38/03; [2003] VSC 361

SUPREME COURT OF VICTORIA

NATIONAL EXCHANGE PTY LTD v VANE

Osborn J

18 September, 23 October 2003

CIVIL PROCEEDINGS – CONTRACT – OFFER AND ACCEPTANCE – OFFER BY COMPANY TO BUY SHARES – OFFER CONTAINED IN LETTER REQUIRING SIGNATURE TO TRANSFER FORM – DOCUMENT ALSO REQUIRED OFFEREE TO SEND THE RELEVANT HOLDING STATEMENT WITH THE SIGNED TRANSFER FORM – TRANSFER FORM SIGNED AND RETURNED WITHOUT RELEVANT HOLDING STATEMENT – CLAIM AGAINST OFFEREE FOR DAMAGES FOR BREACH OF CONTRACT – AT HEARING MAGISTRATE IDENTIFIED THRESHOLD QUESTION – SUBMISSIONS ON THRESHOLD QUESTION HEARD AND CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR IN TAKING SUCH A COURSE – WHETHER MAGISTRATE IN ERROR IN CONCLUDING THAT THE COMPANY'S OFFER HAD NOT BEEN ACCEPTED.

NEP/L offered to buy shares owned by V. The offer was contained in a document which required V. to sign an enclosed transfer form and send it together with V's holding statement to NEP/L by a certain date. "Important Instructions" on the transfer form required V. to sign and date the form and place it with the "Issuer Sponsored Statement" in the reply paid envelope and mail "the documents" to arrive no later than a certain date. V. signed the form and returned it but did not include the issuer sponsored statement. NEP/L subsequently claimed damages from V. in the sum of $977.24 alleging breach of contract. At the hearing, V. appeared in person. The magistrate identified a threshold question namely, whether NEP/L's offer had been accepted by V. resulting in a concluded agreement. The magistrate heard submissions on the threshold question and dismissed the claim. Upon appeal—

HELD: Appeal dismissed.

1. It was open to the Magistrate to raise a point of law which he believed necessary to the proper determination of the matter particularly when he had an unrepresented litigant before him. On one view it is the duty of a Magistrate to raise such a point not only to ensure a just outcome according to law but also to avoid so far as possible appeals on questions of law not raised before the Magistrate. The Magistrate was of course bound to ensure that once the point was raised the appellant was accorded procedural fairness with respect to it. In this case there had been no failure to accord procedural fairness with respect to the point in issue nor could it be said that the course adopted by the magistrate was beyond power.

2. The proper construction of the offer must take into account the terms of the transfer document itself which was supplied as an enclosure with the offer. The "IMPORTANT INSTRUCTIONS" at the foot of this document emphasised the necessity to supply both the transfer and the holding statement. Important instruction 2 required the seller to place both the signed transfer form and the holding statement in the reply paid envelope. Important instruction 3 was "Mail the documents to arrive no later than the closing date of the offer". These instructions treated steps 2 and 3 as being on the same footing as step 1 namely signature and dating of the transfer form. Completion of the transfer in accordance with its terms required compliance with the important instructions and these included mailing both documents, namely, the transfer and the holding statement to arrive no later than the closing date of the offer. It follows that the magistrate's conclusion that there had been no acceptance by V. of the offer was correct.

OSBORN J:

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 against a decision with respect to a claim by the appellant.

2. The appellant's claim is for damages in the sum of $977.24, for breach of an alleged contract whereby the respondent agreed to sell 1,214 shares in AXA Asia Pacific Holdings Ltd to the appellant.

3. The proceedings before the Magistrate commenced by way of arbitration (as a result of the sum claimed)[1]. The Magistrate then himself identified a threshold question, namely, whether the appellant's offer to purchase the shares in issue had been accepted by the respondent resulting in a concluded agreement. Having articulated this question, he referred the matter back into open

court because he took the view that this would facilitate any appeal the appellant might wish to make with respect to his decision in the matter. Having heard submissions on the threshold question, he dismissed the claim.

4. The appeal before me raises two questions of law:

> (a) whether the Magistrate was wrong in concluding there had been no acceptance by the respondent of the appellant's offer; and
>
> (b) whether it was open to the Magistrate to dismiss the claim on the ground which he identified having regard to the terms of the respondent's notice of defence.

5. By letter dated 26 August 2002, the appellant offered to purchase shares from the respondent. The letter stated in substance:

> **"Offer to Buy your Shares in AXA Asia Pacific Holdings Ltd ('AXA')-**
> **(Formerly National Mutual Holdings Ltd)**
> According to AXA's register of members, you own **1214** shares in AXA. As a buyer of securities, National Exchange is making the following offer for your shareholding. On the terms set out in this letter, we will pay
> $1.50 for EACH of your 1214 SHARES = $1,821.
> No brokerage is payable by you if you accept this offer - you receive the amount shown above. Also, no stamp duty or GST is payable on a sale of shares in AXA. Our offer will close at 5 pm Wednesday, 18 September 2002, unless withdrawn earlier by notice published in 'The Australian' newspaper. National Exchange is offering to buy your shares as principal and is not associated with AXA. We recommend that you obtain independent advice before accepting this offer. **How to Accept this Offer** This offer is accepted when you **sign the enclosed transfer form** and it is received in our office. Please also enclose your issuer sponsored holding statement in the enclosed envelope. We will post a cheque to you THE SAME DAY we receive these documents. If you have any questions about this offer, please contact us on (03) 8302 1245."

6. The letter enclosed a transfer form which set out a description of the shares, the quantity of such shares, the name and address of the seller, the proposed consideration, the name of the transferee, and the postal address of the transferee. It then stated in small print:

> "I/we the registered holder(s) and the undersigned Seller(s) for the above consideration do hereby transfer to the above named hereinafter called the Transferee the securities as specified above standing in my/our name(s) in the books of the above-named company or corporation subject to the several conditions on which I/we held the same at the time of signing hereof and I/we the buyer do hereby agree to accept the said securities subject to the same conditions...I/we have not received any notice of revocation of the Power of Attorney (where signed under the authority) by death of the grantor or otherwise, under which this transfer is signed."

7. The transfer form then provided for signature by the seller and in turn by the transferee. At its foot beneath the words "IMPORTANT INSTRUCTIONS" which words were emphasised by arrows, the following appeared:

> "1. **PLEASE SIGN & DATE** this Transfer Form between the crosses above. In the case of joint holders all must sign. 2. **Place** the signed **Transfer Form and Issuer Sponsored Statement** in the reply paid envelope. 3. **Mail** the documents to arrive no later than the closing date of this offer."

8. The Magistrate's view was that acceptance of the offer required not only both signature and supply of the transfer form to the transferee, but also supply by the seller to the transferee of the relevant holding statement. This view was based on his construction of the letter itself and turned upon the twin elements stated beneath the heading "How to Accept this Offer" namely:

> "This offer is accepted when you **sign the enclosed transfer form** and it is received in our office. Please also enclose your issuer sponsored holding statement in the enclosed envelope."

It is submitted by the appellant that the first sentence should be given its natural meaning and that the request to also enclose the holding statement which follows in the second sentence, should not be regarded as a prerequisite to acceptance.

9. In my view the proper construction of the offer must also take into account the terms of the transfer document itself which was supplied as an enclosure with the offer. The "IMPORTANT INSTRUCTIONS" at the foot of this document emphasised the necessity to supply both the transfer and the holding statement. Important instruction 2 requires the seller to place both the signed transfer form and the holding statement (both identified in bold print) in the reply paid envelope. Important instruction 3 is "**Mail** *the documents* to arrive no later than the closing date of the offer" (Emphasis supplied). These instructions treated steps 2 and 3 as being on the same footing as step 1 namely signature and dating of the transfer form.

10. In my view completion of the transfer in accordance with its terms required compliance with the important instructions and these included mailing both documents, namely, the transfer and the holding statement to arrive no later than the closing date of the offer.

11. It was not in my view intended by the transferee that performance of the contract would remain open to the seller after 5.00 pm Wednesday 18 September 2002. What was contemplated was that the seller would exercise his option by performing his part of the contract and supplying both the transfer and the holding statement to the transferee by the specified date. That is, the acts required to accept the offer were the only acts the seller had to perform under the contract.

12. It follows that reference to the transfer form which was enclosed with the letter of offer and formed part of the offer demonstrates that the learned Magistrate's conclusion was correct.

13. It was further submitted, however, that this conclusion was not open to the Magistrate having regard to the terms of the notice of defence. This document was not in proper form but comprised a letter to the following effect.

> "In regards to your complaint, Court no R00463874, in the Magistrate's Court of Victoria, between National Exchange Pty Ltd and myself, I will defend this case if brought against me by the plaintiff, on advice from my solicitor, 'Armstrongs Solicitors'. I state that I do not owe the money stated by the plaintiff and am not liable for the cost indicated. I forwarded an acceptance form to National Exchange Pty Ltd on the 12th September 2002. A copy of Share Dividends Statement, as requested in their letter of the 3rd October 2002 was forwarded on the 9th October 2002. My attempts to contact the company and discuss this matter with them by telephone, during the cause (sic) of the letters was not possible due to continuing engaged telephone numbers and extensive delays on hold. Due to the unprofessional and misrepresentative conduct of this company, I hereby withdraw my previous acceptance for the sale of the subject shares and will not be conducting any further business with National Exchange Pty Ltd. If this complaint is preceded with (sic) I will be making a claim for all my cost and professional expenses, including air fares and accommodation, against the plaintiff."

14. It is submitted, first, that it is clear from this letter and from the evidence before the Magistrate that the defendant intended that the return of the signed transfer would constitute an acceptance of the offer. The evidence relied on was the statement by the defendant to the Magistrate in the course of the hearing:

> "I did sign that at the time when I was sick accepting I was going to sell and then when I checked up later on, checked the paper, and found out the differences in the prices I didn't want to sell it at the time for that price."[2]

15. In my view neither the defendant's letter nor the oral statement made to the Magistrate required the Magistrate to conclude that the offer had been accepted at law.

> (a) the defendant's letter was not a pleading but a layman's letter;
> (b) insofar as it contained a relevant admission of fact that admission was that the transfer was forwarded to the transferee;
> (c) the letter cannot be regarded as precluding the Court from forming its own conclusion as to whether objectively the offer was accepted;
> (d) the letter constitutes an account of the defendant's subjective understanding;
> (e) the letter culminates in a contention that the contract is unenforceable in any event.

16. It was put in argument that the Magistrate should not have raised the question of acceptance of the offer when this issue was not raised by the parties. I do not accept that the Magistrate was not entitled to raise a point of law which he believed necessary to the proper determination of the matter particularly when he had an unrepresented litigant before him.

17. Indeed, on one view it is the duty of a Magistrate to raise such a point not only to ensure a just outcome according to law but also to avoid so far as possible appeals on questions of law not raised before the Magistrate. That such appeals may be open has been recognised both under the current provisions of the *Magistrates' Court Act* and the preceding longstanding provisions for appeal by way of order to review[3]. The Magistrate was of course bound to ensure that once the point was raised the appellant was accorded procedural fairness with respect to it. It was conceded by Mr Strahan QC on behalf of the appellant that there had been no failure to accord procedural fairness with respect to the point in issue.

18. It is to be noted that O.35.02 of the *Magistrates' Court Civil Procedure Rules* 1999 provides:

> "For the purpose of determining the real question in issue between the parties to any proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings, the court may at any stage order that any document (including a complaint) in a proceeding be amended or that any party have leave to amend any document in the proceeding."

19. Furthermore, O.2.04 provides:

> "The court may dispense with compliance of any of the requirements of these rules, either before or after the occasion for compliance arises."

20. In the present case, if the Magistrate had deemed it necessary for the purpose of determining the real question in issue between the parties he could have amended the notice of defence, such as it was. He presumably did not do so because he formed the view that the point in issue did not require further formal articulation to ensure procedural fairness to the respondent. No doubt he was encouraged to dispose of the matter summarily because of the smallness of the claim. Order 35.02 is the equivalent to O.36.01 of the Rules of the Supreme Court. Under that rule an amendment to a defence may extend to the withdrawal of an admission although such an amendment will not be made without good cause[4]. If the letter sent in place of a notice of defence is to be construed as an admission that the offer was accepted in law (although as I have stated the better view is that it simply amounts to an admission that the transfer was forwarded to the transferee with the intention of acceptance) then it was still open to the Magistrate to exercise his powers under the rules to determine what he regarded as the real question in issue between the parties. His powers extended to dispensing with compliance with any of the requirements of the rules. It cannot be said that the procedure that he adopted was beyond power. Nor can it be said that it resulted in any procedural unfairness, indeed, the appellant expressly disclaims such a proposition. It follows that for the above reasons the notice of defence did not preclude the Magistrate from deciding as he did.

21. Lastly, it was submitted that the appellant had accepted the transfer as constituting a binding contract. It was submitted that the appellant was entitled to waive the requirement for a holding statement if on the true construction of the offer it included such a requirement. In my view this submission is misconceived. Either the offer was accepted or it was not. The underlying principle was authoritatively stated in the case of *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd*[5] in which Owen J, Roper CJ in Eq and Herron J adopted with approval the following statement from *Williston*:

> "It has sometimes been suggested that a defect in an acceptance may be 'waived' by the offeror. If what is meant by this is merely that the offeror may accept a counter-offer by the offeree, which, by reason of delay, or the addition or change of terms failed of being an acceptance of the original offer, and furthermore that sometimes silence under the circumstances stated in the preceding sections may amount to an acceptance binding both parties, no fault can be found; but if, as seems to be the case, the meaning is that the offeror may at his option assert either that there has not been a valid acceptance and hence no contract because of some defect, or that there has been a contract made because he is willing to disregard the defect in the acceptance, and that this option on the part of the offeror may be exercised without communication with the offeree, and perhaps without any limitation of time, a vital principle of the law of contracts is violated. Nothing is more fundamental than that in bilateral contracts both parties must be bound, or neither; and that in unilateral contracts, the performance requested must be simultaneous with the creation of any obligation on the part of the promisor. To allow a waiver of a defect of an acceptance is virtually to say that the acceptance is binding on the acceptor, or may be treated as binding by the offeror (which amounts to the same thing) from the time when it is made though the offeror himself is still perfectly free to assert that

> the acceptance was defective, and though no estoppel forbids the acceptor from showing the true facts, and the only way a contract can be formed is by acceptance of the counter-offer in the same way as if it were an original offer."

22. While it may be possible to regard the return of the signed transfer as a counter offer, this is not the basis on which the claim was brought and there is no evidence it was ever regarded as such by the appellant. The appellant did not sue for specific performance, but purported to accept repudiation of the contract it alleged was formed on return of the transfer and sued for damages. There is reference to a letter sent by the appellant to the respondent in the respondent's letter of defence (as set out in paragraph [14] above), however, the appellant's letter is not before me, and there is no other evidence as to the appellant's conduct after the respondent returned the transfer. It is not unlikely such letter comprised a further counter offer requiring delivery of the Issuer Sponsored Statement with details of the respondent's Security Holder Reference Number on or before a specified date. In turn it seems no such document was supplied. There is in any event no evidence that even if the signed transfer could be regarded as a counter offer it was ever accepted by the appellant. Counsel for the appellant did not put its case on any other basis than that the respondent's return of the transfer form resulted in a contract.

23. For the above reasons the appeal must fail.

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[1] See s102 *Magistrates' Court Act.*
[2] Transcript p8.
[3] *NAB v Coutts* [1984] VicRp 69; [1984] VR 790 at 799; (1984) 1 MVR 407; *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342.
[4] *Divcon (Australia) Pty Ltd v Devine Shipping Pty Ltd* [1996] VicRp 58; [1996] 2 VR 79 at 80.
[5] [1959] SR NSW 122.

APPEARANCES: For the appellant National Exchange Pty Ltd: Mr J Strahan QC and Mr W Stark, counsel. For the respondent Vane: Mr J Burnside QC and Ms L Nichols, counsel. Slater & Gordon, solicitors.
