36/09; [2009] VSC 618

SUPREME COURT OF VICTORIA

COHEN v ACCOUNTS CONTROL MANAGEMENT SERVICES PTY LTD

Vickery J

4 December 2009

CIVIL PROCEEDINGS – CREDIT CARD IN DEFAULT – DEFAULT NOTICE GIVEN TO DEBTOR – DEBT ASSIGNED TO THIRD PARTY – ACTION TAKEN BY THIRD PARTY TO ENFORCE DEBT – AT HEARING DEBTOR STATED THAT HE HAD CHANGED HIS ADDRESS AND THAT HE DID NOT RECEIVE NOTICE OF DEFAULT – NO EVIDENCE GIVEN BY THIRD PARTY ON ISSUE OF SERVICE OF NOTICE – FINDING BY MAGISTRATE THAT NOTICE DULY SERVED – WHETHER THIRD PARTY SHOULD HAVE ADDUCED EVIDENCE AS TO SERVICE OF DEFAULT NOTICE – WHETHER AN ADVERSE INFERENCE SHOULD HAVE BEEN DRAWN PURSUANT TO THE PRINCIPLE IN *JONES v DUNKEL* – WHETHER MAGISTRATE IN ERROR IN UPHOLDING CLAIM – ON APPEAL TO ASSOCIATE JUDGE FINDING THAT DEBTOR DID NOT HAVE AN ARGUABLE CASE – WHETHER ASSOCIATE JUDGE IN ERROR: *CONSUMER CREDIT (VICTORIA) ACT* 1995; *CONSUMER CREDIT CODE*, S80; *SUPREME COURT (GENERAL PROCEDURE) RULES* 2005, RULE 58.10(8)

C. was issued with a credit card by a Bank. Later, the card fell into default. The Bank assigned its debt to Accounts Control who sought to enforce the debt owed by C. to the Bank. At the hearing, C. took issue with the service of the notice of default on him as was required by s80 of the *Consumer Credit Code*. C. also said that he had changed his address. The only evidence adduced by Accounts Control as to service of the relevant notice were conversations which were recorded in the Bank records. In upholding the claim, the Magistrate found that the notice of default was received by C. and that he failed to comply with it. C. appealed to an Associate Judge who dismissed the appeal on the ground that C. did not have an arguable case or to refuse leave would impose no substantial injustice. Upon appeal—

HELD: Appeal dismissed.

1. It was argued by C. that an adverse inference ought to have been drawn against Accounts Control by its failure to call any witness from the Bank to provide evidence of the change of address in accordance with the case of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298. Further the inference should have been drawn that the calling of such evidence would not have been favourable to the case of Accounts Control.

2. The operation of whether the principle of *Jones v Dunkel* can or should be applied depends on whether the conditions for its operation exist. These conditions are three in number; (a) the missing witness could be expected to be called by one party rather than the other; (b) his evidence would elucidate a particular matter; (c) his absence is unexplained.

***Payne v Parker* [1976] 1 NSWLR 191, applied.**

3. In the present case not all of the conditions were met for the application of the principle. In particular, it did not follow that the alleged missing witness from the Bank would be expected to have been called by Accounts Control rather than by C. In his particulars of defence, C. did not state that he had not received the default notice by reason that he had changed his address and also that he had notified the Bank of that change of address. It followed that it could not be expected that Accounts Control would have adduced some evidence on that issue. On the other hand, given the way the defence was conducted, it would have been expected that C. would have called evidence rather than leave it to Accounts Control to undertake that task. In those circumstances, the *Jones v Dunkel* submission does not have substance.

4. It did not necessarily follow that because C. changed his address that he did not receive the notice of default. It is common for mail to the former occupant to be passed to the new occupant of premises previously occupied by a person who has moved from an address. Commonly arrangements are made to pass on mail, whether through Australia Post readdressing mail or by private arrangement made with the new occupant of the premises.

5. Given facts which could be found from the Bank records tendered in evidence including conversations between C. and the Bank officers, it was open to the Magistrate to infer that C. acknowledged receipt of the default notice and make an order on the claim. That being the case, it was open to the Associate Judge to dismiss C.'s claim on the basis that C. did not have an arguable case and also that to refuse leave would impose no substantial injustice.

VICKERY J:

1. This matter arises out of an appeal under s109 of the *Magistrates' Court Act* 1989 pursuant to which the appellant, Adrian Cohen, seeks to appeal a decision of a Magistrate made in favour of the respondent, Accounts Control Management Services Pty Ltd ("Accounts Control"). The appeal came before an Associate Judge on an application by Accounts Control that the appeal should be dismissed under rule 58.10(8) of the *Supreme Court (General Civil Procedure) Rules* 2005. Under this rule, the Associate Judge may dismiss an appeal if satisfied:

> (a) the notice of appeal does not identify sufficiently or at all a question of law on which the appeal may be brought;
>
> (b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or
>
> (c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the court.

2. The Associate Judge dismissed the appeal. I infer from the way in which argument has been presented before me that this was done pursuant to sub-paragraph (b) of the rule 58.10(8), namely on the ground that the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice.

3. The appellant now seeks to appeal the decision of the Associate Judge.

4. I accept the submission made by Mr Corrigan, who appeared on behalf of the appellant, assisted by Mr Herbert of Counsel, that a high degree of certainty must be present before an Associate Judge should act under sub-paragraph (b) of rule 58.10(8) to dismiss an appeal in effect summarily on the basis that an appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice. In this situation, there are parallels with the operation of Order 23 and the well established observations of the High Court on the way in which summary dismissal applications ought to be approached.[1]

5. In this case, being an appeal pursuant to s109 of the *Magistrates' Court Act* 1989, the appeal to the Supreme Court is confined to an appeal on a question of law. In relation to appeals which effectively attack the factual foundation of the decision of a Magistrate, it needs to be demonstrated that there was no evidence upon which the Magistrate, acting reasonably, could have reached the decision he did.

6. In this case, the essential question for the Magistrate arose under the *Consumer Credit (Victoria) Act* 1995 and the *Consumer Credit Code* which is incorporated into the Act. The facts which were not in contention before me were: first, that the appellant, Mr Cohen, had a credit card issued to him by the National Australia Bank ("the Bank") in 2005. That credit card fell into default. Pursuant to the *Consumer Credit Code*, s80 provided that as a precondition for enforcement of a credit contract, a credit provider must not begin enforcement proceedings against the debtor in relation to a credit contract unless the debtor is in default under the credit contract, and the credit provider has given the debtor a default notice complying with the section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default. The Bank assigned its debt in respect of Mr Cohen's credit card, along with other debts, to the respondent, Accounts Control. The respondent sought to enforce the debt owed by Mr Cohen to the Bank. The question was whether there was evidence that the Bank had given the notice as required by s80 of the *Consumer Credit Code*.

7. Mr Cohen took issue with the service of the notice upon him. He said that he did not receive the notice, he also said that he had changed address at the relevant time when the notice may have been sent.

8. The only evidence adduced by Accounts Control at the hearing before the Magistrate as to the service of the relevant notice were conversations which were recorded in the records of the Bank.

9. What was before me was squarely the question as to whether or not there was any or sufficient evidence of the delivery of the notice upon the debtor such that it was reasonably open

to the Magistrate to find that the debtor, Mr Cohen, was given the relevant notice as required by s80 of the *Consumer Credit Code*.

10. It was put in Mr Cohen's favour by Mr Corrigan, that the question of a *Jones v Dunkel*[2] inference was not properly raised before the Magistrate, or alternatively, that the Magistrate misconstrued the submission that was advanced on that question. It was said that the failure on the part of Accounts Control to call any witness from the Bank to provide evidence of the change of address notification to the Bank was such that an adverse inference ought to have been drawn against Accounts Management pursuant to the principle of *Jones v Dunkel*. It was submitted that, in accordance with the explanation of *Jones v Dunkel* given in *White Industries (Qld) Pty Ltd v Flower and Hart (a firm)*[3], the inference should be drawn that the calling of such evidence would not have been favourable to the case of Accounts Control.

11. In *Payne v Parker*,[4] Glass JA made a number of observations in relation to the operation of the principle of *Jones v Dunkel*. His Honour said:[5]

> When the principle can or should be applied depends on whether the conditions for its operation exist. These conditions are three in number; (a) the missing witness could be expected to be called by one party rather than the other; (b) his evidence would elucidate a particular matter; (c) his absence is unexplained.

12. In this case I am not satisfied that all of those conditions have been met for the application of the principle. In particular, I am not satisfied that the alleged missing witness, that is a witness from the Bank, would be expected to have been called in this case by Accounts Control rather than by Mr Cohen.

13. The case was initiated by a process before the Magistrates' Court which included basic pleadings. A defence mounted by Mr Cohen was to the effect that he did not receive the relevant notice under s80 of the *Consumer Credit Code*. He did not descend into particulars. He did not in particular, give any prior notice to Accounts Control that he contested the position of non-receipt of the notice by reason that he had changed his address, and also that he had notified the Bank of that change of address.

14. Accordingly, on the basis allegations referred to in Mr Cohen's defence prior to the hearing, Accounts Control was not in a position to anticipate that the factual issue would arise at the trial of the proceeding, namely, that the Bank had been notified of Mr Cohen's change of address. In those circumstances, in my opinion, it could not be expected on behalf of Accounts Control that it would have called a person from the Bank on the question or adduced some evidence that would elucidate that particular issue.

15. On the other hand it was always open to Mr Cohen, who was making the factual allegation, to have subpoenaed the Bank for relevant records which would have been then before the Magistrates' Court to either support or explain his case. He did not take that step of issuing any subpoena for these documents from the Bank or indeed issuing a subpoena to any witness to attend from the Bank.

16. Alternatively, it was open in the course of the conduct of the trial before the Magistrate, in the course of presentation of Mr Cohen's case, for those documents to have been called for from a relevant witness, namely Mr Wu, who was called in the case as a witness and cross-examined. He was a present serving officer of the Bank. I am not satisfied that any call was made specifically upon Mr Wu for the production of those documents during the conduct of the case before the Magistrate.

17. In my opinion, given the way in which the defence was conducted by Mr Cohen, it would have been rather more expected that he would have called evidence of matters that he wished to adduce to support his case, rather than to leave it to Accounts Control to undertake that task.

18. Accordingly I find that the *Jones v Dunkel* submission made by Mr Corrigan on behalf of the Mr Cohen, does not have substance.

19. Mr Corrigan also referred to inconsistencies in the findings of the Magistrate which he

took me to, namely, the finding made by the Magistrate that Mr Cohen did change his address followed by what was said to be an inconsistent finding that Mr Cohen did receive the notice of default.

20. In my opinion, the so-called inconsistency leads nowhere. It does not necessarily follow that because Mr Cohen did change his address at the time, that he did not receive the notice of default. It is common for mail to be passed on by the new occupant of premises previously occupied by a person who has moved from an address, to the former occupant. Commonly arrangements are made to pass on mail, whether through Australia Post readdressing mail, or by private arrangement made with the new occupant of the premises. It does not necessarily follow, therefore, that merely because Mr Cohen did change his address, that he did not receive the notice of default.

21. It is to be noted in this case that Mr Cohen did give evidence and was cross-examined and the Magistrate was in a position first hand to observe the demeanour of the witness and assess his credit, something which is, of course, denied to a Court on an appeal such as this. The Magistrate did make a finding specifically in relation to Mr Cohen's position, as he concluded in his lengthy reasons:

> In short, I find that this notice of default was received by Mr Cohen and that he failed to comply with it, and that there is no condition precedent, there is no barrier, there is no impediment to this proceeding. That being the case, with the admission that I have from him of owing the debt, there must be judgment against him for it.

22. The question then arises was there any evidence upon which the Magistrate could have reasonably concluded in the way he did, that in fact Mr Cohen did receive the relevant notice.

23. In the trial of this matter before the Magistrate, Bank records were produced in evidence pursuant to s55B of the *Evidence Act* 1958. There were entries in the Bank records which were produced in evidence which related to three dates, namely 12 December 2006, 15 December 2006 and 29 December 2006. It was conceded that those entries did relate to Mr Cohen's account but there was no concession made that the notes accurately recorded any conversation between the Bank or its officers and Mr Cohen.

24. It was further conceded that the Bank's records, as they were admitted into evidence, were admissible under s55B of the *Evidence Act* 1958.

25. The Bank records to which I have referred were the subject of evidence given by Mr Beech, a former bank employee who explained the text of the notes. The notes were recorded, in part, in code, but were explained by Mr Beech in the course of his evidence.

26. The Bank record indicates that a letter, being a default letter, was generated on 12 December 2006.

27. The record further indicates, by an entry dated 15 December 2006, that there was a telephone conversation between a Bank officer and a person who I infer was Mr Cohen. Although Mr Cohen was not identified in the record, the call was made to his mobile telephone. The note recorded in the Bank record is that the customer, who I infer to be Mr Cohen, received a letter and that he would be replying on 18 December. He did not want to proceed further with the call.

28. Thereafter there was a further conversation noted which occurred on 29 December 2006. The coded parts of that telephone conversation, which were noted in the Bank record, show that it was a conversation between an officer of the Bank and a customer, that the Bank was missing deposits from August 2006 and that the Bank was "still following up ANZ for trace details." It stated further that a letter was written to the Bank on 18 December and a default notice issued 12 December, but noted that this was "not on file yet." "Offers for half of the default moneys in deposit January, balance following month" was also the subject of the note.

29. Clearly enough it is reasonably open to infer from these conversations, as recorded in the Bank's business records, that Mr Cohen, in conversations with an officer of the Bank, did acknowledge receipt of the default notice which had been issued on 12 December 2006.

30. In my opinion, that is some evidence upon which the Magistrate could have arrived at the decision he did and, accordingly, the appeal under s109 of the *Magistrates' Court Act* 1989 would have no prospects of success.

31. That being the case, it was open, in my opinion, for the Associate Judge to dismiss the appeal on the basis that the appellant, Mr Cohen, does not have an arguable case on appeal and, secondly, that to refuse leave would impose no substantial injustice because, in my opinion, that would be the inevitable outcome of the appeal. I have arrived at the same conclusion in the appeal before me.

32. Accordingly, I dismiss this appeal.

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[1] See: *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at 129; [1965] ALR 636; 38 ALJR 253 per Barwick CJ.
[2] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.
[3] [1998] FCA 806; (1998) 156 ALR 169 at 226-227; 29 ACSR 21 per Goldberg J.
[4] [1976] 1 NSWLR 191 per Glass JA.
[5] [1976] 1 NSWLR 191 at 201 per Glass JA.

APPEARANCES: For the appellant/defendant Cohen: Mr M Corrigan, counsel. Salinger & Associates, solicitors. For the respondent/plaintiff Accounts Control Pty Ltd: Mr M O'Connor, counsel. Macpherson & Kelley Lawyers Pty Ltd, solicitors.
