

41/08; [2008] VSC 314

SUPREME COURT OF VICTORIA

MOTOR TRADERS GROUP PTY LTD v WEST CITY AUTOS PTY LTD

Smith J

6, 25 August 2008

CIVIL PROCEEDINGS – CONTRACT FOR SALE OF MOTOR CAR BETWEEN CAR DEALERS – PARTIES TO CONTRACT – CLAIM BY DEALER THAT BUSINESS SOLD TO ANOTHER PERSON PRIOR TO CONTRACT – DOCUMENT PRODUCED TO EFFECT THAT DEALER ALLOWED ANOTHER DEALER TO CARRY ON THE BUSINESS UNTIL THAT DEALER OBTAINED AN LMCT LICENCE – FINDING BY MAGISTRATE THAT DEFENDANT NOT A PARTY TO THE CONTRACT – CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR.

A motor car was sold to another dealer in July 2007. That dealer's business had been sold to another person in March 2006 but that person did not at that time hold a Licensed Motor Car Trader licence. An agreement was entered into between the dealer and the purchaser of the business to continue to trade using the LMCT number until the purchaser was granted a licence in its own right. When the proceeds of the sale were not paid, the vendor car dealer claimed the amount owing from the car dealer. The magistrate held on the evidence before the Court that she was unable to conclude to the standard of proof required, that the car dealer was a contracting party liable for the purchase price as alleged in the claim and accordingly dismissed the claim. Upon appeal—

HELD: Appeal dismissed.

1. Having regard to the lack of authentication of the relevant documents relating to the sale of the motor car and the failure to call the salesman and produce the document which was the vendor's original record of the sale, it was open to the Magistrate to find that the purchaser of the vehicle was a third party and not the defendant car dealer. In that situation it became critical whether any, and if so what, legal effect should be given to the document which purported to be executed on 17 March 2006 – the “Trading and Trust Agreement” – between the car dealer and the third party.

2. The “Trading and Trust Agreement” was intended to operate for a period of time within which the third party would obtain a licence in its own right. That licence was important because it was needed by the third party to trade in motor vehicles with the public. It was plainly open to be found that, if it was a genuine agreement executed by the described parties, it was intended to create a basis to enable the third party to hold the licence and trade with it in circumstances where it owned and ran the car dealership and not the defendant.

3. In these circumstances it was reasonably open to the Magistrate to be unable on the evidence before her to be satisfied as to the requisite extent that there was a contract between the plaintiff and the defendant for the purchase by the defendant of the vehicle for the consideration alleged.

SMITH J:**The appeal**

1. The appellant, Motor Traders Group Pty Ltd (“The Appellant”) has appealed under s109 of the *Magistrates Court Act 1989* from an order made in the Magistrates’ Court at Melbourne on 11 February 2008 dismissing its complaint with costs.

The original proceedings

2. By its complaint dated 10 September 2007 the appellant had brought a claim for goods sold and delivered against the respondent, West City Autos Pty Ltd (“The Respondent”). The complaint alleged that, on 25 July 2007, the appellant had sold a Mitsubishi Pajero motor vehicle for \$29,850 to the respondent. In its notice of defence filed 2 October 2007, the respondent denied that the vehicle had been sold to it by the appellant. The respondent also alleged that it sold the business of “Wangaratta Mitsubishi” to Matt Peachey Nominees Pty Ltd on about 29 March 2006 and had not traded with the appellant after the sale of the business. The relevance of the reference to “Wangaratta Mitsubishi” is that that was a business name under which the respondent had traded prior to the sale of the business to Matt Peachey Nominees Pty Ltd, and a number of the documents relied upon by the appellant in support of its claim referred to “Wangaratta Mitsubishi” as the purchaser of the car.

The question of law raised in the appeal

3. The Notice of Appeal states that the question of law upon which the appeal is brought is “Whether the finding of the learned Magistrate that the evidence did not establish that there was a contract for the sale of the motor vehicle the subject of the proceeding (‘the finding’) was a finding which upon the evidence a reasonable Magistrate could make.”
4. The notice of appeal alleges two grounds of appeal. They are stated as follows:
 1. No reasonable Magistrate could make the finding.
 2. There was no basis upon which the learned Magistrate could have made the finding.
5. Counsel indicated that two formulations were used as a result of the discussion of the test to be applied in *The State of Victoria v Subramanian* [2008] VSC 9. It is common ground, however, that in this particular case, the differences in formulations would not affect the result in this appeal.
6. The submissions presented by counsel for the appellant addressed this primary question which involves a consideration of the finding that was in fact made by the learned Magistrate. Counsel for the respondent argued that in fact the learned Magistrate did not make the alleged finding but rather found that the evidence did not establish that there was a contract for the sale of the motor vehicle by the appellant to the respondent. The respondent filed a Notice of Contention in which it sought to justify the decision of the learned Magistrate on the basis that the decision

“Should be confirmed on the ground that at no time was Matt Peachey Nominees Pty Ltd, or its directors, agents or employees, legally acting as agent of the respondent in respect of the purchase of the vehicle.”

The result was, that the debate before me concerned both aspects and the evidence relevant to both aspects. At times, counsel for the appellant appeared to be also arguing that it was not open for the learned Magistrate to find that a contract with the respondent had not been proved. The issues having been argued, I will address them although ultimately, in my view, it is not necessary to determine the matters raised in the Notice of Contention.

Submissions of the parties – Introduction.

7. A variety of issues were raised before the learned Magistrate. Some were repeated before me relating to agency matters and issues of illegality. Detailed and helpful submissions have been made on those matters. Having considered the parties’ submissions, however, I have come to the conclusion that the appeal is resolved by consideration of the factual decision made by the learned Magistrate and the evidence relevant to that decision.

Primary issue – the precise finding of the learned Magistrate.

8. As noted above, the appellant submits that the learned Magistrate’s finding was that she was not satisfied to the requisite standard, by the appellant, that there was a contract for the sale of the vehicle. The respondent submits that that was not the learned Magistrate’s finding. Rather, she was not satisfied to the required level of proof that there was a contract between the appellant and the respondent for the purchase price alleged.

9. The learned Magistrate commenced her reasons by referring to the fact that she had heard much during the hearing about agency, the sale of the business and the effect of a particular agreement of 17 March 2006 to which I will refer later.^[1] She indicated, however, that such evidence assumed matters which she was not satisfied had been adequately or sufficiently established by the evidence being matters concerning “the actual basics of any transaction or the contract of sale between the parties.” She then stated that

“For the plaintiff to succeed in this action it must establish that the Mitsubishi Pajero....was sold to the defendant and that there was consideration for....that sale.”

She then commented that the evidence of the transaction was “slim” and that she did not have evidence from the “persons” who were involved in the transaction. In particular, she noted that the salesperson who was identified on a tax invoice was not called to give evidence by the appellant. She then commented that in her view this gave rise to the inference that his evidence would not have assisted the appellant’s case.^[2]

10. The learned Magistrate then referred to the evidence of Ms Leon who was called for the appellant. Ms Leon gave evidence about the business practices of the appellant company and how the tax invoice relied upon by the appellant in its attempt to prove the alleged contract came to be created. Her Honour referred to the fact that, on the evidence, the tax invoice would have been generated from a blue card that would have been written by the salesman, assuming the usual business practice was followed. The blue card was not tendered by the appellant. The learned Magistrate commented that the weight to be given to the invoice was diminished because there wasn't any reference at the hearing to the original document.^[3]

11. The appellant had also relied, in part, on the purchaser number that had been entered in the tax invoice. That number was 752, a purchaser number held in the records of the appellant which referred to the respondent. The learned Magistrate commented that for all she knew the "752" entry in the tax invoice could have been made incorrectly – for example a data entry error. It might have been 751. She commented that there was no evidence to verify the details contained in the tax invoice and that "everything else comes from reliance upon this purchase number" and the subsequent documents generated presumably within the records of the appellant (the evidence is discussed below) were generated relying on the plaintiff's system which in turn was connected to the client number reference, 752. She also commented that the LMCT number arising from the later documents also triggered material from the Vic Roads database, in particular, about the owner of that number which was the respondent. I will refer later to this evidentiary material in more detail.

12. The reasons then referred to a document, "Exhibit B", the vehicle registration transfer form. It referred to "Wangaratta Mitsubishi trading for Matt Peachey Nominees Pty Ltd" as the purchaser. That document contained the LMCT reference number of 1869. The transcript records the learned Magistrate stating that this "contradicts or ...corroborates, if you like, the Wangaratta Mitsubishi document...". In that comment I believe she was referring to the tax invoice and saying that Exhibit B, the vehicle registration transfer form, both corroborated and contradicted the tax invoice. As to how the LMCT number came to be on Exhibit B, the learned Magistrate commented that it was not clear but she presumed that where it said a Victorian licence number on that document that you put in the LMCT number if you are a motor trader. Counsel expressed agreement with the conclusion at that time.

13. The vehicle registration transfer form did both contradict and corroborate the tax invoice. The appellant had relied on the content of the tax invoice which identified the buyer as "Wangaratta Mitsubishi" and as the holder of customer number 752. Its own records then identified the respondent as the person with the customer number. The vehicle registration transfer took that further by referring to the purchaser as holding licence 1869 and other evidence suggested that this licence was also held by the respondent. The vehicle registration transfer form, however, also contradicted those conclusions by asserting that "Wangaratta Mitsubishi" was trading for Matt Peachey Nominees Pty Ltd, not the respondent.

14. The learned Magistrate is then recorded as stating the following.

"So who the contract between is really the matter of fact is the first thing that must be established. There's clearly, and I think it's been conceded, no evidence about actual representations which were made by someone acting on behalf of Wangaratta Mitsubishi to found a filing of ostensible authority. The case is put on the higher level. However, I do conclude that the plaintiff will fail on its case, before we ever get to consideration at that level. It's – I am unable – simply unable to conclude on the basis of the evidence before the court to a satisfactory level of the identity of the contracting parties such as to find the defendant liable for the purchase price which is alleged by the plaintiff in its claim. The complaint will be dismissed."

15. As can often happen with the transcription of *ex tempore* reasons, they are not as clear as they might be at different places. But the learned Magistrate's ultimate conclusion is reasonably clear and it is stated in the passage cited immediately above. It is the response to her earlier statement of what the appellant had to prove to succeed. From the latter passage it is clear, in my view, that the learned Magistrate held that on the evidence before the court she was unable to conclude to the standard of proof required, that the respondent was a contracting party liable for the purchase price alleged by the appellant in its claim. She did not conclude that she was not satisfied that there was a contract of sale. She did not express a conclusion on that narrower

question. The primary argument of the appellant therefore fails. I therefore turn to the alternative analysis of the decision and whether it was open on the evidence before the learned Magistrate and whether, as contended by the respondent, the learned Magistrate's decision can be supported on the basis that the evidence required a finding that the respondent was not at the time of the sale acting as the agent of Matt Peachey Nominees Pty Ltd.

The evidence before the learned Magistrate.

16. Before the learned Magistrate, the appellant attempted to establish its case by relying primarily on documents. In relation to the documents produced from the records of the appellant, the appellant also relied upon the evidence of Ms Leon as to the usual business practice in selling vehicles at that time.

17. Ms Leon gave evidence that contracts were generally initiated by telephone calls from the appellant to the respondent and confirmed by issuing a tax invoice following which the vehicle would be delivered.

18. The following documents and evidence of Ms Leon were relied upon by the appellant.

(a) A tax invoice dated 25 July 2007.

The appellant tendered before the learned Magistrate, without objection being taken, a copy of a tax invoice of the above date which recorded the sale of the relevant Mitsubishi Pajero to "Wangaratta Mitsubishi PO Box 406, 51 Parfitt Road Wangaratta Victoria 3677." It identified the purchaser number as 752. It was submitted that this was evidence that the vehicle in question had been sold to Wangaratta Mitsubishi by Motor Traders. Ms Leon gave evidence that when a vehicle "is sold in the system you fill in the stock card" and the tax invoice was "automatically generated" by the appellant's computer.

(b) Extracts from records of the appellant.

Apparently contracts between the appellant and respondent were recorded in the appellant's records under Customer Number 752 and entries from the appellant's computer showed that Customer Number 752 was "Wangaratta Mitsubishi" and "City West Autos Pty Ltd trading under Licence LMCT 1869". These details were entered in the appellant's records in about 1995. Ms Leon gave evidence that if the appellant had been told that the details had changed, the appellant would have faxed a credit application to the new organisation.

(c) Disposal Notice

Also tendered was a disposal notice sent by the appellant to Vic Roads on 16 August 2007. It listed 68 vehicles including the vehicle in question and recorded that it had been transferred to "Wangaratta Mitsubishi".

(d) The vehicle registration transfer.

Counsel for the appellant described this document as the key piece of evidence on the issue of whether there was a sale. That may be so. The issue here is different. This document recorded the disposal of the vehicle by the appellant to the purchaser, "Wangaratta Mitsubishi trading for⁽⁴⁾ Matt Peachey Nominees Pty Ltd... 52 Parfitt Road (PO Box 406) Wangaratta Vic 3677". On that document is recorded as part of the buyer details "Victorian Licence Number" - 1869. The date of the sale recorded is 02082007. I note that Ms Leon said that this was not a document that the appellant would have seen.

(e) A Vic Roads document produced under subpoena

This document is a certificate recording the transfer of registration. It refers to a transfer of registration from the appellant to the respondent (named) and several days later, a transfer from the respondent to a third person. It was common ground that such certificates are produced on request and purport to state what appears in the records of Vic Roads.

19. In the Magistrates' court hearing, the respondent made a no-case submission at the end of the appellant's evidence. When put to its election, the submission was abandoned. Other evidence was then adduced. First, the respondent tendered evidence of an agreement pursuant to which the respondent sold the business conducted under the business name of "Wangaratta Mitsubishi" to Matt Peachey Nominees Pty Ltd. The agreement was recorded in Heads of Agreement entered into December 2005 and varied on 27 or 28 March 2006. Under that agreement the business

name “Wangaratta Mitsubishi” was to be transferred to the purchaser Matt Peachey Nominees Pty Ltd. Also before the learned Magistrate was a letter dated 14 December 2005 signed by Mr Robert Brock, the managing director of the respondent, advising the Business Licensing Authority that an agreement had been entered into to sell the business of the respondent to Matt Peachey Nominees Pty Ltd. The letter indicated that on settlement, the respondent’s LMCT number would be returned for cancellation and they would cease trading and the business name of Wangaratta Mitsubishi Pty Ltd would be transferred to Matt Peachey Nominees Pty Ltd. Mr Brock gave evidence that the LMCT 1869 was not returned to the Business Licensing Authority until after Matt Peachey Nominees Pty Ltd ceased trading. He gave evidence that he believed the return of the licence was the contractual responsibility of Matt Peachey Nominees Pty Ltd.

20. On 17 March 2006 it appears that the respondent through Mr Brock and Matt Peachey Nominees Pty Ltd through Matt Peachey also signed the following document.

“This is to certify that West City Autos Pty Ltd ABN: 11 004 598 627 will trade in trust for Matt Peachey Nominees Pty Ltd ABN: 19 116 882 494 until such time as Matt Peachey Nominees Pty Ltd is granted a licence in its own right.

This agreement allows Matt Peachey Nominees Pty Ltd to use the LMCT of West City Autos Pty Ltd until Matt Peachey Nominees Pty Ltd is granted its licence in its own right.”

21. Counsel for the appellant in this proceeding made submissions on the effect of this agreement, to argue that the learned Magistrate should have found that the respondent was the agent of Matt Peachey Nominees Pty Ltd. Counsel submitted that pursuant to the above document the parties made an agreement under which the respondent agreed to hold business assets in trust for Matt Peachey Nominees Pty Ltd and to trade with those assets until that company was granted a licence under the relevant legislation. During that time, however, Matt Peachey Nominees Pty Ltd would be allowed to use the LMCT of the respondent until it was granted its own licence. Counsel submitted that what this meant was that there was a somewhat circular arrangement in which effectively the respondent conducted trading in trust for Matt Peachey Nominees Pty Ltd but that Matt Peachey Nominees Pty Ltd acted as the agent of the respondent in discharging its obligations as the person conducting the business in trust for Matt Peachey Nominees Pty Ltd. Counsel submitted that this had the result that so long as that arrangement existed any transaction conducted by Matt Peachey through “Wangaratta Mitsubishi” was done as trustee’s agent for the respondent trustee and so the respondent was liable.

22. To complete the summary of the state of the evidence before the learned Magistrate, there was no direct evidence from the appellant confirming the sale by calling as a witness the salesperson involved who was identified. The record made by the appellant’s salesperson – the blue card – was not tendered in evidence by the appellant.

23. No one from Matt Peachey Nominees Pty Ltd who was involved in the transaction was called to give evidence about the transaction. Mr Brock gave evidence for the respondent. Mr Brock gave evidence that the respondent was aware in November 2006 that Matt Peachey Nominees Pty Ltd had failed to get an LMCT licence and was continuing to trade using the respondent’s LMCT licence and authenticated an annual statement dated 12 November 2006, signed by him confirming that the respondent was the licence holder for the “Wangaratta Mitsubishi” business LMCT 1869 carried on at the relevant address. He declined to answer questions about matters such as the actual car sale, whether he had been aiding and abetting unlicensed trading and the legality of the arrangement made – relying on the ground of privilege against self-incrimination.

24. None of the documents relied upon for the appellant about the transaction were formally proved in a complete fashion. They were admitted into evidence but their probative value suffered from the failure to authenticate the documents in a complete fashion.

Analysis of the evidence

25. At the conclusion of the evidence it may be said that the learned Magistrate had at best, from the appellant’s point of view, some evidence which supported the conclusion that the vehicle in question had probably been sold by the appellant to “Wangaratta Mitsubishi” which was the name used at the time for trading purposes by Matt Peachey Nominees Pty Ltd.

26. Having regard to the lack of authentication of the relevant documents relating to the sale to “Wangaratta Mitsubishi” and the failure to call the salesman and produce the blue card which was the appellant’s original record of the sale, it would, in my view, have been open to the learned Magistrate to find that she was not satisfied that a sale had taken place. I proceed, however, on the basis that that was not the decision made. Taking the view most favourable to the appellant, I will proceed on the basis that the learned Magistrate considered that there was evidence of a contract of sale and turned to the question of to whom and for what consideration the sale was made. The evidence of the transaction supported the conclusion that such a sale was to “Wangaratta Mitsubishi”. But the evidence as to the ownership of that business name and the sale of the business supported the conclusion that the purchaser of the vehicle was Matt Peachey Nominees Pty Ltd and not the respondent. In that situation it became critical whether any, and if so what, legal effect should be given to the document quoted above which purported to be executed on 17 March 2006 – the “Trading and Trust Agreement”.

27. That document was executed after the business had been sold by the respondent to Matt Peachey Nominees and the business name transferred. It was admitted by Mr Brock that it bore his son’s signature and possibly Matt Peachey and was part of the records of the respondent. Evidence was given by Mr Brock in cross-examination in which he denied that the effect of the agreement was that sales would be conducted in the name of West City Autos Pty Ltd and denied that it allowed Matt Peachey Nominees Pty Ltd and its employees to conduct sales in the name of West City Autos Pty Ltd. He conceded that it could be assumed that it was done “because Matt Peachey Nominees Pty Ltd didn’t have a licence and could not trade on its own account” but did not accept that it was necessary for Matt Peachey Nominees Pty Ltd to have an arrangement whereby the respondent could enter into transactions. In particular, he denied that there was any agreement under which Matt Peachey Nominees Pty Ltd could use West City Autos Pty Ltd name in any trading, pointing out that the business had been sold. He said the agreement was made because the parties wanted to settle the sale and it was understood that the Business Licensing Authority would permit the arrangement pending the issue of the licence to Matt Peachey Nominees Pty Ltd. He said he had had the impression that the licence would be produced ultimately.

28. Under the sale agreement admitted into evidence, the respondent was to continue to be involved in the business for one month. Mr Brock gave evidence that the respondent ceased to trade following the sale to Matt Peachey Nominees Pty Ltd. Mr Brock gave evidence that he had in fact been asked not to continue to be involved in the business after one week. All staff were transferred to Matt Peachey Nominees Pty Ltd. By the date of the transaction which occurred apparently on 2 August 2007, over one year had gone by. On the evidence of Mr Brock there had ceased to be any relationship between Matt Peachey Nominees Pty Ltd and the respondent.

29. Assuming any sense can be given to the alleged “Trading and Trust Agreement”, it does not contain any express time limit and so theoretically it could have continued indefinitely. That was unlikely to have been the intention, however, because it was intended to operate for a period of time within which Matt Peachey Nominees Pty Ltd would obtain a licence in its own right. That licence was important because it was needed by Matt Peachey Nominees Pty Ltd to trade in motor vehicles with the public. The purpose of the alleged “Trading and Trust Agreement” would seem to have been to try and create a structure which dealt with Matt Peachey Nominees Pty Ltd’s problem until it obtained the licence. There was no evidence from Mr Peachey about the circumstances existing at the time it was entered into which might have aided in its construction. In my view, it was plainly open to be found that, if it was a genuine agreement executed by the described parties, it was intended to create a basis to enable Matt Peachey Nominees Pty Ltd to hold the licence and trade with it in circumstances where it owned and ran “Wangaratta Mitsubishi” and not the respondent. It was also, however, open to be found that the purported agreement was a sham.

30. There remains the certificate from Vic Roads setting out a history of transfers of ownership which purported to state that the appellant transferred ownership to the respondent which in turn transferred ownership of the motor vehicle to another person. This was a statement prepared by someone at Vic Roads on the basis of other records held by it which were not produced.^[5] This certificate is only as accurate as the information supplied to it and there was no evidence before the learned Magistrate as to who it was that supplied the information to Vic Roads. Bearing in mind the difficulty that Matt Peachey Nominees Pty Ltd was operating under because it had not

obtained a licence, it was a real possibility that it chose to nominate the name of the respondent as the purchaser because it knew that the respondent would still have been on the official records as the owner of the licence it claimed to use.

Conclusion

31. In all these circumstances one could well understand why the learned Magistrate reached the conclusion that she did that she was unable on the evidence before her to be satisfied as to the requisite extent that there was a contract between the appellant and the respondent for the purchase by the respondent of the vehicle for the consideration alleged. Plainly, the decision reached was reasonably open and there was also a clear basis on which it could have been made. For the above reasons, therefore, the appeal should be dismissed.

32. For completeness, as to the issue raised by the respondent in its Notice of Contention, I note that the problems with the evidence are such that, in my view, the evidence failed to establish the respondent's contention.

33. For the foregoing reasons, the appeal should be dismissed.

[1] It is Exhibit PJC 3 and was described as the "Trading and Trust Agreement".

[2] Counsel for the appellant submitted that this application of *Jones v Dunkel* was not open. This was not raised as a separate ground of appeal. It was, in any event, a conclusion that was open and did not affect the ultimate reasoning.

[3] Counsel for the appellant also challenged this criticism. It also was not raised as a separate ground of appeal. It was, in any event, a conclusion that was open.

[4] I note that counsel for the appellant submitted that there was a significance in the fact that the reference in the description of the connection between the business name used the expression "trading for" and did not in the more traditional fashion refer to the company and state that it was "trading as" the business name. Counsel argued that this indicated that Wangaratta Mitsubishi was someone different from Matt Peachey Nominees Pty Ltd. I do not accept that the substitution of "for" for "as" makes any difference.

[5] It is not necessary to consider the effect of s9(B) *Road Safety Act 1986*.

APPEARANCES: For the appellant Motor Traders Group Pty Ltd: Mr D Gilbertson, counsel. Alpha Legal Pty Ltd, solicitors. For the respondent West City Autos Pty Ltd: Mr M Hoyne, counsel. Piper Alderman, solicitors.
