**08/71**

**SUPREME COURT OF VICTORIA**

# *Wm NOALL & SON (a firm) v GOLBERGER*

**Gillard J**

**18 March 1971**

**CIVIL PROCEEDINGS – STOCKBROKER/CLIENT – TRANSACTION BROUGHT ABOUT BY UNDERAGE SON – STOCKBROKER DECLINED TO CARRY OUT ANY FURTHER TRANSACTIONS UNLESS CARRIED OUT IN SON'S MOTHER'S NAME – DOCUMENT PREPARED BY STOCKBROKER REQUIRING THE MOTHER TO SIGN A FORM TO THE EFFECT THAT THE FIRM COULD OPERATE ON INSTRUCTIONS GIVEN BY SON – DOCUMENT NEVER SIGNED NOR RETURNED TO STOCKBROKER – LOSS INCURRED WHEN SHARES SOLD AT A LOSS – CLAIM MADE AGAINST STOCKBROKER FOR THE LOSS – ORDER MADE BY MAGISTRATE IN FAVOUR OF THE CLAIM – WHETHER MAGISTRATE IN ERROR.**

**HELD: Order nisi discharged with costs.**
**1. The question was whether there was any, and what contract, between the broker and the mother when the broker refused to act upon the son's instructions.**

**2. By the course of dealing it must have become apparent to the stockbroker that the son was speculating in shares and whilst one could well understand the desire to have his account guaranteed, they should also have known that delay in carrying out instructions might lead to inevitable loss. Therefore, the broker firm should have been quite explicit in their letter of the 21 January to say it would not carry out any more transactions on the son's instructions, either of purchase or sale until the document which they enclosed was signed.**

**3. In March the broker still held the defendant's selling order, and asking for some amendment of it to bring it into line with market conditions. By the course of conduct of the parties, the broker knew that each time he purchased he would be faced with the prospect of resale.**

**4. It is true that the broker was entitled to indemnity from the person instructing him. Furthermore he knew that the actual person instructing him had the authority of the person against whose account he was buying and selling. Having regard to these views, the Magistrate was justified in finding a contract which required the complainant to act upon the son's instructions.**

**5. On the finding of a continuing relationship importing contractual obligations, as a matter of law the nature of the transaction afforded no assistance to the stockbroker.**

**GILLARD J:** In the Magistrates' Court at Melbourne, William Noall & Son, a firm of stockbrokers, sued Mrs Margit Golberger and her husband Mr K Golberger for a balance of account arising out of a purchase and sale of some 7,000 Olympus Oil shares. At the commencement of the proceedings it was indicated that no order was sought against Mr K Golberger, who the complainant thought was a son of Mrs Golberger, but in fact turned out to be her husband.

The transaction, the subject of the proceedings, was brought about by Mr Zottle Golberger who was a son of the defendant. Mr Zottle Golberger had apparently, in 1969, been a customer of the firm of stockbrokers.

As I understand the evidence he indulged in the fashionable practice of trading in speculative shares on the Stock Exchange. Some member of the firm discovered that Zottle Golberger was under the age of 21 years and the firm refused to do business on his behalf unless it were in the name of his mother.

I think it is preferable that I should read the actual evidence given by Mr Noall before the Magistrate at the Magistrates' Court. Mr Noall swore

"He said the complainant firm had conducted share transactions on behalf of the second named

> defendant until it was ascertained at some stage in 1969 that the second named defendant was under 21. The second named defendant was then informed that the complainant would not continue to carry out transactions on his behalf unless they were carried out in the mother's name, his mother being the first named defendant. This was agreed to and thereafter the complainant negotiated a number of transactions in the name of the first named defendant on the instruction of the second named defendant."

It is common ground, that in swearing that it was the second named defendant who gave instructions, such allegations were erroneous. The instructions were given by Zottle Golberger who, as I said was the son of the defendant whereas the second named defendant turned out to be the husband of the first named defendant. The importance, however, of substituting Zottle Golberger for the words: 'The second named defendant' in the foregoing citation, it appears that Zottle Golberger was informed by Mr Noall that the firm would not continue to carry out transactions on his behalf unless they were carried out in the mother's name. Mr Noall has further sworn that this was agreed to. It it common ground that he never saw the defendant and that obviously all arrangements were carried out with Zottle Golberger. It becomes clear from that evidence that having discovered Zottle Golberger's infancy the firm were not prepared to carry on business in his name, but nevertheless to carry out transactions on his behalf. Although this has had a profound effect upon my mind I am not certain it had any effect on the Magistrate.

In December 1969, having discovered that Zottle Golberger was under the age of 21 years, the complainant required the defendant, the mother to give an authority in writing to Zottle Golberger. Zottle Golberger has sworn that he delivered that authority to the office of the firm in December 1969 and the Magistrate has accepted that oath. Accordingly from December 1969 the firm has in its possession an authority in writing from the defendant for the firm to act on instructions of Zottle Golberger. On the 21 January 1970 Zottle Golberger gave the firm instructions to purchase 7,000 Olympus Oil shares at 10 cents each. On that very day Mr Noall apparently wrote to the defendant a letter in these terms:

> "Would you kindly sign this form so that we can continue to operate in your name on instructions given by your son."

Then with that letter was enclosed a form of indemnity and a guarantee. It is the latter part of the document which is of some importance and again I quote:

> "In the event of my son making default in the performance and observance of his duties and obligations to your firm according to customs and uses of stock exchanges and the rules and regulations of stock exchanges in any of the Australian states and territories, I hereby guarantee to your firm, and each member thereof, the payment on demand of all monies, losses damages and expenses and costs which are now or shall at any time be due to your firm from my son."

It is common ground that Zottle Golberger received that letter and enclosure but did not show it to his mother, as he said, until he had received legal advice about it. The document was never signed, so far as I know, and was never returned to the complainant.

On the 28 January 1970, the price of Olympus Oil having advanced to 15 cents, Zottle Golberger then instructed the complainant to sell that day. Mr Noall refused to accept that instruction until he received back the document that had been sent on 21 January.

On the day following Zottle Golberger and the defendant each rang up the firm's office to confirm the order given by the son the preceding day. Unfortunately the market had fallen and the buyers were no longer present who were prepared to pay 15 cents. Accordingly the market was missed by the refusal of the firm to sell on the 28th.

No evidence was given of the number of buyers in the market on the 28th but the proceedings in the Court below seemed to proceed on the basis that the shares would have been sold. Nobody seems to have applied their mind as to the ability of the complainant to sell on that day; it was accepted. Indeed, Mr Noall apparently said that on the 28th the price range for the options was 13 to 15 cents. No evidence is given as to whether they could have got 15. It may be that if they tried they would have only found buyers at 13. But the fact is that they did not try at all, and of this, the defendant complains.

On the 19 February 1970 the complainant gave notice of a threat to sell under the rules of the stock exchange unless payment were made for the shares, This, in my view, shows a relationship of broker and client still continuing. It may be the proper inference to draw is that it only continued for the purpose of a contract of purchase made by the complainant on behalf of the defendant and nothing more.

However, on the 4 March 1970 the complainant sent a further notification to the defendant pointing out that they were unable to sell on her selling order of 15 cents, pointing out, I think, that the present price was seven cents, and asking for further instructions. This, as was pointed out by Mr Ross for the defendant indicated that at that stage the complainant still regarded itself as being retained by the defendant for the purpose of the sale of the shares. In fact, the shares were finally sold by the complainant, under rule 70 of the Rules of the Stock Exchange, and there was a deficit of some $89.42 arising out of the share transactions, being the balance of monies alleged to be owing by the defendant to the complainant.

The complaint and summons came on for hearing before Mr Thompson SM on the 16 September 1970. After evidence was given His Worship reserved judgment, apparently, and at a subsequent date, some six weeks later, he gave a fairly closely reasoned judgment whereby he found, amongst other things, that on the 28th the son was acting as agent for the defendant when he gave the instructions to sell the shares that they had purchased on his instructions and their failure on that day, when the shares were 15 cents, was a "breach of contract". He then found that this breach caused a loss to the defendant as set out in the counter claim of $310.35 and together with an additional amount of $147.00 which was, before that transaction owed by the complainant to the defendant. Accordingly he entered judgment on the counter claim in the proceedings for $457.62 with $143.00 costs and he dismissed the complainant's claim for the amount of $89.42 being the amount lost on resale.

The complainant then applied to this court for an order nisi to review the Magistrate's decision, and on the 26 November 1970 Master Bergere granted such an order nisi on three grounds:

> (1) That the Magistrate was wrong in holding that on the 28 January 1970 there was an existing contract between the complainant and the defendant, Mrs M Golberger pursuant to which the defendant Mrs M Golberger could require the complainant to act as her broker and to sell the shares on her behalf.
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> (2) The Magistrate was wrong in holding that the complainant committed a breach of an existing contract between the defendant Mrs M Golberger and if by refusing to sell shares on her behalf at the order or request of her agent.
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> (3) The Magistrate should have held, there being no allegation or evidence that the complainant was retained by the defendant Mrs M Golberger under special contract to act as her broker, each instruction given by the defendant Mrs M Golberger to the complainant constituted a separate offer to employ the complainant as a broker and could be refused or made the subject of special terms for the option of the complainant.

It seems to me that having heard argument, and having read the papers and considered the matter over night, that the vital question to the determination of this case is:

> "Was there any, and what contract, between, the complainant and the defendant on the 28 January 1970, when the complainant refused to act upon the son's instructions?"

The existence of a contract and its provisions are essentially questions of fact. From the finding of the Magistrate that on the 28 January 1970 there was a breach of contract and the refusal of the complainant to sell the shares that day constituted a breach of contract, he implied that there was an existing contract which required the complainant to act on the son's instructions. For myself I was very inclined to accept the view that each time a transaction took place on the Stock Exchange it required a separate and distinct direction by the principal of the broker to carry out such transaction.

But having had the benefit of reading the case of *Thacker v Hardy* (1878) 4 QB 685 at 686 to which my attention was drawn by Mr Nicholson, it became apparent that this is too narrow a view to take in some circumstances.

In that particular case Lindley J, who tried the case initially in the first instance, did not find separate contracts of that character at all. He found a contract of a continuing character and he analysed out very carefully all the various terms and conditions of that contract.

Some of the conditions he referred to would not be applicable to the relationship here but looking at it as a question of fact for the Magistrate to determine it seems to me that some such contract would have existed on the evidence led before the Magistrate.

It appeared that prior to Zottle Golberger delivering the authority of the defendant to the complainant's office in December 1969 he had carried out certain transactions which were later brought into account in the name of the defendant. I would infer that the complainant was prepared to accept his instructions to buy and sell from those entries in their ledger cards which was in the name of the defendant. It becomes apparent from a perusal of that ledger card that although, I think, some application money was paid to the complainant the picture is one of complete speculation of buying speculative shares and within a very short period, a matter of days, weeks, reselling them. By such method of dealing the account was in credit at the time of the purchase of Olympus Oil shares, and that credit formed part of the judgment given by the Magistrate in favour of the defendant.

Having regard to this course of conduct, what was the effect, first of the conversation between Mr Noall and Zottle Golberger, when he said he would buy on his behalf in the name of the mother, and of the subsequent conduct by him in receiving an authority in writing from the mother to allow Zottle Golberger to order transactions in her name and then to rely upon the failure of the defendant to comply with his letter of the 21 January?

Now it has been urged to me that no broker can be forced into carrying out any instruction from a client, that he is independent of any obligation to buy or sell even though the client or the client's agent might request it. Ordinarily, I think I would be prepared to accede to such a notion. But I do not know that in this case such consideration should apply. By the course of dealing it must have become apparent to the firm that this young man was speculating in shares and whilst one could well understand the desire to have his account guaranteed, they should also know that delay in carrying out instructions might lead to inevitable loss. Therefore, my view, the firm should have been quite explicit in their letter of the 21 January to say it would not carry out any more transactions on Zottle Golberger's instructions, either of purchase or sale until the document which they enclosed was signed.

Secondly I find support in this view by their subsequent notification in March that they still held the defendant's selling order, and asking for some amendment of it to bring it into line with market conditions. It seems to me that here, by the course of conduct of the parties, the broker knew that each time he purchased he would be faced with the prospect of resale.

It is true he was entitled to indemnity from the person instructing him. Furthermore he knew that the actual person instructing him had the authority of the person against whose account he was buying and selling. Having regard to these views, it seems to me, the Magistrate was justified in finding a contract which required the complainant to act upon Zottle Golberger's instructions. Whether I would have drawn that inference is immaterial, the question is; was there evidence from which such an inference could be drawn? I believe there was. I repeat, however, something I said earlier, I doubt whether very much attention was paid by the legal representatives before the Magistrate as to this vital question as to the nature of the contract.

As I pointed out to Mr Nicholson in the course of discussion, it may be that his client is, at this stage, affected by the conduct of the case in the Court below founded on the assumption that such a contract existed. There does not seem to have been any attention paid, if one can take notice of the affidavit and the terms of the judgment of the Magistrate, to this very important matter. Accordingly if in the Court below the complainant did not seek to set out there was no such contractual obligation then it seems to me that it is too late now, in this court, to try to resile from the position that the complainant took up in the Court below.

It seems to me, therefore, that grounds 1 and 2 of the order nisi must fail, or at least that the review of the order based upon such grounds must be rejected. Ground 3 raises a slightly

different matter. That is that each transaction required a separate instruction. Now this as I say, impressed me considerably. However, I do not know that I have to give any concluded view on the matter because in effect the Magistrate has found that in this particular case there was a special contract. Something similar to the character of the contract found by Lindley J in *Thacker's case*.

Accordingly it seems to me that on that finding ground 3 becomes irrelevant. Whatever one's views might be in regard to separate instructions for each transaction the important thing emerges – what was the transaction? Having regard to the course of dealing between the parties it may well be that here the proper inference to draw of the transaction would be one of purchase and resale, unless reasonable notice were given that the resale would not take place. Now there is no finding about this one way or the other. Indeed, nobody seemed to pay any attention to it and the complainant accordingly suffers from the deficiency in fact.

As I say, on the finding of continuing relationship importing contractual obligations, as a matter of law, the nature of the transaction also can afford no assistance to the complainant in these proceedings. Having regard to these views the order nisi will be discharged with costs.

**APPEARANCES:** For the complainant Wm Noall & Son: Mr A Nicholson, counsel. Aitken, Walker & Strachan, solicitors. For the defendants Golberger: Mr D Ross, counsel. AR Samuel & Woolf, solicitors.

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