court. Paradoxically, if the execution of the mortgage had been obtained at the time, it is likely that the proceeding would have been one for possession and sale in the Supreme Court.

Moreover, one might doubt the social utility of encouraging the obtaining of mortgages over real estate, doubtless frequently a dwelling house, occupied by the debtor to support relatively modest advances, linked to the opportunity to enforce through the Magistrates' Court. This aspect could not be of much potency if the intention of the legislation was clear and if it had been drafted more carefully. Neither of those features are apparent. It is at least possible that the section was modelled on a statute of the Northern Territory. Mr McInnes, in his helpful submissions, suggested that this was likely. (See *Local Court Act (NT)* s14(1)). No such provision occurs elsewhere. The NSW Local Courts lack equitable jurisdiction. In South Australia, Western Australia and Queensland, the equitable relief is substantially limited to the recovery of money, although there are some ancillary orders in aid of that obtainable. In Tasmania, the equitable relief obtainable is clearly spelt out but is limited to a prescribed amount.

16. The County Court of Victoria does not have the broad power of the Magistrates' Court in this respect. Section 37(2) provides that the Court has no jurisdiction to hear and determine any application claim dispute or other civil proceeding by which title to any property, the value of which is greater than the jurisdictional limit, is sought to be affected, unless the parties consent.

17. The equitable relief sought is directed to compelling the execution of a mortgage over registered land the value of which is in excess of the Court's jurisdiction. No equitable damages are sought and none could arise. Damages for breach of the promise to pay for goods sold and delivered were claimed and obtained. The plaintiff's right to execute on the land, if the judgment debt is not otherwise met, cannot be doubted, subject to prior equities. That is a matter of execution, not jurisdiction. What can be doubted, and is by me, is that jurisdiction is in these circumstances conferred because the ultimate objective is to obtain a sum within the jurisdiction by securing a property the value of which is well beyond the jurisdiction.

18. Whilst the matter is not free from doubt, I have formed the view that the magistrate was correct, that is, that, with respect to the issue of equitable relief, the relief was in effect conditioned upon orders in relation to property the value of which was beyond the Court's jurisdiction.

19. I conclude that the relief sought (which is to be distinguished from the consequences of the basis for relief) is in respect of property the value of which is beyond the Court's jurisdiction. The appeal must be dismissed.

APPEARANCES: For the appellant Crane Distribution Ltd: Mr R McInnes, counsel. Leo Dimos & Associates, solicitors. No appearance of respondents.