

08/08; [2008] VSC 8

SUPREME COURT OF VICTORIA

**NICHOLSON v MATLER**

Bell J

30, 31 January 2008

**CIVIL PROCEEDINGS – NEGLIGENCE – NEGLIGENT PROPERTY VALUATION – PROPERTY OVER – VALUED BY VALUER – ACTION TAKEN IN COUNTY COURT BY VENDOR OF PROPERTY AGAINST REAL ESTATE AGENT – PROCEEDING SETTLED WITH EACH PARTY TO BEAR THEIR OWN COSTS – CLAIM BY VENDOR IN MAGISTRATES' COURT AGAINST VALUER FOR COSTS THROWN AWAY IN COUNTY COURT PROCEEDING – CAUSE OF LOSS – WHETHER LOSS CAUSED BY VALUER OR VENDOR WOULD HAVE ISSUED PROCEEDINGS IN ANY CASE – FINDING OF MAGISTRATE IN FAVOUR OF VALUER – WHETHER MAGISTRATE IN ERROR.**

N. engaged M. a valuer to provide a valuation report in respect of N.s property which had been sold for \$365,000 by the real estate agent. M.'s valuation was for \$465,000. Subsequently, N. sued the estate agent for damages in the sum of \$107,300 being the difference between the sale price and the valuation plus other incidental costs. At the hearing of the claim in the County Court, M. was forced to admit that his valuation of the property was over by about \$40,000. After 3 days' hearing in the County Court, the action was settled on the basis that each party would withdraw and bear their own costs. N. later claimed from M. the costs thrown away in the County Court hearing. The magistrate found that M.s negligent valuation had no effect on N.s conduct of the County Court action and dismissed the claim. Upon appeal—

**HELD: Appeal dismissed.**

1. The magistrate had to decide whether the valuer's negligence had caused the vendor's loss namely, her legal expenses thrown away in the County Court action. In the County Court action, another valuer had valued the property at \$426,000 meaning that N. could have had a viable claim in the County Court for the lesser amount. However, N. settled the case without an order in her favour. Accordingly, it was open to the magistrate to have found that as N. settled the proceeding, it could not be said that the costs were thrown away because of M.s negligence. The magistrate was not in error in finding that N. would have issued the County Court proceeding even if she had known M.s valuation was incorrect.

2. In relation to the test of causation, the magistrate did not have to apply the "but for" test. In view of the magistrate's finding that the proceedings would have been issued despite M.s valuation, the valuer's negligence was not "a" cause of the loss and it could not be said the loss would have occurred "but for" the negligence.

*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, referred to.

**BELL J:**

**INTRODUCTION**

1. Claire Nicholson engaged David Matler in 1997 to provide a valuation in respect of her property at 31 Kinane Street, Brighton. On the advice of her agent, Costello Real Estate, she had sold the property for \$365,000, but suspected that price was too low. She engaged Mr Matler, a valuer, to assist her to avoid the contract of sale, which she was unable to do, despite Mr Matler twice valuing the property at \$465,000.

2. Ms Nicholson issued a proceeding in the County Court of Victoria against Costello Real Estate, and its principal, Greg Costello, in 1998. She alleged the defendants were liable in contract, negligence and under the *Trade Practices Act* 1975 (Cth) to pay her damages of \$107,300, being the difference between the sale price at which the property was sold and Mr Matler's valuation, plus some other incidental costs.

3. The proceeding, which was heard in 1999, did not go well for Ms Nicholson. After three days it was settled on the basis that each party would withdraw and bear their own costs. Ms Nicholson did not obtain any order for damages against Costello Real Estate. From her point of

view, that result came about because Mr Matler's evidence was destroyed in the cross-examination conducted on behalf of the defendants. Mr Matler was forced to admit to a number of errors in his reports. He ended up conceding his valuation of \$465,000 was over by about \$40,000.

4. Having settled the County Court proceeding against the real estate agent in 1999, Ms Nicholson issued a proceeding in the Magistrates' Court of Victoria against Mr Matler in 2005. Ms Nicholson alleged Mr Matler was liable to her in negligence, contract and under the *Fair Trading Act* 1985 for damages in the sum of \$40,490.03, mainly constituted by the costs she incurred with her own then solicitors in the County Court proceeding issued against Costello Real Estate.

5. A magistrate rejected that claim and Ms Nicholson now appeals to this Court on a question of law under s109 of the *Magistrates' Court Act* 1989.

6. The amended notice of appeal dated 23 October 2006 specifies these two questions of law:

(1) Given the findings of the learned Magistrate that the Respondent's valuation was negligent, was the negligence without effect on the Appellant's conduct of the proceedings in the County Court, to and at trial?

(2) Were the reasons of the learned Magistrate sufficient to justify the conclusion that the Appellant suffered no loss in consequence of the Respondent's valuation, when the reasons are or appear to be silent as to the impact or otherwise of his negligence on the Appellant's conduct of the proceedings in the County Court, to and at trial?

7. I will deal with each of these questions in turn.

#### QUESTION (1)

8. Question (1) states correctly that the magistrate found Mr Matler was negligent in the valuation he gave. That finding, which was not contested, was that Mr Matler breached the duty of care he owed to Ms Nicholson in these three respects, which were specified in the reasons for decision:

(a) by failing to realise that 4 Gould Street was part of two properties (2 and 4) sold at the same time. If he had realised that fact, the square metre value would have dropped significantly;

(b) by including 5 Stewart Street, which was a mortgagee's sale and "may not have achieved an optimum figure";

(c) failing to include other sales for the purposes of comparison. With the possible exception of 18 Kinane Street (the sale occurred in July), the defendant ought to have had regard to the other four properties identified by Keck for the purposes of his first report.

9. The consequence of these errors was that Mr Matler had overvalued the property by about \$40,000, as I have said.

10. The magistrate went on to decide that Mr Matler's negligence was not a cause of the loss Ms Nicholson claimed. His Honour decided she would have issued the County Court proceeding against Costello Real Estate even if she had known Mr Matler's valuation was incorrect. It is this aspect of the decision Ms Nicholson argues was based on errors of law.

11. Ms Nicholson argues she suffered loss because Mr Matler's negligent advice meant she had to settle the County Court proceeding without obtaining an award of damages and her costs. Her case to the magistrate was that, even though she did not have to pay Costello's costs, the costs she paid her own solicitors were thrown away, and only because her case collapsed when Mr Matler's evidence was irreparably damaged in cross-examination.

12. The magistrate rejected that argument on the basis I have mentioned – that Ms Nicholson would have issued the proceeding against Costello Real Estate anyway. Before I analyse those reasons, I should mention some unusual features of this case, which do bear on the result.

13. The proceeding in the County Court was based largely on competing valuation evidence. On Ms Nicholson's side, there was Mr Matler, who, as I have said, had twice valued the property at

\$465,000, and a Mr Browne, who had valued the property at \$426,000. On Costello Real Estate's side, there were two valuers who both valued the property at its selling price – \$365,000. The proceeding was settled after Mr Matler had completed his evidence, but before Mr Browne had completed his. In the result, no finding was made by the judge about what the true value of the property was.

14. The question of the true value of the property was raised by Ms Nicholson in her pleadings in the Magistrates' Court proceeding against Mr Matler. She contended it was \$365,000, which was denied by Mr Matler. But she presented no evidence on that subject, as to which the magistrate made no finding. Having no valuation evidence (except Mr Matler's), the magistrate was in no position to make any such finding.

15. The finding of the magistrate that Mr Matler had been negligent was based on his own evidence. The finding was not a generalised finding of negligence, but quite precise. The finding, in effect, was Mr Matler had negligently overstated the value of the property at \$465,000 when, on his own evidence, it should have been about \$40,000 less. The finding was not that Mr Matler's valuation was completely worthless. Nor could the magistrate have made a finding of that kind, for there was no evidence about the practice of valuers to support it.

16. Against this background, the magistrate had to determine whether Mr Matler's negligence had caused Ms Nicholson's claimed loss – her thrown away legal expenses in the County Court. As we have seen, he decided that question against her because, in his view, she would have issued the County Court proceeding against Costello Real Estate anyway. His Honour reached that conclusion for two reasons:

- Ms Nicholson was prepared to issue the County Court proceeding against Costello Real Estate even though Mr Browne had valued the property at \$426,000
- Ms Nicholson was very upset with the way the real estate agent had handled the matter

17. Both of these are reasons are based on findings of fact from which there can be no appeal. To succeed before me, Ms Nicholson must demonstrate an error of law.

18. Ms Nicholson's main complaint is that the magistrate did not appreciate she had sued Costello Real Estate in the County Court to recover damages of \$107,300, and it was that proceeding she was forced to settle by reason of Mr Matler's negligence. On her submission, his Honour erred in law in rejecting that submission.

19. Ms Nicholson's submission in this regard fails to focus sufficiently on the cause of the loss that she claimed. To repeat, it was the thrown away legal expenses. The claim in the County Court was for \$107,300 damages based on Mr Matler's valuation of \$465,000, but she also presented evidence of Mr Browne's valuation of \$426,000. Ms Nicholson's claim must therefore be understood as having a fall back position, namely, a claim for about \$60,000 damages based on Mr Matler's and Mr Browne's combined evidence. Probably that claim for about \$60,000 damages was the only viable one from the outset, because it was the lower of the two inconsistent valuations on which Ms Nicholson was relying in the County Court proceeding.

20. Even after Mr Matler's evidence was damaged by cross-examination, the evidence on Ms Nicholson's side supported a claim for damages of about \$60,000. If she had persisted with that claim, and succeeded, she would not have incurred the costs thrown away claimed against Mr Matler in the Magistrates' Court proceeding. As she settled the County Court proceeding, it cannot be said the costs were thrown away because of Mr Matler's negligence. There was no sufficient factual foundation for that conclusion. Even if that negligence may have been responsible for reducing the claimable damages down to about \$60,000 – which I doubt – the magistrate was quite entitled to find, indeed compelled to find, that the negligence was not responsible for the costs thrown away.

21. In summary, it was just not open to Ms Nicholson to settle the County Court proceeding without the judge finding what the true value of the property was and then, in the Magistrates' Court proceeding, claim the costs of that County Court proceeding on the straightforward basis that they were necessarily incurred by Mr Matler's negligence.

22. Ms Nicholson submitted the magistrate incorrectly answered the question whether she would have commenced “the” County Court proceeding in any event, because that proceeding involved a claim for damages of \$107,300. I have said something about this subject already, but I will deal with it now in more detail.

23. From page 10 of his Honour’s reasons, it is clear he saw “the” proceeding in the County Court as involving a claim for \$107,300 damages or for a lesser amount of about \$60,000 damages in the alternative. He saw the claim in this way because Ms Nicholson’s own evidence included that of Mr Browne, whose valuation was \$426,000, not \$465,000. His Honour accepted Ms Nicholson thought Mr Matler was her principal witness, but it was self-evident he was not her only witness. In these circumstances, there was nothing legally wrong with the magistrate’s conclusion that the proceeding involved a claim for damages of \$107,300 or, as a fall back position, about \$60,000.

24. The magistrate’s second reason – Ms Nicholson’s sense of grievance – was clearly open on the evidence.

25. Ms Nicholson submitted the magistrate erred by applying the wrong test of causation. The test he applied was whether the defendant’s negligence was “a” causal factor of the harm suffered by the plaintiff. There is nothing legally wrong with his Honour’s statement and application of that test. In fact, it is a test most favourable to Ms Nicholson.

26. The magistrate was not bound to state and apply a “but for” test, as Ms Nicholson submitted. The leading authority is *March v E and MH Stramare Pty Ltd*.<sup>[1]</sup> As that case made clear, the “but for” test is not so easy to apply in a case of multiple causes. In any event, asking whether the negligence was “a” cause of the loss is not so different from asking whether the loss would not have occurred “but for” the negligence. The magistrate decided Ms Nicholson would have issued the County Court proceeding – in which she suffered the loss – even if Mr Matler had given the valuation of \$425,000. So the negligence was not “a” cause of the loss, and it could not be said the loss would not have occurred “but for” the negligence.

27. Ms Nicholson submitted the magistrate legally erred by paying regard to a medical negligence case, *Hotson v East Berkshire Area Health Authority*.<sup>[2]</sup> His Honour referred to this case only to illustrate a general point that, where the damage claimed was not due to the admitted negligence but another cause, the plaintiff was not entitled to an award for those damages. That point applies to this case. The magistrate did not err by illustrating it by reference to the decision in *Hotson’s case*.

28. Ms Nicholson submitted the magistrate should have dealt with the claims in negligence, contract and under the *Fair Trading Act* separately because the tests of causation are different. I cannot accept that submission. The causation issue in this case was common to all three causes of action, and his Honour was entitled – indeed bound – to apply the finding made under negligence to the other two causes of action.

## QUESTION 2

29. Question 2 relates to the sufficiency of the magistrate’s reasons for decision, and I have already set out the question in full.

30. There was an unfortunate slip in the reasons for decision of the magistrate. To the question “would she [Ms Nicholson] have commenced the County Court proceeding?” the reasons originally gave the answer “no”. The senior master asked for clarification and the magistrate replied by saying the word “no” should have been “yes”. From the context of the considered analysis on page 10 of the reasons for decision, it is clear that the word should have been “yes” from the outset, and that stating “no” was a slip, which is why the correction fitted naturally into the rest of the reasoning without the need for any other change. I do not think there was any need for explanation of the correction, for the explanation is obvious from the circumstances I have described.

31. Question 2 says the magistrate’s reasons for decision are silent on the impact or otherwise of Mr Matler’s negligence on Ms Nicholson’s conduct of the County Court proceeding. I do not think the reasons are silent on that subject.

32. The magistrate expressed the view, for which he gave reasons, that Ms Nicholson would still have issued the County Court proceeding if Mr Matler had valued the property at \$425,000. He had to address this question because the damages claimed were the costs thrown away in that proceeding. The question was whether that loss was caused by the negligence alleged (and admitted). This was not a case about whether Ms Nicholson lost a chance or opportunity to sue Costello Real Estate by reason of Mr Matler's negligence. It was a case about whether she could recover the costs thrown away as damages arising from that negligence. The magistrate's finding that Ms Nicholson would have issued the proceeding anyway was a necessary one for him to consider and, once made, was a fatal answer to Ms Nicholson's claim.

33. Ms Nicholson submits the magistrate's finding in this regard was not open on, or justified by, reference to the evidence. I cannot accept that submission. There was evidence permitting his Honour to make that finding. He referred to it in his reasons for decision and I have done so extensively in this judgment.

34. Ms Nicholson also generally criticised the reasons for decision of the magistrate as being inadequate. I cannot accept that submission either. In my view the reasons for decision very adequately explain the basis of his Honour's conclusions, which I consider to be free of legal error.

### CONCLUSION

35. Claire Nicholson has brought an appeal against the decision of a magistrate dismissing her claim for damages against David Matler. In the proceeding before the magistrate, Ms Nicholson claimed that Mr Matler, a valuer, was responsible for the costs thrown away by her in a separate proceeding in the County Court of Victoria in which Mr Matler gave negligent valuation evidence. The magistrate rejected her claim on the basis that her loss was not caused by that negligence.

36. Ms Nicholson's appeal is brought under s109 of the *Magistrates' Court Act* 1989, which requires her to establish that the magistrate erred in law in the decision that he made. Having considered the grounds put forward by Ms Nicholson, I am of the view that the magistrate made no errors of law. In particular, he applied the correct legal test; and the finding he made that Ms Nicholson's loss was not caused by Mr Matler's negligence was open on the evidence.

37. For these reasons the appeal must be dismissed.

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<sup>[1]</sup> [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.

<sup>[2]</sup> [1988] UKHL 1; [1987] AC 750; [1987] 2 All ER 909; [1987] 2 WLR 287.

**APPEARANCES:** For the appellant Nicholson: Mr D Sharp, counsel. Dan Horesh, solicitor. For the respondent Matler: Mr M McNamara, counsel. Pryles and Co, Lawyers.

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