8/97

SUPREME COURT OF VICTORIA

OTTE v COCHRANE and ORS

Balmford J

25 September, 20 November 1996 — [1996] 89 A Crim R 223

CRIMINAL LAW – SUMMARY JURISDICTION – ATTEMPTING TO OBTAIN FINANCIAL ADVANTAGE BY DECEPTION – DEPOSIT REQUIRED UPON PURCHASE OF PROPERTY – WORTHLESS CHEQUES FOR $26500 EACH PASSED FOR DEPOSIT – "AMOUNT OR VALUE" – WHETHER ATTEMPT TO OBTAIN FULL VALUE OF DEFERRAL OF ANTECEDENT CONTRACTUAL DEBT – WHETHER VALUE OF CHEQUES EXCEEDED JURISDICTIONAL LIMIT: *MAGISTRATES' COURT ACT* 1989, S53, Sch 4, Items 22, 58; *CRIMES ACT* 1958 SS82, 321M.

O. agreed to buy a property for $265,000 and pay a 10% deposit. As payment of the deposit, O. passed two worthless cheques each with a face value of $26500. Subsequently he was charged with two counts of attempting to obtain a financial advantage by deception. At the hearing, the magistrate declined to hear and determine the charges summarily on the ground that the Court lacked jurisdiction. Upon application for an order in the nature of mandamus alternatively a declaration—

HELD: Application dismissed.
1. The effect of Items 22 and 58 of Schedule 4 of the *Magistrates' Court Act* 1989 is that jurisdiction is conferred on a Magistrates' Court if either the amount or the value of the financial advantage attempted to be obtained does not exceed $25000.
***Arthur v Westcott* [1918] VicLawRp 74; [1918] VLR 482; 24 ALR 264; 40 ALT 53, applied.**

2. In the present case, whilst the "amount" of each cheque in question exceeded $25000, this alone did not conclude the question of jurisdiction. It was necessary to assess as a matter of fact the "value" of the financial advantage which O. was alleged to have attempted to obtain.

3. As the value of the financial advantage alleged to have been attempted to be obtained was the full value of the deferral of the antecedent contractual debt of $26500, such value exceeded $25000 and accordingly, the Magistrates' Court lacked jurisdiction to hear and determine the charges summarily.

BALMFORD J: [1] 1. By originating motion filed on 3 June 1996 the plaintiff seeks an order in the nature of mandamus to require the Magistrates' Court to hear and determine the matter of certain informations against the plaintiff according to law or alternatively a declaration that the decision of the Magistrates' Court, constituted by Mr Power, Magistrate, that that Court lacked jurisdiction to hear and determine the matter of the informations against the plaintiff was wrong in law.

2. Mr Power filed an affidavit in the matter but otherwise indicated that he was content to abide the decision of this Court.

3. The other material before the Court was an affidavit by Mr Thomas of Victoria Legal Aid, exhibiting the hand-up brief which was served on the plaintiff as defendant in respect of certain criminal charges against him, and the depositions relating to the proceedings before the Magistrates' Court on 1 and 4 April 1996. Mr Thomas deposed that he had been instructed that the plaintiff wished to have the charges dealt with in the Magistrates' Court.

4. A number of charges against the plaintiff were before the Magistrate. As to charges 9 and 10, the matters with which these proceedings are concerned, he ruled that the Magistrates' Court lacked jurisdiction to hear and determine them. Those two charges were that the plaintiff on each of 11 and 13 October 1994, contrary to section 321M of the *Crimes Act* 1958 ("the Crimes Act"), "did attempt to dishonestly obtained [sic] for himself a financial advantage namely by placing a deposit for $26,500 to buy a house by deception".

5. The hand-up brief includes a statement by Mr Holdsworth, associate director of Hocking

Stuart Pty Ltd, which reads as **[2]** follows, so far as relevant:

> "On the 11th of October, 1994, I met a person who I now know to be Craig Ian OTTE. He made an offer to purchase a property that we were selling. Negotiations were completed and we received a written offer for the property situated at 235 Bridge St, Port Melbourne. An agreement was then made to place a 10% deposit on the property with the balance to be paid on the 22nd of December, 1994.
>
> OTTE then handed me an ANZ cheque which he made payable to Hocking Stuart for the amount of $26,500. Upon receiving this cheque sale was completed and contracts were exchanged with OTTE for the purchase of the house.
>
> This cheque was subsequently deposited into our Commonwealth Bank Trust Account. On the 13th of October, 1994, I was advised by the bank that the cheque OTTE had given me had been dishonoured. I was further (sic) that the ANZ account held by OTTE was closed.
>
> On the same day I contacted OTTE to find out the circumstances of the dishonoured cheque. He expressed surprise that the cheque had been dishonoured and he stated that he would issue another cheque. Later that afternoon I attended at 198 Normanby Rd, South Melbourne and met with OTTE outside. I believed this address to be his work address. OTTE provided me with a Bank of Melbourne cheque again addressed to Hocking Stuart for the amount of $26,500. I banked this cheque immediately a (sic) put a special clearance on the cheque.
>
> On the 17th of October, 1994, I received notification from the Bank of Melbourne that this second cheque had also been dishonoured. I was further advised that OTTE's Bank of Melbourne account was also closed."

6. The hand-up brief also includes the record of an interview between the secondnamed defendant and the plaintiff conducted at the South Melbourne C.I.B. office on 22 November 1994. At pages 35-36, in the course of consideration of the handing of the two cheques to Mr Holdsworth, the following passage appears:

> "Q 300 Okay. Now, when you gave out the cheque, what were you trying to do? You knew there was no money in the account, we agreed to that, is that right?
> **[3]** A It's likely that - there was definitely not enough to - - -
> Q 301 Alright.
> A Pay $26,000.
> Q 302 What were you trying to do, by passing that cheque?
> A Buy time.
> Q 303 To do what?
> A To get the money.
> Q 304 To get the money from where?
> A Hope.
> Q 305 Well, can you - hope? Hope of what?
> A Hope that I'll get twenty-six - $265,000 to get the house
> Q 306 From where?
> A On the stance of Tattslotto.
> Q 307 Pardon?
> A On the stance of Tattslotto.
> Q 308 So, this is another fantasy, isn't it, Craig?
> A Not really, there's always a chance."

7. It is to be assumed that the material set out in the two preceding paragraphs constitutes the evidence on which charges 9 and 10 are based. 8. The relevant statutory provisions are sections 82(1) and 321M of the *Crimes Act* and section 53(1) and items 22 and 58 of Schedule 4 of the *Magistrates' Court Act* 1989 ("the Act"). Those provisions read as follows:

> ***Crimes Act* 1958**
> **"82. *Obtaining financial advantage by deception***
> (1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment.
>
> **321M. *Attempt***
> A person who attempts to commit an indictable offence is guilty of the indictable offence of attempting to commit that offence."

[4] *Magistrates' Court Act* 1989
"53. (1) If a defendant is charged before the Court with any offence referred to in Schedule 4, the Court may hear and determine the charge summarily if—
(a) the Court is of the opinion that the charge is appropriate to be determined summarily; and
(b) the defendant consents to a summary hearing.

Schedule 4
Obtaining financial advantage by deception
22. Offences under section 82 of the *Crimes Act* 1958, if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the Court exceed $25 000.

Attempts
58. Offences under section 321M of the *Crimes Act* 1958 which are alleged to have been committed in relation to an indictable offence triable summarily by virtue of any item from 1 to 56."

9. Relying upon the decision of Gray J in *Matthews v Fountain* [1982] VicRp 104; [1982] VR 1045, the Magistrate took the view that subject to the trier of fact being satisfied that the contract was not a terms contract, the plaintiff had, by passing two worthless cheques each with a face value of $26,500, obtained a financial advantage, being the deferral of an antecedent contractual debt, the value of which was $26,500. That value exceeded $25,000 and accordingly, the two charges did not fall within the jurisdiction of the Magistrates' Court. He indicated that he would have exercised his discretion under section 53(1)(a) of the Act to hear and determine the charges had he been of the view that he had jurisdiction to do so. Thus in this case the requirements of paragraphs (a) and (b) of section 53(1) are both met (see paragraph 3 above).

10. It was conceded by both counsel that the "amount" of each of the cheques in question exceeded $25,000. The principal issue therefore is whether that is sufficient to deprive the Magistrates' Court of jurisdiction to hear the charges or **[5]** whether it is necessary to consider the "value" of the cheques and, if so, the manner in which that value may be assessed.

11. As was pointed out by Mr Just for the secondnamed and thirdnamed defendants, the jurisdictional limit contained in a large number of items in the Schedule 4 to the Act is expressed by reference to the phrase "amount or value". He submitted, and I agree, that in using that phrase, Parliament intended to draw a distinction between the concept of "amount" and the concept of "value". He conceded that the "value" of each of the cheques in question might be less than $25,000.

12. Having regard to this distinction, Mr Just submitted that if either the amount or the value of the financial advantage alleged to have been attempted to have been obtained by the plaintiff exceeds $25,000, then the Magistrates' Court does not have jurisdiction to deal with the matter. He put this submission on the basis that it is desirable that matters going to the jurisdiction of the Magistrates' Court ought to be able to be resolved as quickly and easily as possible. That being so, where *prima facie* the amount of the advantage attempted to be obtained was readily ascertainable, the jurisdiction should be decided by reference to the amount. The amount of a cheque can be easily determined on the face of it whereas the question of its value is a far more subtle and difficult issue. On that basis he concluded that the amount of the financial advantage attempted to be obtained by the plaintiff in passing each of the two worthless cheques exceeded $25,000 and the decision of the Magistrate was accordingly correct.

13. While I agree that it is preferable that the Magistrates' Court be able to resolve jurisdictional issues quickly and easily, I do not accept the submissions of Mr Just as to the manner of operation of the distinction between "amount" and "value" appearing in item 22 and other items of Schedule 4. Section 53(1) confers jurisdiction on the Magistrates' Court **[6]** where it would not otherwise have jurisdiction, and the provisions defining that jurisdiction must be read and interpreted in that light. In my view, the effect of items 22 and 58 of Schedule 4 is that jurisdiction is conferred, in a relevant case, if either the amount or the value of the financial advantage attempted to be obtained does not exceed $25,000.

14. This interpretation is established by the words of Cussen J in *Arthur v Westcott* [1918] VicLawRp 74; [1918] VLR 482; 24 ALR 264; 40 ALT 53. His Honour was concerned there with the expression "amount or value" as appearing in section 121(2) of the *County Court Act* 1915, also in the context of a limit on jurisdiction. His Honour said at 486:

> "I think you cannot divide all cases into two classes and say in one class the amount is to be taken, and in the other class the value is to be taken. There may be cases under sec. 121(2), and some other sub-sections, where you may have to consider that an amount is *prima facie* fixed by some set of figures, but may also have to consider the real value—the substance—and to decide that, if either the amount or value does not exceed £500, the Court is not deprived of jurisdiction."

15. Having decided that the amount of the cheques in this case does not alone conclude the question of the Magistrates' Court's jurisdiction, it is necessary to assess, as a matter of fact, the value of the financial advantage which the plaintiff is alleged to have attempted to obtain.

16. If the charges had been brought under section 82(1) of the *Crimes Act*, the effect of section 53(1) and item 22 of the Act would have been that, being charges for an indictable offence, they might, in the circumstances set out in section 53(1), be heard and determined summarily "if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the Court exceed $25,000".

[7] 17. However, the plaintiff is charged, not under section 82 with obtaining a financial advantage, but under section 321M with attempting to obtain a financial advantage. That being so, by definition no financial advantage is alleged to have been obtained. If the matter rested there, section 53(1) of the Act would apply to every case of attempting to commit an offence under section 82, because the "amount or value of the financial advantage alleged to have been obtained" would always be nil, and thus would never exceed $25,000. If it had been the intention of Parliament that all charges of attempting to commit an offence under section 82 be triable summarily, regardless of amount or value and subject only to paragraphs (a) and (b) of section 53(1) of the Act, it would have been simple to say so directly. It would seem unlikely that Parliament did so intend. In my view where the charge is under section 321M and not section 82, items 22 and 58 of Schedule 4 should be read together as though the expression "attempted to be" were inserted before the word "obtained" in item 22, causing the relevant passage to read "the amount or value of the financial advantage alleged to have been attempted to be obtained does not in the judgment of the court exceed $25,000".

18. As noted in paragraph 9 above, the Magistrate relied on the decision in *Matthews v Fountain* to support his conclusion that the value of each cheque was $26,500 in the form of the deferral of a debt to the vendor of the house for that amount. Mr Perkins, for the plaintiff, accepted that *Matthews v Fountain* is authority for that proposition. However, he submitted that that case turned on the question as to whether a financial advantage is obtained by the proffering of a valueless cheque; the matter of the value of the financial advantage so obtained, with which this Court is presently concerned, had not been in issue in that case. I accept this submission.

[8] 19. In *Matthews v Fountain* Gray J said at 1050 "There may be factual situations, (although they are not easy to conjure up) in which it may be said that, despite the dishonest proffering of a valueless cheque, there was no financial advantage obtained." In *Fisher v Bennett* (1987) 85 FLR 469 Miles CJ of the Supreme Court of the Australian Capital Territory cited that statement with approval and found that the matter before him was such a case. The appellant had left a valueless cheque for another person to collect, but had not improved his financial situation by doing so. There was no forbearance to sue on the part of the cheated creditor, and no reduction or forgiveness of the debt. Interest continued to accrue.

20. In *Associated Midland Corporation v Bank of New South Wales* [1983] 1 NSWLR 533 the Court of Appeal of New South Wales held that while *prima facie* the measure of damages recoverable for the conversion of a cheque is the face value of the cheque, payments subsequently made may be taken into account to reduce the damages recoverable by the owner of the cheque. In *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 Phillimore LJ said at 379:

> "It may be also that anyone who has obtained its value by presenting a cheque is estopped from asserting that it has only a nominal value."

21. In the present case, Mr Perkins submitted that as the obligation to pay the deposit of $26,500 was ongoing, the plaintiff could not be said to have obtained the advantage of evading that debt. The only advantage which could be said to have been gained was the evasion of the interest which would have accrued in the period between the date each cheque was passed and

the date it was discovered to be worthless. This period was described by Mr Perkins as being in the order of a week or at the most, two weeks. Had the plaintiff simply failed to hand over the cheques, interest would have started to accrue from the date that the payment of the deposit was due. That being so, based on any reasonable assumption as to rates of interest, the value of the financial advantage gained **[9]** was considerably less than $25,000 and accordingly the Magistrates' Court had jurisdiction to hear and determine the charges.

22. However, the value of the financial advantage alleged to have been attempted to be obtained (see paragraph 17 above) must surely be the full value of the deferral of the antecedent contractual debt, that is, $26,500. (It would appear from the statement of Mr Holdsworth that the debt was antecedent to the payment by a few minutes only, but that is not significant in the circumstances.) It is apparent from the hand-up brief that each of the attempts charged is alleged to have been an attempt to obtain credit for the full value of the deposit, and not merely for a few days interest. That being so, the "value" of the financial advantage attempted to be obtained as well as the "amount" of that financial advantage exceeds $25,000. Accordingly section 53(1) of the Act does not apply to these charges, and the decision of the Magistrate is correct. The plaintiff's application will be dismissed**.**

APPEARANCES: For the Plaintiff: Mr D Perkins, counsel. Solicitors: Victoria Legal Aid. For the Defendant: Mr D Just, counsel. Solicitor for Public Prosecutions.
