

04/10; [2010] VSC 36

SUPREME COURT OF VICTORIA

SHU ZHANG v WEST SANDS PTY LTD

Byrne J

18, 24 February 2010

CIVIL PROCEEDINGS - BREACH OF CONTRACT - SALE OF A LICENSED GROCERY BUSINESS - DEPOSIT AND FURTHER SUMS PAID TO VENDOR BY PURCHASER - BALANCE OF PURCHASE PRICE NOT PAID - VENDOR GAVE NOTICE OF TERMINATION OF CONTRACT - CLAIM BY VENDOR FOR DAMAGES FOR BREACH OF CONTRACT - CLAIM BY PURCHASER THAT SHE ENTERED UPON THE BUSINESS MERELY AS MANAGER FOR THE VENDOR - TRIAL IN THE MAGISTRATES' COURT LASTED FIVE DAYS - MAGISTRATE'S JUDGMENT GIVEN IN FAVOUR OF VENDOR - CLAIM UPHeld AND COUNTERCLAIM DISMISSED - WHETHER MAGISTRATE GAVE ADEQUATE REASONS FOR DECISION.

1. It has been said again and again that the duty of a judicial officer is to provide adequate reasons for the orders made. This is particularly the case where the orders are made following a contested trial. This was a relatively long contested trial of substantial claims. What may be adequate reasons in a given case will depend upon the circumstances, having regard to the purposes for the giving of reasons. These purposes are to inform the parties why and how the result was arrived at and to inform any appeal court what were the contentions of the parties, what were the facts as found, what were the principles of law relied upon and how these principles were applied. A further reason is the fact that it is often useful for the judicial officer to set out his or her reasoning process as a discipline to ensure that this process was in fact undertaken and that it was intellectually satisfactory.

2. The reasons for the Magistrate in this case, regrettably, do not address these objectives. His Honour said nothing about the facts which he found or about the documentary evidence which suggested the vendor was operating the business as manager rather than as owner. His Honour may have been perfectly correct in his assessment of the competing witnesses and in the conclusions of fact which he reached. It may be that there was evidence which supported these conclusions but from the Magistrate's reasons no view can be formed view upon this matter.

3. The consequence is that the appeal must be allowed on the basis that the Magistrate failed to provide any or any adequate reasons for his decision. The proceeding must therefore be remitted to the Magistrates' Court at Geelong to be reheard by a differently constituted court as the trial is now nearly two years old and there will be little recollection of the detail of the evidence. This is a regrettable result which is the result of none of the parties.

BYRNE J:

1. This appeal is brought from an order of the Magistrates' Court of Victoria sitting at Geelong made on 20 June 2008. Before the Magistrates' Court was a claim arising out of the sale of a licensed grocery business carried on at 18 Stinton Avenue, Newtown. By a contract of sale entered into as long ago as 8 June 2006, the present appellant, Shu Zhang, agreed to purchase from the respondent, West Sands Pty Ltd, the business for \$250,000 plus stock at valuation.

2. The appellant purchaser was self-represented on the appeal. There was no appearance for the respondent vendor.

3. The form of contract was the REIV copyright 2000 edition contract of sale. It provided for payment of \$12,500 as deposit on the signing and the balance of \$237,500 plus stock on the settlement date, 4 September 2006. It included in Schedule C particulars of the lease under which the premises were held. The term was five years from 6 May 2002 with an option of a further five years. By cl 5, the vendor was to procure by the settlement date an assignment of the lease to the purchaser.

4. It seems to be common ground that on 4 September 2006 the purchaser entered upon the premises and conducted the business until she vacated in about July 2007. She had paid to the vendor the deposit of \$12,500 and a further \$50,000 on 4 September 2006. On or about

that date the stock was valued at \$66,665.68 and she also paid this to the vendor. The balance of the contract price, assuming these were payments on account of the purchase, was therefore \$187,500. This was not paid and, by notice dated 19 September 2006, the vendor gave notice of termination of the contract of sale for non-payment. The vendor contends that on the expiry of this notice the contract of sale came to an end.

5. The area of conflict as it appears from the claim, the defence and the counterclaim before the Magistrate is as to the circumstances in which the purchaser paid the money and entered upon the business in September 2006. In her defence, the purchaser says that settlement of the contract did not occur. She accepts that she paid the \$50,000 and the value of the stock but says that she entered upon the business merely as manager for the vendor. The \$50,000 was paid as a guarantee and it was agreed, she says, that when she ceased to be the manager, this plus the value of the stock at that time would be repaid to her.

6. The purchaser also says that in December 2006 after receipt of the termination notice the dispute between them was settled on the basis that the contract of sale was terminated and that the deposit should be forfeited to the vendor. Presumably the vendor was to refund the \$50,000 and to pay her the then value of stock.

7. The vendor then alleges that it sold the business in August 2007 for only \$80,000 so that it claims a sum in excess of \$100,000, being the limit of the Magistrates' Court jurisdiction, by way of damages for breach of contract.

8. The purchaser, for her part, counterclaims damages of about \$80,000.

9. And so, the claim concerned a large sum of money. It was complicated by the fairly informal way the parties dealt with each other. The trial before the Magistrates' Court occupied no less than five days. It would not have been an easy trial as the parties had a limited command of English and negotiations were conducted in Chinese. Finally, there were difficulties caused by the fact that the purchaser was self represented.

10. The notice of appeal was also prepared by the unrepresented purchaser. No less than 23 grounds are asserted, many of which, on their face, do not appear to raise a question of law. As I explained to Ms Zhang at the hearing, she cannot base an appeal on a complaint that the Magistrate took a certain view of the facts or that he disbelieved a certain witness, unless, as a matter of law, this was not open.

11. Her first two grounds of appeal were these:

1. The Magistrate failed to consider all of the evidence.
2. The Magistrate failed to give any or any adequate reasons for accepting the evidence of the respondent in preference to the evidence of the appellant.

The first questions of law raised are these:

1. The Magistrate failed to provide any or adequate reasons for his decisions.
2. Considering the whole of the evidence, could a reasonable Magistrate properly instructed have held that the contract was settled?

12. In support of her appeal Ms Zhang placed before me a number of documents which, she said, were in evidence before the Magistrate. These are referred to in her affidavit of 26 August 2009. These documents, she said, bore out her contention that she was only a manager and that the takings were banked with the vendor. As I explained to her, this probably represents part only of the material before the Magistrate and that this material may show a different picture when seen in the context of all of the evidence.

13. As I have mentioned, there was no appearance before me on behalf of the vendor, so I was largely dependent upon what Ms Zhang had to say and the documents which I was able to inspect.

14. And so, I turned to the reasons for judgment of the Magistrate. I had been provided by the Magistrates' Court with a CD of the proceeding including his Honour's judgment. This judgment occupied 25 minutes of which 21 minutes was taken up in a reading of the pleadings. I will set

out in full his Honour's reasons which followed his recitation of the pleadings:

I have carefully considered all the relevant evidence in this matter. I have analysed closely the exhibits in the proceedings. I have observed the plaintiff having given evidence, further I have also observed Ms Zhang in the witness box. Both have been subject to cross-examination at length.

For the purpose of these proceedings the balance of probabilities is the appropriate test, correct, Mr James? MR JAMES: Yes.

HIS HONOUR: Very well. It is an action for breach of contract.

By reference to the relevant exhibits in connection with the plaintiff's case, further in connection with the exhibits relevant to the defendant's case I have taken all those matters into account.

I am satisfied that there was, in the circumstances, a contract that was settled, that there was a default clause, that pursuant to that contract the defendant was required pursuant to the terms and conditions of the contract to pay the balance of the purchase price. The defendant failed to make the necessary payment pursuant to the terms and conditions of the contract.

As a consequence of the default notice the plaintiff then has sought to enforce the rights enshrined within that signed, settled contract.

I find that on the basis of the plaintiff's case I am satisfied on the basis of the evidence of the plaintiff as to the existence of the contract, the terms and conditions of the sale, the terms of settlement.

Further, in relation to the counterclaim I have assessed the counterclaim particulars. I am not satisfied on the balance of probabilities that there was a management agreement. Indeed the assertions made by Ms Zhang in her counterclaim, I am not satisfied, relevant to the issue of the breach of the contract, are indeed on the balance of probabilities proven.

I am satisfied that there was, in the circumstances, a breach of the contract as per the particulars referred to in the plaintiff's statement of claim.

Indeed I reject the essential issues that are raised in the counterclaim that are asserted by Ms Zhang.

I will simply add this, Ms Zhang I found as a witness to be indirect, evasive and unsatisfactory in many respects in connection with specific issues put to her – that were put by way of cross-examination. Indeed the exhibits before the court did not assist in corroborating the assertions which she put in her evidence.

For the purposes of the plaintiff, I found the plaintiff to be a direct, straightforward witness where the exhibits that have been referred to in the plaintiff's claim corroborate the assertions made in the evidence.

There are many unsatisfactory features of the counterclaim and the defence that has been asserted by Ms Zhang, suffice to say that I am satisfied on the balance of probabilities that the contract was breached as per the issues raised in the statement of claim and in the particulars referred to in the statement of claim.

As indicated, I preferred the evidence of the plaintiff, to that end the claim is upheld and proven. Judgment is for the plaintiff in the terms as per the statement of claim. The counterclaim is dismissed.

15. It has been said again and again that the duty of a judicial officer is to provide adequate reasons for the orders made. This is particularly the case where the orders are made following a contested trial. This was a relatively long contested trial of substantial claims. What may be adequate reasons in a given case will depend upon the circumstances, having regard to the purposes for the giving of reasons. These purposes are to inform the parties why and how the result was arrived at and to inform any appeal court what were the contentions of the parties, what were the facts as found, what were the principles of law relied upon and how these principles were applied. A further reason is the fact that it is often useful for the judicial officer to set out his or her reasoning process as a discipline to ensure that this process was in fact undertaken and that it was intellectually satisfactory.

16. The reasons for the Magistrate in this case, regrettably, do not address these objectives. His Honour says nothing about the facts which he found or about the documentary evidence which suggested the vendor was operating the business as manager rather than as owner. His Honour may have been perfectly correct in his assessment of the competing witnesses and in the conclusions of fact which he reached. It may be that there was evidence which supported these conclusions. The difficulty which I face is that I cannot from the reasons of the Magistrate form any view upon this.

17. The consequence of this is that I must allow the appeal on the basis that the first question of law is answered in favour of the appellant. The Magistrate failed to provide any or any adequate reasons for his decision. The proceeding must therefore be remitted to the Magistrates' Court at Geelong. I make no finding as to the remaining grounds. I make no order as to costs because the appellant was self-represented. It is probably desirable that the proceeding be reheard by a differently constituted court as the trial is now nearly two years old and there will be little recollection of the detail of the evidence. This is a regrettable result which is the result of none of

the parties. For this reason I will reserve to the respondent liberty to apply for a certificate under section 4 of the *Appeals Costs Act* 1998 if it be so advised.

APPEARANCES: For the plaintiff Ms Zhang: Ms Zhang appeared in person. No appearance of defendant West Sands Pty Ltd.
