43/08; [2008] VSC 348

SUPREME COURT OF VICTORIA

UMBERS v KELSON

Smith J

15 April, 11 September 2008

CIVIL PROCEEDINGS – CONTRACT FOR SALE OF BUSINESS – FINANCE CLAUSE IN CONTRACT – CONTRACT SUBJECT TO A CONDITION AS TO PURCHASER'S FINANCE BEING APPROVED – PURCHASER UNABLE TO RAISE NECESSARY FINANCE BY DATE SPECIFIED IN CONTRACT – LETTER SENT TO VENDOR STATING THAT FINANCE HAD NOT BEEN APPROVED AND REQUESTED AN EXTENSION OF ONE MONTH AND IF EXTENSION NOT GRANTED LETTER MAY BE TREATED AS WRITTEN NOTICE ENDING THE CONTRACT – LETTER NOT REPLIED TO BY VENDOR – PARTIES CONTINUED TO HAVE CONTACT IN RELATION TO THE RUNNING OF THE BUSINESS AND PURCHASER INVOLVED IN TRAINING BY VENDOR IN HOW TO RUN THE BUSINESS – FINANCE NOT FORTHCOMING – BUSINESS SOLD BY VENDOR TO ANOTHER PERSON AT A LOSS – CLAIM BY VENDOR FOR DAMAGES OCCASIONED BY THE WRONGFUL REPUDIATION OF THE CONTRACT BY THE PURCHASER – CLAIM BY VENDOR THAT PURCHASER ESTOPPED FROM DENYING THAT THE CONTRACT WAS IN EXISTENCE – FINDING BY MAGISTRATE THAT THE PURCHASER'S LETTER DID NOT TERMINATE THE CONTRACT – FINDING THAT THE PURCHASER'S CONDUCT ESTOPPED HIM FROM RELYING ON THE PURPORTED TERMINATION OF THE CONTRACT – WHETHER MAGISTRATE IN ERROR.

U. agreed to purchase a business from K. A contract of sale was executed between the parties which provided for the amount to be paid, the settlement date and subject to a condition as to U.'s finance being approved by 15 August. On 17 July due to a problem with U.'s obtaining finance, a letter was sent to K. requesting an extension of the finance condition for another 30 days. The letter also said that if an extension was not granted the "letter may be treated as written notice ending the contract". This letter was not replied to. However, the parties continued to have contact and time was spent by K. in training U. in running the business, introducing U. to clients and/or suppliers and disclosing confidential information in relation to the business in the form of manuals. When U. failed to complete the contract, K. sold the business to another person thereby incurring a loss. Subsequently, K. claimed from U. damages for the loss allegedly suffered and this claim was upheld by the Magistrate. In his findings, the Magistrate held that the letter requesting the extension of time for the payment did not end the contract. He further found that having regard to U.'s conduct, he was estopped from relying upon the purported termination of the contract as contained in U.'s letter of 17 July. Upon appeal—

HELD: Appeal dismissed.
1. The legal effect of the 18 July letter was critical to the submissions relevant to the estoppel issue. In essence, if the letter had terminated the contract, K. had to establish that the subsequent conduct gave rise to an equitable estoppel. If the letter had not terminated the contract, K. had an ongoing contract to rely upon and were able to argue that the subsequent conduct gave rise to common law estoppel preventing U. from avoiding the contract.

2. The July letter was not a "written notice ending the contract" within the prescribed "two business days" or any period. Therefore, it did not constitute a valid exercise of the contractual power given to U. to terminate the contract and was ineffective. It was an approach by U. to K. to seek an extension of the finance approval clause and, in terms, left with K. the option to accept the letter as a notice terminating the contract if K. wished to do so. U. tried to "have his cake and eat it". The letter did not end the contract and, so, the contract remained on foot.

3. Accepting that the letter did not terminate the contract the Magistrate was correct in considering common law estoppel only and his finding on that issue was plainly open on the basis advanced by his Honour. K. borrowed $25,000 on the basis that the contract was proceeding, and when it did not, were financially embarrassed and were unable to pay the debt and judgment was subsequently obtained against them. Further, accepting that the contract was not terminated, the magistrate's analysis of the estoppel issue as common law estoppel was correct in law and his finding of estoppel plainly open on the facts. The decision may also be upheld on the basis that, the letter not having terminated the contract, U. was liable in damages for failure to complete the contract on 15 September 2005 or, on the ground of repudiation of the contract by his letter of 12 September 2005.

SMITH J:
The Appeal

1. By notice of appeal dated 9 January 2007, the appellant, Gary Rowland Umbers (the purchaser) has appealed from an order of the Magistrates' Court requiring him to pay the sum of $61,524.20, together with interest of $3959.46 and costs of $8,962.00 to the respondents, Timothy John Kelson and Michelle Ina Kelson (the vendors). The learned Magistrate also dismissed the purchaser's counter-claim. This appeal is brought against the whole of the order.

2. By order dated 12 February 2007 Master Efthim gave leave to amend the notice of appeal to state the following questions and grounds

> **"The question of law upon which the appeal is brought is:**
> 1. On the evidence before the Court, it was not open to reach the conclusions that it did.
>
> 2. The Learned Magistrate failed to provide adequate reasons for his decision.
>
> 3. The Learned Magistrate erred in law in finding that the conduct of the appellant estopped him from relying upon the finance clause in the contract of sale.
>
> 4. The Learned Magistrate erred in law in finding the respondents had adopted an assumption that the appellant was proceeding with the contract and/or had waived his reliance in the subject to finance.
>
> 5. The Learned Magistrate erred in law as set out in the Grounds for Appeal.
>
> **Grounds of appeal:**
> The Learned Magistrate:
> 1. erred in finding that the conduct of the appellant/defendant estopped him from relying upon the finance clause in the contract of sale between the appellant/defendant and the respondents/plaintiffs;
>
> 2. erred in finding that the respondents/plaintiffs had adopted an assumption that the appellant/defendant was proceeding with the contract of sale;
>
> 3. erred in finding that the appellant/defendant had waived his reliance on the subject to finance clause;
> 4. erred in finding that the contract of sale had not come to an end once finance had not been obtained and the subject to finance clause had been complied with;
>
> 5. erred in finding that detriment had been suffered by the respondents/plaintiffs;
>
> 6. erred in finding that the loss and damage suffered by the respondents/plaintiffs was different from the detriment suffered by the respondents/plaintiffs;
>
> 7. failed to give adequate reasons explaining his decision."

The original Magistrates' Court proceedings – pleadings

3. The vendors originally brought proceedings before the Magistrates Court against the purchaser seeking damages for the loss allegedly suffered as a result of the purchaser wrongfully repudiating a contract to purchase a business known as a Joroni Embroidery conducted in Warrnambool.

4. The vendors alleged that the purchaser agreed to purchase the business from them for a price of $220,000 pursuant to a contract of sale dated 17 June 2005. In the complaint, a number of terms were pleaded. Of particular relevance are the following terms as pleaded:

> "(a) the price would be paid as to a deposit of $1,000 and the residue of $219,000 on the settlement date;
>
> (b) the settlement date is the date…90 days from the date of sale being on or before 15 September 2005;
>
> (c) the contract was subject to a condition as to the purchaser's finance being approved by 15 August 2005;
>
> (d)(e)… (f) the contract was subject to Silvan Ridge Mortgage Brokers approving the finance for the purchase of the business by the approval date or any later approval date allowed by the plaintiffs. The defendant may end the contract, if the loan is not approved by the approval date, only if the defendant:
> (i) made immediate application for the loan;

(ii) had done everything reasonably required to obtain approval of the loan;
(iii) serves written notice ending the contract on the purchasers on or before two business days after the approval date; and
(iv) is not in default under any other condition of the contract when the notice is given."

5. The alleged condition as to the purchaser's finance being approved by 15 August 2005 was based in part on an alleged oral agreement to extend the finance condition for a further thirty days. This was alleged by the vendors to have been the result of discussions between the vendors' agent and the purchaser on about 17 July 2005, the substance of which was that the purchaser requested an extension of the finance condition for a further thirty days. The particulars alleged that the vendors' agents obtained instructions and communicated the vendors' agreement to that variation. It is on the basis of that oral agreement, that the vendor's statement of claim alleged that there was a finance condition which operated until 15 August 2005. As will be seen, the evidence did not support the alleged oral agreement; the vendors' agent failed to communicate the vendors' agreement to the purchaser.

6. The vendors' statement of claim, in paragraph 4, went on to allege that in August 2005 the purchaser had affirmed and/or elected that the contract was to proceed to settlement. Particulars advanced under that pleading were as follows:

"The defendant stated to the plaintiff on 23 August 2005 that he had finance available and would be proceeding to settle the Contract. On 25 & 26 August 2005 the defendant attended training of the business and received confidential information in relation to the business."

7. The acts of repudiation pleaded against the purchaser were a failure to comply with clause 4 of the general conditions "and/or" a failure to give notice on or before two business days after the relevant approval date. Clause 4 of the contract provided as follows:

"This contract is subject to the lender approving the finance of the purchase of the business by the approval date or any later approval date allowed by the vendor. The purchaser may end the contract if a loan is not approved by the approval date only if the purchaser has
(a) made immediate application for the loan;

(b) has done everything reasonably required to obtain the approval of the loan;

(c) serves written notice ending the contract on the vendor on or before two business days after the approval date; and

(d) is not in default under any other condition of this contract when notice is given.
Money must immediately be refunded to the purchaser if the contract is ended."

It is common ground that the approval date specified in the contract was within one month of the date of the contract. Thus the finance clause time limit fixed by the contract was 17 July 2005.[1]

8. The damages claimed related to an alleged loss of $50,000 on the ultimate sale to a third party which occurred in February 2006 and the costs and expenses associated with it.

9. In his defence, the purchaser denied the alleged collateral agreement and denied that the contract was subject to a condition as to the purchaser's finance being approved by 15 August 2005. He maintained that the term as to finance approval set a time limit of 17 July 2005 for obtaining the approval of finance. He also denied any affirmation or election to proceed to settlement in August 2005 and pleaded that if the contract was on foot he validly gave notice by letter to the vendor's solicitors dated 12 September 2005. He denied any repudiation and alleged that he had complied with the requirements of clause 4 of the general conditions of the contract relating to finance. He alleged in his pleading that by letter dated 18 July 2005 from his lawyers to the solicitors for the vendors, he advised the vendors that finance had not been approved, requested an extension to 17 August 2005 and advised that if an extension was not granted then

"that letter may be treated as written notice ending the contract in accordance with general condition 4 of the contract".

He alleged that no extension for approval of finance was given and, as such, the contract was at

an end. He also alleged that the vendors had failed to secure a written lease of the premises, being Shop 3 Norfolk Plaza by the settlement date, and so had failed to perform their obligations under the contract. Finally, damages were not admitted. The purchaser also filed a counter-claim dated 10 July 2006 in which he sought the return of the deposit of $1,000 paid by him.

10. On 29 November 2006 the vendors filed a reply to the purchaser's defence. It first took up the issue of the purchaser's reliance upon the letter of 17 July 2005 "to allege termination" and pleaded that any such termination was not lawful. In particulars of that pleading, the vendors stated that the purchaser had admitted that finance had been approved or, it not approved, the purchaser had not complied with clause 4 of the agreement in that he had not done everything reasonably required to obtain approval of the loan for the purpose of the contract.

11. The other point raised in reply was an alternative argument that:

> "The defendant [the purchaser] should be equitably estopped from relying upon the letters of 17 July 2005 or alternatively 12 September 2005 as valid termination of a contract pursuant to clause 4."

In the particulars given under this pleading, the vendors first referred to the statement of claim paragraph 4[2] and the particulars given under it. In further and better particulars they listed alleged statements and conduct which the vendors maintained involved representations that caused them to believe that the contract remained on foot[3]. They were as follows:

> "On 18th August 2005 the Defendant attended the Plaintiffs' business premises in person and met with the Secondnamed Plaintiff. The Defendant and the Secondnamed Plaintiff discussed the general running of the business. The Defendant then suggested in relation to further training that he had some spare time the following day being Friday 19th August 2005 and that there could be more days also available in the following week and he further requested that he be permitted to attend the business in the afternoons. The Firstnamed Plaintiff then asked the Defendant if his finance was "right". The Defendant stated that "Plan A did not happen" but that the Defendant was proceeding with "Plan B, so it is all under control".

The Defendant re-attended the business premises in person on 19th August 2005 at approximately 1pm, ate his lunch at the premises and commenced training in terms of how to operate the machinery. This also occurred on 23rd and 24th August 2005. On 24th August 2005 the Defendant's partner "Michelle" who was in attendance with him at the business premises enquired on behalf of the Defendant as to whether there was a manual available in relation to the software embroidery program. The Plaintiffs provided the manual to her for the Defendant, which was subsequently returned by Ludeman Real Estate on 29th August 2005.

On 31st August 2005, the Firstnamed Plaintiff attended upon the Defendant at his business premises being Robb's Greyhound and Pet Service, Fairy Street Warrnambool. The Firstnamed Plaintiff asked to further discuss the Defendant's finance arrangements for settlement. The Defendant stated to the Firstnamed Plaintiff that whilst "the shares are not going to be through in time, my sister who is executor of the Will is just stuffing us around. So we are going to go with Plan B which is to put the $170,000.00 we have in cash into long term deposit until the shares come through because the shares could be delayed as late as March which delay Silvan Ridge would not accept". The Firstnamed Plaintiff offered to accept part payment in the sum of $170,000.00 with the balance to be the subject of a finance arrangement between the parties. The Defendant stated that he could not afford to put the whole $170,000.00 in because he still had bills and wages to cover in his present business. The Firstnamed Plaintiff offered a preliminary settlement on payment of $140,000.00 which the Defendant agreed to think about.

The particulars in the reply then went on to list the ways in which the vendors alleged they had acted to their detriment in reliance upon those statements and conduct of the purchaser, namely:

> "(i) time spent training the defendant in relation to the business;
>
> (ii) introduction of the defendant to clients and/or suppliers;
>
> (iii) disclosure of confidential information in relation to the business in the form of manuals;
>
> (iv) continuing to incur legal costs in relation to the sale of the business and;
>
> (v) delay incurred in otherwise proceeding to re-sell the business."

In support of the equitable estoppel pleading, reference was also made to a letter dated 25 October 2005 by which the vendors' solicitors made an open offer to extend the settlement date to 30 November 2005 to give the purchaser the opportunity to take a transfer of the shares needed as security for the purchase funds and the vendors alleged that the purchaser refused or failed to accept the offer.

Submissions to the Magistrate

12. In the course of opening the vendors' case before his Honour, counsel referred to the alternatives. The learned Magistrate sought clarification of the estoppel argument in the course of which counsel agreed with his Honour's description of "an estoppel from denying that the contract was in existence". A little later, counsel summarised the issues to be determined as whether the defendant affirmed the contract and waived any right to avoid or was otherwise estopped from his purported avoiding of the contract.

13. Counsel for the purchaser briefly addressed his Honour after counsel for the vendors completed his opening. In doing so, he drew particular attention to two matters:

> • He referred to the letter from the purchaser's solicitor to the vendors' solicitor seeking an extension, the letter being dated 18 July 2005. The extension of one month would have extended the date for financial approval to 17 August. Counsel noted that the letter stated:
>
> "We understand delay relates to actual distribution of our client's share under an estate, which will form security of the borrowings. Should you have any queries please contact Basil Fogarty."
>
> • Counsel then referred to the last paragraph, which read:
>
> "In the event that an extension is not agreed to, you may treat this letter as written notice ending the contract."

14. Counsel submitted that there did not appear to be an argument advanced for the vendors that there was any response to that letter. Counsel submitted that the purchaser's position was that

> • "The contract came to an end at that point in time" and there was "no grant of an extension to obtain finance".
>
> • In further discussions following the letter in July, "the defendant may have an interest" but he was trying to get finance and the finance never came through. By the time the shares were transferred, in November 2005, the contract was truly at an end and the parties were in dispute.

15. The vendors tendered on this appeal with the consent of the purchaser appellant a copy of the written submission presented to the learned Magistrate below. They run for some five pages and comprise principally arguments relevant to the construction of the finance clause in the original contract. As to the estoppel issue, the following appears at the conclusion of the written submission:

> "**Whether in these circumstances the defendant affirmed the contract or otherwise should be equitably stopped from purporting to avoid the Contract.**
>
> 22. It is a question of fact for determination as to whether the conduct of the defendant amounted to an election to affirm the contract.
>
> 23. The plaintiffs point to the conduct occurring notwithstanding the letter of 18th July 2005.
>
> 24. The alternate proposition is that the same conduct, if not amount to a binding affirmation, nevertheless was relied upon by the plaintiffs to believe the contract was proceeding, that as a result, the plaintiffs were induced to act to their detriment and that it would be unconscionable for the defendant to now resile from that position.
>
> 25. In *Parissis & Ors v Etna* [1998] VSC 124 (2 November 1998) consideration of a similar argument summarised the principles from *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387; (1988) 76 ALR 513; (1988) 62 ALJR 110; [1988] ANZ Conv R 98 in the following terms:
>
> Brennan J as he then was, (at 428/9) setting out the matters that a party needs to establish to prove

an estoppel of that kind, described by his Honour as a equitable estoppel. They were the following:

> "(1) The plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, the defendant would not be free to withdraw from the expected legal relationship;
>
> (2) The defendant has induced the plaintiff to adopt an assumption or expectation;
>
> (3) The plaintiff acts or abstains from acting in reliance on the assumption or expectation;
>
> (4) The defendant knew or intended him to do so;
>
> (5) The plaintiff's action or inaction will occasion detriment if the assumption or exception is not fulfilled;
>
> (6) The defendant has failed to act to avoid that detriment whether by fulfilling that assumption or expectation or otherwise."

26. These matters again are questions of fact for the Court."

16. In final submissions, counsel for the purchaser submitted to his Honour that the vendors were not pursuing the allegation of an effective extension to August pursuant to a collateral agreement as pleaded. Counsel further submitted that what the vendors were left with was the estoppel argument. Counsel further submitted that if the vendors did agree to an extension in July 2005 it was not communicated. He submitted that the contract was at an end on either the 18th or 19th July 2005 and from then on the parties acted with different perspectives. In response to the argument that the contract was at an end by 19 July 2005 the learned Magistrate commented that he had concerns about all sorts of aspects about the case but said that the purchaser seemed to have proceeded for at least a month on the basis that the contract was still on foot. He commented that on 18 August or thereabouts the purchaser bobbed "up at the premises", had a "chat with Mr Kelson" and then turned up "the following Tuesday....". Counsel responded referring, *inter alia*, to the proposition that it was the agent who contacted the purchaser. After referring to other matters, counsel for the purchaser repeated the proposition that the contract was at an end at the time of the discussion about Plan A and Plan B. Counsel also submitted that the purchaser had done all that was reasonably required of him under the finance approval clause.

17. I note that apart from the bald assertion by counsel for the purchaser that the letter of 18 July 2005 had terminated the contract, no further submission was made as to the letter. In particular, counsel did not address the detail of the letter and its effect.

18. In submissions made to his Honour on behalf of the vendors, counsel conceded that he would struggle to dispute the proposition (put by his Honour) that an extension had not been officially agreed to by the parties – although one of the vendors, Mr Kelson, thought it had been. Counsel for the vendors stated that the issue was whether the subsequent conduct amounted to an agreement at a later stage. Counsel for the vendors then devoted most of his submissions to the construction of the agreement and in particular the termination clause and whether the purchaser had done all that could be reasonably expected of him in securing finance.

19. I note that counsel, before turning to the remaining issues, stated that the strongest points had been dealt with for his client. They had comprised the issue of the finance condition (Clause 4) and the reasonableness or otherwise of the conduct of the purchaser. Counsel for the vendors then addressed the estoppel question. He stated the following:

> "But nevertheless the facts were open to pleading these alternate issues and ultimately they are matters of fact for determination for your Honour as to whether in the conduct of the parties and assessment of their credit where conflict about who did what and said what and whether that amounts to either an affirmation of conduct that effectively formed a representation that things were still proceeding that my clients have relied on and so forth".

20. His Honour then stated:

> "But my understanding of – and indeed I think you put in your submission, that for an equitable estoppel you have to show that the plaintiffs were induced to act to their detriment."

21. A discussion then ensued. Towards the end of the discussion counsel for the vendors referred to the "subsequent problems the vendors suffered in terms of the loans being called up and the banks". He then commented:

> "It's difficult to necessarily pin that down to a particular point in time, however whether – and your Honour has heard evidence about all of that – whether then one could say there's no evidence of detriment, I would submit that that's not the case. There is evidence of detriment..."

His Honour then took that matter up stating:

> "The one evidence of detriment that I have overlooked, I think, is the loan that they took from the ANZ Bank".[4]

Counsel for the vendors then referred to and handed to his Honour some authorities dealing with the construction of finance approval clauses.

22. Counsel for the purchaser in final submissions to his Honour argued that the purchaser had given clear evidence that he believed the contract was at an end until he was contacted by Mr Dwyer. Counsel submitted that that in any event followed as a matter of law from the purchaser's construction of the contract. Counsel referred to the issue of whether the purchaser had done everything reasonably required and conceded that this concerned the period up to 16 or 17 July. There was then further discussion about issues related to the issue of reasonable efforts. I note counsel also described the finance clause as one that gave the purchaser the ability to end the contract if finance is not obtained by the specified date.

23. I note that towards the end of his submission, counsel for the purchaser submitted that the purchaser was in an unfortunate position because he needed to know whether he had an extension of time and they didn't get the extension of time. If they had got an extension of time until August, then they may well have asked for and received further extensions of time. Counsel submitted, however, that we do not know. His submissions ended at that point.

24. It is apparent from a reading of the transcript below that neither parties' representative effectively explored the issue of the validity and effect of the letter of 18 July 2005. Counsel for the purchaser made it clear, however, that it was his client's position that the letter had terminated the contract on 18 or 19 July 2005. He made submissions on the assumption that it was valid and effective to terminate by simply asserting that it did terminate the contract. Counsel for the vendors did not address the issue. This was notwithstanding that the learned Magistrate stated:

> "Whilst we're talking about that, it seems to me its pivotal to this case as to what effect that letter of 18 July has...and the final paragraph of it reads 'in the event that an extension is not agreed to, you may (indistinct) written notice in the contract'".

His Honour went on to say that as he understood it the extension was not "at any stage officially agreed to".

25. It was unfortunate that the parties did not address these issues and, in particular, the question of the meaning, validity and effect of the letter.

The reasons for the decision

26. The learned Magistrate gave oral reasons for decision a week after the hearing concluded. The reasons were transcribed.

27. He opened by referring to the pressure he had been under[5] and saying that he would have "preferred to have had a little bit longer" and that, if he had, he would probably have come up with reasons expressed a little bit more fluently. He offered that explanation if "things seem to be slightly garbled".

28. After describing the business of the vendors and the original attempt to advertise and sell that business, his Honour noted that the offer of $220,000 by the purchaser was accepted. He found that the purchaser had few assets at the time but was likely to inherit a substantial asset from his father's estate namely, shares in the Warrnambool Cheese and Butter Factory worth $700,000 and would also receive a sum once other assets had been sold, a sum that turned out to

be $170,000.00. His Honour noted that when the offer of $220,000.00 was made, the purchaser did not know how much cash he would receive, but must have realised it would be significant, and he realised that to purchase the business he would need to raise finance. His Honour commented that, accordingly, when the offer was made, it was made subject to finance being approved within one month of the date of the contract. He found that the offer was accepted on that basis.

29. Prior to signing the contract the purchaser contacted a friend to investigate the ways in which he might finance the purchase. His Honour found that the solution adopted was to use the shares the purchaser would receive from his father's estate as security for a loan and the National Australia Bank was selected as the preferred lender and an application form filled out for the purpose of obtaining a loan from that bank. The National Australia Bank gave approval subject to the shares being in the name of the purchaser a short time after 17 June 2005. His Honour noted that the contract was subject to finance being approved within one month of the date of the contract which was 17 June 2005 and thus the finance approval time limit was 16 July 2005.

30. His Honour then recounted the subsequent history of the attempt to transfer the shares from the estate to the purchaser. He found that it became clear that the estate could not distribute the shares until 18 August for reasons associated with problems in the administration of the estate[6]. As a result, on 18 July 2005, the solicitor acting for the purchaser wrote a letter to the solicitors for the vendors. The learned Magistrate described the letter as:

> "requesting an extension of one month for the finance to be approved and, further, if that finance approval was not received then the contract would be considered ended."

I note that the description was inaccurate. Accepting it, however, his Honour's description assumed that the letter had not ended the contract.

31. The exhibited letter was in fact in the following terms:

> "Our client has not had finance approval as at this stage.
>
> We seek an extension of one month to 17 August 2005. We understand the delay relates to the actual distribution to our client of shares under an estate, which will form security for the borrowings.
>
> Should you have any queries, please contact Mr Basil Fogarty.
>
> In the event that an extension is not agreed to, you may treat this letter as written notice ending the contract."

32. His Honour found that the letter was faxed to the solicitors for the vendors on 18 July 2005. They contacted the vendors through their agent. The vendors advised their agent that they were prepared to give the extension. His Honour found, however, that that acceptance was never communicated to the purchaser or his advisers.

33. The learned Magistrate stated that "in purporting[7] to terminate the contract", the purchaser was relying on general condition 4 of the contract. He referred to the requirements of general condition 4 and considered a number of arguments that had been advanced in relation to that clause including arguments of construction. Among other things, his Honour found that the purchaser had done everything that was required of him to secure the loan and had complied generally with the provisions of condition 4. His Honour concluded:

> "I therefore find the [purchaser] has proved on the balance of probabilities that he did everything reasonably necessary to obtain approval of the loan. If nothing else had occurred, that would have been the end of the matter, but other things did occur. That leads me to the last of the submissions put by [counsel for the vendors], namely that the conduct of the [purchaser] after 18 July 2005 was such as to have estop[ped him] from avoiding the contract pursuant to general condition 4 or would act as a waiver of their right to do so".

34. I note that, in the last sentence his Honour was stating the submission of the vendors. It was expressed in terms that assumed that the letter had not terminated the contract. If his Honour had come to a contrary view, he would have rejected the argument as formulated and

restated it in terms appropriate to the situation of the contract having been terminated by the letter.

35. His Honour then went on to refer to evidence as to what happened subsequent to the letter of 18 July 2005. His Honour commented:

> "Between 18 July and mid-August, nothing of any note seems to have happened. Sometime in mid-August- ...- Mark Dwyer phoned the [purchaser] and asked him if he was still interested in purchasing the business: [the purchaser] replied that he was, and Dwyer suggested that he go and see the plaintiffs at their shop. The [purchaser] and Smith [his partner], apparently as a result of this call, dropped in on the plaintiffs shop – there is some dispute as to the actual date, but I find that it was on Thursday 18 August."

36. His Honour noted that Timothy Kelson was not present but Michelle Kelson was and that the purchaser and Ms Smith were there for some 10 or 15 minutes and had a casual chat during which they were asked whether or not the finance had been approved. His Honour noted that there was a dispute as to the answer.

> "Ms Kelson saying that there was talk of Plan A having failed but that Plan B was going ahead, the [purchaser] denying this and saying that he merely stated that finance was not yet approved. In view of the defendant's subsequent actions, I accept the plaintiffs' version of this conversation."

His Honour then went on to refer to the subsequent actions which involved the purchaser and Ms Smith attending the shop for what had been described as training on Friday 19 August 2005 and the following Tuesday and Wednesday. A total of six hours in all was spent on training, two hours per day. In addition, on Wednesday 24 August, the purchaser was taken by Mr Kelson and introduced to three of their main customers. His Honour noted that the precise words of the introduction were in dispute but indicated that he was satisfied that:

> "The defendant knew that he was being introduced around as the person buying the business and as the person who would be taking over the business and as the person who would be dealing with the people."

His Honour found that on that Wednesday evening as they left the vendors' shop, Ms Smith asked for and was given a computer manual so that they could study it at home. His Honour then made the following important finding:

> "It seems to be, and I find, that their actions clearly induced the plaintiffs into believing that the contract was going ahead. As a result of believing that the contract was continuing, the plaintiffs either then extended or had already extended their overdraft at the bank by $25,000 with the agreed repayment date at the bank being two days after the settlement of this contract. I might say as an aside that the money had been borrowed from the bank to pay trade creditors so that the handover to the defendant when the sale went through would be easier".

Again, his Honour approached the issues on the basis that the original contract had not been terminated but was continuing.

37. His Honour then found that on 29 August 2005 the purchaser rang the vendors' agents to say that he could not get finance and was terminating the contract. Thus the purchaser was treating the contract as being on foot at the time when he made the phone call.

38. His Honour found that the vendors' agent then contacted the vendors to advise them. The vendors attempted in two further conversations to persuade the purchaser to change his mind but to no avail. His Honour then ruled on the estoppel issue in the following passage:

> "The principle of estoppel, and I think also of waiver these days, is as stated some time ago now by Dixon J in *Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507; 40 ALR 47 as follows:
>
> > "In principle the concept of estoppel, the object of which is to prevent an unjust departure by one party from an assumption adopted by another, should apply to conduct by a party to a contract which induces the other to assume that the contract is discharged or varied."
>
> In the present case the plaintiffs had borrowed the $25,000 on the basis the contract was proceeding.

> When it did not, they became so seriously financially embarrassed that they were unable to repay the bank, which subsequently successfully sued them for the money plus (indistinct) cost and obtained judgment against them. It is thus quite apparent and I find that, as a result of being mislead by the actions of the [purchaser] and Ms Smith, the plaintiffs acted very much to their detriment. In the circumstances I find the defendant is estopped from relying on the purported[8] termination of the contract contained in [the purchasers' solicitors' letter to the vendors' solicitors' letter] on 18 July 2005, or, alternatively that the defendant has waived his right to rely on the termination. There will therefore be judgment for the plaintiff in the amount claimed plus costs and the counter-claim will be dismissed."

I note that his Honour thereby held that the vendors could rely on common law estoppel.

39. I turn to the arguments that were raised on the appeal.

Original Arguments on the appeal

40. The submissions advanced for the appellant purchaser focused on the decision as it related to the estoppel issue and essentially involved two matters:

> (a) whether on the evidence before his Honour, it was open to find that there was the necessary estoppel
> (b) the adequacy of the reasons in respect of the estoppel issue.

The argument for the appellant purchaser before me proceeded on the basis that the learned Magistrate had found that the pre-requisites for the termination of the contract under clause 4 had been satisfied and that the letter of 18 July 2005 had terminated the contract. Counsel for the vendors also proceeded on that basis.

41. In essence, the purchaser's argument was that, in that context, it was not open to his Honour to find an estoppel. Counsel argued that the question raised by the reply and the other facts, in particular, the termination of the contract, was whether an equitable estoppel had arisen. Counsel submitted that his Honour had erred in failing to consider the six elements identified in *Walton Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, 428-9; (1988) 76 ALR 513; (1988) 62 ALJR 110; [1988] ANZ Conv R 98. Further, the facts established by the evidence did not support those six elements. Alternatively, it was put that the reasons were inadequate in explaining how he had arrived at his conclusion on the estoppel issue.

Analysis of the appellant purchaser's original argument

42. The legal effect of the 18 July 2005 letter was critical to the analysis of the submissions relevant to the estoppel issue. In essence, if the letter had terminated the contract, the vendors to succeed, had to establish that the subsequent conduct gave rise to an equitable estoppel. If the letter had not terminated the contract, the vendors had an ongoing contract to rely upon and they were able to argue that the subsequent conduct gave rise to common law estoppel preventing the purchaser from avoiding the contract.

43. Prior to the hearing of the matter I had not had the opportunity to consider the material. After the hearing I had that opportunity. In considering the learned Magistrate's reasons, I formed the view that there was a real question as to whether his Honour had decided the case on the basis that the contract had been terminated by the letter of 18 July 2005. In addition, if his Honour had rejected the argument that the letter terminated the contract, that would explain why the estoppel question raised in the pleadings as affirmation, election and "equitable estoppel" and discussed as equitable estoppel in the course of the debate between the learned Magistrate and counsel was ultimately dealt with by his Honour as a common law estoppel question. That was the appropriate analysis to apply to the conduct subsequent to the July letter if the contract had continued. In that situation it was necessary then for his Honour to consider only the representations made and the detriment alleged to flow from it. It was not necessary to consider the requirements of equitable estoppel spelt out in *Waltons case*.

44. I arranged for my Associate to convey to counsel my concern that the issue as to whether the letter had terminated the contract had not been discussed with counsel in the appeal and that it would be undesirable for the appeal to be decided on a basis that might be erroneous. The parties were invited on 25 June 2008 to make submissions. Submissions were received from the respondent vendors on 15 July 2008 and the appellant purchaser on 25 August 2008.

Further submissions

45. Counsel for the appellant purchaser acknowledged that his Honour had not made a specific finding that there was an actual termination of the contract. Counsel argued, however, that his Honour's reasons assumed that the contract was in fact terminated. A number of matters were referred to in the submissions.

46. In considering matters raised by counsel for the purchaser, his Honour's opening remarks, referred to above, should be borne in mind. Plainly, at times, matters could have been expressed with greater precision and clarity if his Honour had had more time and more assistance. But in considering the argument advanced on this appeal by the purchaser, arguments which rely on his Honour's language, one must look beyond the precise language used and consider the substance of his meaning having regard to the context and the unstated assumptions that lie behind his Honour's statements.

47. I turn to the submissions.

(a) Counsel for the purchaser referred to the statement by his Honour that Clause 4 had been complied with by the purchaser and that he had done his best to secure the loan and its approval. Counsel referred to the fact that his Honour then stated

> "That would have been the end of the matter, but other things did occur. That leads me to the last of the submissions put by Mr Laidlaw namely that the conduct of the defendant after 18 July was such as to have estop[ped] them from avoiding the contract pursuant to General Condition 4 or to act as a waiver of their right to do so."

Counsel submitted that "the phrasing of the words used" by the learned Magistrate supports the conclusion that he had concluded that there was a termination by the letter.[9] That, however, depends on what it was his Honour meant by the quoted words "that would have been the end of the matter".

The quoted words occur after the following

> "I therefore find the defendant has proved on the balance of probabilities that he did everything reasonably necessary to obtain approval of the loan. If nothing else had occurred, that would have been the end of the matter, but other things did occur..."

The quoted words, however, in my view, mean no more than that the purchaser could have refused to continue with the contract and the vendors could have done nothing about it. In my view, what the learned Magistrate was saying was that that could have occurred but that a number of other things occurred including an ineffective letter which left the question raised by Mr Laidlaw of whether the purchaser was "estop[ped] from avoiding the contract pursuant "to the general condition or constituted "a waiver" on his part of "his right to do so". That language involved an assumption there was a right to avoid the contract, that it had not been exercised and the question was whether the purchaser was estopped from using that right or had waived that right. As I have noted above, while his Honour was there stating the argument of the vendors, he plainly did not dispute the underlying assumption. If he had, he would have rejected the estoppel argument put in those terms and re-stated it in terms appropriate to the situation of the contract having been terminated.

(b) Counsel for the appellant purchaser also referred to passages preceding the above quoted passage in which the learned Magistrate had referred to the letter "purporting to terminate the contract" and on the same page referred to a "notice of termination" having been given by the purchaser. Counsel then referred me to the following passages from the reasons commencing two pages later.

> "As Mr Laidlaw has submitted the defendant can only avail himself of the ability to terminate the contract as the act (sic) complied with the four conditions set out in sub-paragraphs (a) to (d) and general condition 4"

Counsel also referred to a passage some pages later

> "In the event I do not agree that the defendant has failed to comply with condition 4(a)"

Counsel referred to a further passage a page later

> "I therefore find the defendant has proven on the balance of probabilities that he did everything reasonably necessary to obtain approval of the loan".

Relying on the above matters, counsel submitted that this Honour had taken the view that the letter terminated the contract but that the later conduct induced the respondents to believe the contract was going ahead.

The conclusions asserted do not appear to me to follow from the matters relied upon. I note that his Honour also specifically said that condition (c) was complied because "notice was given" within two business days of 16 July 2005 but his Honour did not say that the notice itself satisfied the contract terms and was effective to terminate the contract. He did no more than say that the purchaser had put himself in a position to rely upon the finance clause to terminate the contract. He did not state that he had. The quoted findings have the result that the purchaser was in a position where he could argue termination by the letter and the question was whether it was effective.

It is true that the letter was referred to by the learned Magistrate on one occasion as the "notice of termination". But this expression was not his Honour's creation. Both counsel had referred to the letter using this language. Counsel for the purchaser referred to it as "the notice terminating". Counsel for the vendors referred to it in a question as "requesting the extension or otherwise terminating the contract if that wasn't agreed to".

It should also be noted that the expression "notice of termination" was used by his Honour in the passage relied on to refer back to his Honour's earlier reference to the document "purporting to terminate the contract" – an expression raising an issue as to the intent and effect of the document. Counsel for the purchaser referred to the fact that at a later point the learned Magistrate used the expression "purported termination of the contract" contained in the letter of 18 July 2005. Counsel submitted that the use of "purporting" and "purported" indicated that the learned Magistrate was viewing the letter of 18 July 2005 from the perspective of a position post-18 August 2005, the date on which the purchaser dropped into the plaintiff's shop. Counsel submitted by that time the letter of termination must have taken effect if it was effective at all.

If it was a letter of termination, the latter proposition would be true. But, as I have indicated above, I interpret the use of the expressions "purporting" by his Honour and "purported" to indicate that his Honour was of the view that the legal effect of the document did not match the attempted appearance of a notice under Clause 4. What the learned Magistrate was trying to convey was that while the purchaser tried to appear to be exercising his powers under Clause 4, the letter was not effective for that purpose because it did not end the contract. Rather it sought an extension of time, deferred the purchaser's decision to terminate and, curiously, invited the vendors to determine whether to terminate the contract if they were not prepared to grant the extension. What was to happen if no extension was granted was left up in the air. There then followed no further communication between the parties until the agent contacted the purchaser in August.

(c) Counsel for the appellant purchaser submitted that the learned Magistrate's statement that the letter was "pivotal to this case" was a tentative view and drew attention to the fact that the learned Magistrate went on to say that as he understood it, "the extension was not at any stage officially agreed to" and to a comment by his Honour that he had been through the evidence and could not find any evidence of such an agreement. Counsel for the appellant purchaser submitted that that was a correct analysis and submitted that the learned Magistrate had found that the determination was effective but that the conduct after the termination was such as to induce the vendors to believe the contract was proceeding.

In my view, it is not to the point that the learned Magistrate agreed, as was necessary, that the extension that was sought was not at any stage agreed to officially. That was not the issue. The issue was whether the purchaser had terminated the agreement by his letter.

48. The purchaser appears to me to be faced with the fundamental difficulty that, as conceded, he cannot point to a finding by the learned Magistrate that the purchaser had terminated the

contract by the letter of 18 July 2005. Instead, the appellant has to demonstrate on this point, that was the starting point for his argument, that it is to be inferred from the learned Magistrate's reasons that he had found that it was in fact terminated. In my view the matters relied upon do not demonstrate such an inference. Rather, his Honour's reasons point to the contrary conclusion; his reasons proceeded on the basis that the contract was not terminated by the letter.[10]

49. The position taken by the respondent vendors on the question of whether the letter actually terminated the contract is not entirely clear. The further submission states

> "The Magistrate appears to have found that the letter of 18 July was in effect a notice of termination".

Reference is made in the submission to the passage in the reasons in which the letter was described as "the notice of termination". I have commented on that above.

50. The submission went on to say

> "If that was right, then the Court has already heard argument on that approach, and it is not proper to add more".

The submission went on, however, to state that it can be argued that the letter did not *per se* terminate the contract. The argument put was that either the letter required a response by the vendors as to whether they were willing to extend the time for finance or, in default, it purported to operate to take effect as a notice of terminating the contract. Counsel went on to submit that "Here there was no response to the purchaser expressing any willingness to extend the period. Instead, (as was found by the Magistrate) the contract was 'terminated'".

51. Up to this point, therefore, the submission on behalf of the respondents appears to have maintained the position previously adopted at the hearing of this appeal, that the letter terminated the contract and that was the finding of the learned Magistrate. Counsel went on, however, to raise the question whether having regard to the terms of the letter there ever was an automatic termination arising by its operation. If there was not, counsel submitted that there was no evidence of any notice terminating the contract and, therefore, the purchaser simply failed to complete the contract on settlement the date, 15 September 2005, or repudiated the contract by his letter of 12 September 2005. Counsel went on to submit that the decision below should be upheld on the above argument in the alternative. Counsel argued that the Court may uphold the decision of the Court below on different grounds from those given by the learned Magistrate provided there was evidence before the learned Magistrate and the different grounds are based on reasonably open findings of fact.

Conclusion

52. In my view, properly construed, the July letter was not a "written notice ending the contract" within the prescribed "two business days" or any period. Therefore, it did not constitute a valid exercise of the contractual power given to the purchaser to terminate the contract and was ineffective. It was an approach by the purchaser to the vendors to seek an extension of the finance approval clause and, in terms, left with the vendors the option to accept the letter as a notice terminating the contract if the vendors wished to do so. The purchaser tried to "have his cake and eat it". The letter did not end the contract and, so, the contract remained on foot.

53. For the foregoing reasons, I have also come to the conclusion that the learned Magistrate proceeded on that basis. Viewed in that light, the learned Magistrate's reasons have an internal logical consistency. In particular, viewed in that light, the reasons in respect of the estoppel issue were plainly adequate.

54. Accepting that the letter did not terminate the contract and, therefore, the learned Magistrate was correct in considering common law estoppel only, his finding on that issue was plainly open on the basis advanced by his Honour. I note that the principal argument advanced by the purchaser on this appeal on the detriment aspect was that the debt incurred by the vendors to pay out creditors was not relevant because the debts had to be paid in any event. But as his Honour noted, they borrowed $25,000 on the basis that the contract was proceeding, and when it did not, were financially embarrassed and were unable to pay the debt and judgment was subsequently obtained against them. Alternatively, if the learned Magistrate proceeded on the basis that the letter terminated the contract the decision should be upheld on the basis that

his Honour was in error because he was obliged to find that the contract was not terminated by the letter. Further, accepting that the contract was not terminated, his analysis of the estoppel issue as common law estoppel was correct in law and his finding of estoppel plainly open on the facts. I note also, in any event, as submitted by counsel for the vendors, the decision may also be upheld on the basis that, the letter not having terminated the contract, the purchaser was liable for damages for failure to complete the contract on 15 September 2005 or, on the ground of repudiation of the contract by his letter of 12 September 2005.

55. Finally, I note that the vendors had not, in terms, pleaded a common law estoppel in their statement of claim or reply, referring to affirmation and election in the former and equitable estoppel in the latter. In my view it was open to his Honour in light of the pleadings, evidence and argument to consider all forms of estoppel. There was no prejudice to the purchaser because, in addressing the estoppels pleaded, the purchaser had the opportunity to address the elements shared with common law estoppel.[11]

56. For the foregoing reasons the appeal should be dismissed.

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[1] The purchaser's notice of defence alleged that the finance approval date was 17 July 2005.
[2] Above para 6
[3] See below
[4] I note that this aspect of detriment was not pleaded, but that issue was not taken below or on this appeal.
[5] Apparently the defendant had another case coming on for hearing the following week.
[6] 18 August was the expiry of the creditor notice period.
[7] Emphasis added.
[8] Emphasis added. The termination was "purported" because the purchaser's letter attempted to create the impression that the power to end the contract was being exercised but the letter did not have that effect.
[9] Counsel had submitted during the hearing of the appeal that his Honour was saying that "the contract, as it were, continued on".
[10] The appellant purchaser has not mounted an argument that the reasons were inadequate because there was no express finding on this issue.
[11] *Southwick and Anor v Moore Stephens Melbourne Pty Ltd* [2008] VSCA 164.

APPEARANCES: For the appellant Umbers: Mr W Gillies, counsel. Maddens, solicitors. For the respondents Kelson: Mr M Bevan-John and Mr D Laidlaw, counsel. Jellie McDonald, solicitors.
