

34/02; [2002] VSC 537

## SUPREME COURT OF VICTORIA

***INDEVELCO PTY LTD v BETTS & ORS***

Williams J

26-28 November, 12 December 2002

**CIVIL PROCEEDINGS – GOODS SOLD – ORDER FOR GOODS PLACED BY EMPLOYEE – FINDING BY MAGISTRATE THAT EMPLOYEE WAS EMPLOYED BY DEFENDANT AND ACTING IN THE COURSE OF HIS EMPLOYMENT WHEN ORDERING GOODS – FINDING THAT INVOICES ADDRESSED TO DEFENDANT – PAYMENTS MADE BY DEFENDANT TO PLAINTIFF – FINDING THAT DEFENDANT LIABLE TO THE DEFENDANT – WHETHER MAGISTRATE IN ERROR IN MAKING FINDINGS.**

In a claim before the Magistrates' Court for goods sold, evidence was given that IP/L had ordered goods from Delta Carpets for use in unit developments sold by IP/L. IP/L had made certain payments to Delta Carpets in relation to the previous supply and installation of floor coverings. At the hearing, an architectural designer employed by IP/L gave evidence that he had ordered goods from Delta Carpets. There was further evidence that invoices had been raised for the sum claimed. The magistrate upheld the claim and found that IP/L were liable to pay the balance of moneys outstanding. Upon appeal—

**HELD: Appeal dismissed.**

**There was sufficient evidence for the magistrate to conclude that the person who ordered the floor coverings was employed by IP/L and that he was acting in the course of his employment when doing so. Further, it was open to the magistrate to conclude that the invoices raised by Delta Carpets were addressed to IP/L and that the previous payments supported the conclusion that IP/L was liable to Delta Carpets.**

**WILLIAMS J:**

1. This is an appeal brought under s109 of the *Magistrates' Court Act* 1989 (Vic) from a decision of the Magistrates' Court of Victoria at Broadmeadows on 12 July 2002 whereby the plaintiff was found to be liable to pay the second defendant the sum of \$27,147.00 together with interest and costs.

2. Section 109 of the *Magistrates' Court Act* 1989 relevantly provides:

"s. 109 (1) A party to a civil proceeding in the Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding."

**The question of law**

3. A decision of the Master on 27 August 2002 that no question of law arose for decision on appeal was the subject of a successful appeal to the Practice Court on 4 September 2002 under O77.05 of the *Supreme Court (General Civil Procedure) Rules* 1996. Directions for the further conduct of an appeal from the Magistrate's decision were made and it was noted in "Other Matters" that:

"The question of law shown by the plaintiff to be raised by the appeal is whether there was any evidence upon which the Magistrates' Court could have reached the decision which it did."

4. It was agreed at the outset that the decision, the subject of the question of law, was the Magistrate's finding of fact that the plaintiff had ordered the floor coverings and other associated goods supplied by the second defendant between March and July 2001 ("the goods").

5. In *Transport Accident Commission v Hoffman and Ors*<sup>[1]</sup> the Court considered an appeal, in relation to a finding of fact by the Administrative Appeals Tribunal, brought under s52(1) of the *Administrative Appeals Tribunal Act* 1984 which similarly permitted an appeal on a question of law. Young CJ and McGarvie J, said<sup>[2]</sup>:

"The only question of law which can be said to ... found the appeal to this Court, is whether, on the evidence before it, it was open to the Tribunal to reach the conclusion it did reach".

6. Herring CJ stated the relevant test in relation to the learned Magistrate's decision in *Young v Paddle Bros Pty Ltd*<sup>[3]</sup>:

"If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision he desires substituted for it. It is a question of what he is entitled to as a matter of law, and he is only entitled to a contrary decision where that decision is the only possible decision that the evidence on any reasonable view can support."

7. It was submitted by the plaintiff that there was no evidence upon which the Magistrate could reasonably have found that it had ordered the goods. This submission was contested by the second defendant.

### **The evidence in the appeal**

8. A transcript of a tape recording of the Magistrates' Court proceedings was in evidence in the appeal. However the quality of the tape recording was poor. It constituted an incomplete record and parts of the evidence were unable to be transcribed. Neither the Magistrate's reasons for decision nor the evidence of the witness, Nick Zervos, were recorded. Accordingly, where necessary in order to provide a record not supplied by the transcript, the parties relied upon the description of the proceedings in affidavits of Christopher William Gilligan, counsel for the second defendant in the Magistrates' Court, sworn on 15 October 2002 ("the Gilligan affidavit"), and William Stark, counsel for the plaintiff, sworn on 12 August 2002 ("the Stark affidavit").

9. With one exception, the exhibits which had been in evidence before the Magistrate were before the Court. The missing exhibit, marked "F" in the Magistrates' Court, was a document bearing the plaintiff's name and specifying colours in relation to carpets and floor coverings sent to the second defendant by facsimile transmission dated 6 February 2001. In my view, the missing document was relevant evidence in relation to the identity of the party placing the orders for the goods. At the commencement of the second day's hearing of the appeal, during the course of the plaintiff's submissions, I expressed concern about the fate of the appeal in the absence of all the material which had been before the Magistrates' Court, in light of the relevant authorities.<sup>[4]</sup> After further submissions had been made, the plaintiff sought time to attempt to locate the missing exhibit and the appeal was stood over to the following afternoon. When the hearing resumed on 28 November 2002 the missing exhibit had still not been found and no adjournment was sought.

### **Undisputed facts**

10. A number of facts would appear to have been common ground in the Magistrates' Court, namely, that:

- The plaintiff was one of a number of companies of which at relevant times Mr John Zervos had been a director and each of which at relevant times had had the word "Indevelco" as part of its name.
- Mr John Zervos was and had been at all relevant times a director of the plaintiff.
- Mr John Zervos had been a director :
  - from 13 May 1997 to 14 June 2001 of NTI (Group) Pty Ltd (named Indevelco Group Pty Ltd between 11 August 2000 and 21 June 2001, Indevelco (Services) Pty Ltd between 15 June 2000 and 10 August 2000 and E.G.L. Property Investments Pty Ltd between 13 May 1997 and 14 June 2000); and
  - from 28 August 1999 to 14 June 2001 of NTI Building Services Pty Ltd (named Indevelco (Construction) Pty Ltd between 27 July 1999 and 21 June 2001).
- Mr Nick Zervos, a brother of Mr John Zervos, had been a director of each of NTI Building Services Pty Ltd and of NTI (Group) Pty Ltd from 14 June 2000.
- NTI Building Services Pty Ltd and of NTI (Group) Pty Ltd had been in liquidation since mid August 2001.
- Mr Fayez El Kady had formerly been a director of NTI Building Services Pty Ltd between 28 August 1999 and 28 May 2001 and was employed at all relevant times by that company.
- The plaintiff had been at all relevant times the proprietor of land in Sugargum Drive, Bundoora and Rimcross Drive, Avondale Heights. The properties had been developed as unit developments. The units had all been sold by the plaintiff.
- Between in or about January and in or about July 2001, the second defendant had supplied floor coverings and associated goods for all units built on the plaintiff's Sugargum Drive land and on the Rimcross Drive land.
- The plaintiff had made payments by its cheques to the second defendant between 25 January and 13 July 2001 in relation to the supply and installation of floor coverings and associated goods at the Rimcross Drive units and at the Sugargum Drive units in the sums of:

- \$16,000.00, by cheque dated 25 January 2001;
  - \$10,065.24, by cheque dated 7 March 2001;
  - \$18,581.00, by cheque dated 18 May 2001; and
  - \$18,406.44, by cheque dated 13 July 2001.
- Each of the six invoices in relation to which the plaintiff's cheque for \$18,406.44 dated 13 July 2001 had been paid had been addressed to "Indevelco" at Level 4, 445 Bourke Street, Melbourne. Five of the invoices were dated 26 April 2001 and one, 30 April 2001.

**The Magistrate's findings**

11. The learned Magistrate found the plaintiff liable to pay the second defendant the balance of moneys outstanding in relation to the supply of the goods. His findings were set out in para 53 of the Gilligan affidavit and in para 19 of the Stark affidavit and may be summarised as follows:

- Early in 2000 Mr John Zervos a director of the plaintiff had telephoned Mr McKenna, a director of the second defendant, and said : "We've got some more developments happening. Someone from the office will be in touch", or words to like effect.
- An employee of the plaintiff, Mr Joseph Meilak, acting in the course of his employment, had ordered the goods from the second defendant.
- The goods had been provided in respect of premises owned by the plaintiff.
- The invoices relating to the amount claimed from the plaintiff were addressed to the plaintiff.
- The plaintiff had paid the second defendant for other works carried out in relation to which other invoices had been raised.
- There was a contract between the plaintiff and the second defendant entitling the second defendant to the sum claimed.

12. Counsel for the plaintiff challenged various findings of the Magistrate.

**The finding that Mr Meilak was employed by the plaintiff**

13. Counsel for the plaintiff submitted that there was no evidence upon which the Magistrate could have reasonably found that Mr Meilak was employed by the plaintiff.

14. Mr Meilak had given evidence at the Magistrates' Court that he was employed by the plaintiff. A letter dated 22 December 1999 from the plaintiff to Mr Meilak was tendered in relation to his application for a position as an "architectural designer". A further letter dated 9 February 2000 from the plaintiff confirming his appointment with it as an architectural designer commencing on 21 February 2000 was also in evidence. On the other hand, Mr John Zervos gave evidence that Mr Meilak was employed by EGL Property Investments Pty Ltd and paid by it from funds provided by the plaintiff.

15. Counsel for the plaintiff relied upon evidence as to Mr Meilak's use of the Indevelco Group Pty Ltd facsimile transmission letterhead dated 13 November 2000 when providing floor plans to the second defendant and seeking quotations in relation to the provision of the floor coverings for the Sugargum Drive units ("the 13 November fax"). He submitted that there was no evidence upon which the Magistrate could reasonably have found that Mr Meilak was acting in the course of his employment by the plaintiff when sending the 13 November fax and that there was, therefore, no evidence upon which the Magistrate could reasonably have found that he was employed by the plaintiff.

16. Mr Meilak gave evidence that from about July or August 2000 he knew of the introduction of new company names for use by the Indevelco business, but was unclear as to which ones he should be using. He said that he had never been given a clear indication as to which company should be used when dealing with the second defendant. His evidence was that, throughout his employment, he believed that he was employed by the plaintiff.

17. Having taken into account the evidence before this Court which was before the learned Magistrate, I am satisfied that there was sufficient evidence from which a reasonable magistrate could have concluded that Mr Meilak was employed by the plaintiff.

**The finding that Mr Meilak ordered the goods in the course of his employment**

18. Counsel for the plaintiff submitted that there was no evidence that Mr Meilak had ordered anything from the second defendant.

19. There was evidence from Mr Meilak that he was told by Mr John Zervos to deal with the second defendant when arranging for carpet and floorboards at the two developments. He said that he had discussed with Mr McKenna which floor areas of the units would be carpeted and which would have "floorboards". He had obtained quotations from other companies in relation to carpets, but was told by Mr John Zervos to "stick with Delta Carpets".

20. Further there was evidence from Mr John Zervos that he had telephoned the second defendant directly in relation to the supply and delivery of carpets for the Rimcross Drive or the Sugargum Drive sites. He said that he had ordered carpet for the units when they were ready for carpeting "or whatever" by telephoning the office (which he described as "the Construction office in the city") and ordering through Mr Meilak or Mr El Kady.

21. Mr McKenna said that he had been contacted in relation to colour selections in respect of the Sugargum Drive development by both Mr Meilak and Mr El Kady. He gave evidence that the 13 November fax from Mr Meilak had made him aware that he was required to put carpet in certain rooms and to provide floor coverings for the kitchen areas and other rooms. He said that he had had a meeting at the plaintiff's offices at Level 4, 455 Bourke Street with Mr Meilak and Mr El Kady before starting the Rimcross Drive job and there had been instructed by Mr Meilak to invoice "Indevelco".

22. Mr El Kady gave evidence that Mr Zervos and Mr Meilak had sat with the client choosing material and colours for the units. He had been advised subsequently of the outcome. Mr El Kady appeared to have limited knowledge of the various companies in the Indevelco group and did not know what the role of each company was, save for being aware that Indevelco (Construction) Pty Ltd was involved with construction. It was his evidence that some sub-contractors were dealt with orally without written purchase orders being completed.

23. Mr John Zervos gave evidence that, before June 2000, Indevelco (Construction) Pty Ltd had sourced the contractors providing services in relation to the developments by the plaintiff, but that any contractors engaged after that date would have been engaged by Indevelco (Services) Pty Ltd.

24. The Magistrate stated that he had found Mr John Zervos to be an unconvincing witness and must be taken to have rejected his evidence as to the identity of the party contracting with the plaintiff at any time (as he was entitled to do).

25. I am satisfied that there was evidence upon which the Magistrate could reasonably have found that Mr Meilak ordered goods, and indeed, ordered the goods from the second defendant and was acting in the course of his employment by the plaintiff when doing so.

**The finding that invoices for the goods had been addressed to the plaintiff**

26. Counsel for the plaintiff also submitted that there was no evidence upon which the Magistrate could reasonably have found that the second defendant had addressed invoices to the plaintiff in relation to the supply of the goods.

27. There were in evidence invoices raised by the second defendant in relation to the supply of the goods which referred to the plaintiff by its full name. Paragraph 53 of the Gilligan affidavit noted that the Magistrate had accepted Mr McKenna's evidence that those invoices (constituting Exhibit "E" in the Magistrates' Court) in which the delivery address referred to the plaintiff's full name, rather than to "Indevelco", had been raised before Mr McKenna had become aware of the liquidation of NTI Building Services Pty Ltd and NTI (Group) Pty Ltd, in or about August 2001.

28. Counsel for the plaintiff submitted that the Magistrate had erred in so far as he had accepted Mr McKenna's evidence about the invoices addressed to the plaintiff. It was however open to the Magistrate to accept or reject any part of the evidence before him.<sup>[5]</sup>

29. There were other invoices from the second defendant in relation to the units which referred only to "Indevelco", some of which included, as the delivery addresses, those of the Sugargum Drive or Rimcross Avenue units owned by the plaintiff.

30. Mr McKenna had given evidence relating to the use of the name "Indevelco" in relation to the supply of the goods. He said that, after his discussions with Mr Meilak and Mr El Kady, customers had come to select colours and had identified themselves as having been sent by "Indevelco". He said that Mr Nick Zervos introduced himself as being from "Indevelco" when he became involved in dealings in respect of the units. Mr McKenna also said that he had been instructed by the plaintiff's employee, Mr Meilak, to invoice "Indevelco", at the meeting at the plaintiff's offices prior to commencement of the Rimcross Drive job.

31. Further, the evidence before the Magistrate indicated that the various companies with which Mr John Zervos was associated used stationery bearing a logo in which the word "Indevelco" appeared inside a black rectangle. The logo formed part of the letterheads of each of the plaintiff, Indevelco Group Pty Ltd, Indevelco (Construction) Pty Ltd and Indevelco (Services) Pty Ltd in evidence before the Magistrate.

32. I am satisfied that there was evidence upon which the Magistrate could reasonably have made a finding, even in relation to the invoices addressed to "Indevelco", that, in all the circumstances, those invoices were addressed to the plaintiff.

#### **The Magistrate's reliance upon the plaintiff's payments to the second defendant**

33. Counsel for the plaintiff challenged the Magistrate's reliance upon evidence as to the payments which had been made by the plaintiff to the second defendant. Counsel referred to the explanation of Mr John Zervos that the plaintiff had acted as "banker" for the various companies in the group.

34. However the learned Magistrate was entitled to treat the evidence of the plaintiff's payments as supporting his conclusion that the plaintiff was liable to the second defendant. He was also entitled to accept or reject the explanation of the payments by Mr John Zervos.

#### **Conclusions: The question of law**

35. Taking into account all the evidence which was both before the Magistrate and before this Court, I find that there was evidence upon which the Magistrate could have reasonably found that the plaintiff ordered the goods supplied to it by the second defendant between March and July 2001.

36. In response to the question of law posed for the Court, I conclude that there was evidence upon which the Magistrate could have reached the decision which he did.

#### **The absence of Exhibit "F"**

37. Further, the appeal also fails because of the absence of apparently relevant evidence which was before the Magistrate, namely, a facsimile transmission dated 6 February 2001 from the plaintiff and from Mr El Kady, described in Mr McKenna's evidence as relating to the colours for the Sugargum Drive project and marked as Exhibit "F" in the Magistrates' Court.

38. In *Nikolic v Schultz*<sup>[6]</sup> JD Phillips J (as his Honour then was) considered the effect of the absence of relevant statements and photographs which had been in evidence before the court at first instance but were missing from the evidence before the Court in the appeal. His Honour said:

"In the absence of such material, which was before the Magistrate and which cannot be said to have been irrelevant to the findings now under challenge, I find it hard to see how the appellant can succeed in this Court in an argument that the material before the Magistrate was not sufficient to sustain his Worship's findings. It is surely important on such an appeal as this that all of the material before the Magistrate the sufficiency of which this Court is being asked to consider be put before this Court. That seems to me to be self-evident; see, for example, [*Clissold v Country Roads Board*]<sup>[7]</sup> at 263 per Young CJ. In this case, it affords another reason why the appeal must fail"

39. In my view, it would not have been possible in any event for the plaintiff to have succeeded, in the absence of Exhibit "F" which would appear from its description to have been a document relevant to the conclusion of the Magistrate.

40. The appeal is dismissed.

[1] [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193.

[2] Ibid at 200.

[3] [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301.

[4] *Nikolic v Schultz* VSCA 6851 of 1999 at 10-11 *per* J D Phillips J; *Clissold v C.R.B.* [1981] VicRp 29; [1981] VR 259 at 263 *per* Young CJ.

[5] *Ericsson Pty Ltd v Popovski* [2000] VSCA 52 at [14]; (2000) 1 VR 260 *per* Brooking JA.

[6] VSCA 6851 of 1999 at 11.

[7] [1981] VicRp 29; [1981] VR 259.

**APPEARANCES:** For the plaintiff Indevelco Pty Ltd: Mr A Herskope, counsel. Rigby Cooke, solicitors. For the second defendant Delta Carpets & Vinyls Pty Ltd: Mr P Lithgow, counsel. Lynette Smyth, solicitors.

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