33/85

SUPREME COURT OF VICTORIA

LETCHFORD v LEISURE MUTUAL SWIMMING POOLS PTY LTD

Nicholson J

2 May 1985

PRACTICE AND PROCEDURE – CIVIL PROCEEDINGS – NOTICE OF SPECIAL DEFENCE – ILLEGALITY – NO FORMAL NOTICE GIVEN BUT DEFENCE RAISED IN NOTICE AND PARTICULARS OF DEFENCE – WHETHER SUFFICIENT – NATURE OF PROCEEDINGS IN COURTS OF SUMMARY JURISDICTION – CONTRACT – DAMAGES FOR BREACH OF – WORK PROPOSED TO BE CARRIED OUT WITHOUT APPROVAL OF BUILDING INSPECTOR – ILLEGALITY – WHETHER CONTRACT ENFORCEABLE: *UNIFORM BUILDING REGULATIONS* 1973, RR508, 511, 512; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S9A(4), 90(1): *MAGISTRATES' COURTS RULES* 1980, RR71, 73.

The parties executed a written agreement whereby LMSP P/L ('the Company') would construct a swimming pool for L. A term of the agreement was that L. would permit all reasonable access to his property to enable work to be carried out. Construction of the pool proceeded to the stage where the concrete was ready to be poured. When the Building Inspector inspected the pool, he refused to approve the pouring of the concrete until the local Shire's requirements had been complied with. Notwithstanding the lack of approval, the Company chose to go ahead with the pouring of the concrete, taking the chance that the Building Inspector would subsequently approve an amended plan. When the concrete sprayers arrived at the site L. refused them access because the Shire's approval had not been given. As a result, the pour was abandoned and the Company occasioned loss. The Company sued L. for damages for breach of contract. When the matter came on for hearing, the Company's counsel submitted that L. could not rely on the special defence of illegality because proper notice had not been given. The Magistrate agreed with this submission and ruled that the special defence could not be relied upon. After hearing evidence, he made an order in favour of the Company with costs. Upon order nisi to review—

HELD: Order absolute. Magistrate's order set aside.
(1) Bearing in mind that courts of summary jurisdiction have the task of disposing speedily and expeditiously with the matters brought before them, Magistrates should look at the substance rather than the form of notices of defence which have been given.

(2) Where a special defence, such as illegality, is clearly indicated by the particulars of the defence and sufficient particulars are given, it is not necessary to lodge a separate notice of a special defence as required by s90(1) of the *Magistrates (Summary Proceedings) Act* 1975.
***Cunningham v Cannon* [1983] VicRp 59; [1983] 1 VR 641, distinguished.**

(3) In the present case, whilst the notice of defence was couched in terms of an alleged breach of contract, it was nevertheless clear that the defendant was giving notice that he proposed to allege that the work was being attempted by the Company to be carried out illegally.

(4) The failure by the Company to comply with the provisions of the *Uniform Building Regulations* was an illegal act which vitiated the contract. Accordingly, the Company was in breach of the contract itself, and L. was entirely justified in refusing admission to his property in those circumstances.
***Varley v Spatt* [1955] VicLawRp 67; [1955] VLR 403; and**
***Bond v Frederick* [1952] unrep, Vic Sup Ct, Martin J, applied.**

NICHOLSON J: *[After setting out the facts, the Particulars of Defence, the Magistrate's reasons and the grounds of the Order Nisi, His Honour continued]:* ... **[9]** I shall for the sake of convenience deal firstly with the second ground of the Order Nisi relating to the question of the defence of illegality and whether proper notice of that defence had been given. The *Magistrates (Summary Proceedings) Act* 1975 requires by s90 that a defendant in proceedings of this nature who proposes to set-up by way of defence and to claim and have the benefit of, *inter alia*, illegality cannot do so without the permission of the court, unless a reasonable time before the hearing of the complaint he has given notice in writing of the defence to the complainant personally or by post or by causing the notice to be delivered at the complainant's usual or last-known place of abode or business or at his address for service set out in the summons upon the complaint. That particular provision or its equivalent has appeared, as I understand it, in legislation governing proceedings in the

Magistrates' Court for many years. Until comparatively recently this was the only requirement contained in the Act, requiring Notice of Defence to be given in the Magistrates' Court in special summons proceedings, the defences otherwise being stated by counsel at the hearing.

In addition to that provision however, there is also a provision which was inserted in the Act subsequently to change that procedure, requiring the delivery of a Notice of Defence, if it is proposed to defend proceedings **[10]** and s9A(4) provides -

> "A Notice of Defence for the purpose of this Part shall be in writing and shall contain—
> (a) a statement of the defendant's intention to defend the matter of the complaint referred to in the summons; and
>
> (b) particulars of his defence."

In addition to those provisions, Rule 73 of the *Magistrates' Courts Rules* 1980 provides that in a Notice of Defence under s90 of the Act, if the defence notified is fraud or illegality, the defendant shall state the particulars of the fraud or illegality. Rule 71 sub-rule (3) provides that the complainant may give notice to the defendant that he requires further particulars (to be specified in the notice) of the defendant's defence, and sub-rule (5) requires that such further particulars shall be given if sought. There was in fact no request for further particulars of its defence given in the instant case.

The first question that falls to be determined is whether the Magistrate was correct in finding that the particulars of defence given by the applicant did not give sufficient notice of the defence of illegality. In my view he was clearly incorrect in this regard. The Particulars of Demand, after alleging that it was a term of the agreement that the defendants agreed to permit the complainant all reasonable access, alleged the specific breach that the defendants denied access to the concrete sprayers on 31st May 1983, and the particulars of defence must be read in the light of that specific allegation. In the particulars of defence, which I have quoted earlier, it is quite apparent that the applicant was alleging that the works that were proposed to be carried out on that day **[11]** were works which were prohibited by the requirements of the *Building Control Act* 1981 or any ordinances thereunder, which include the *Uniform Building Regulations*, and was alleging that the complainant had failed to have the necessary approvals as required by the provisions of the terms of the contract of the relevant statutory authority.

It is true that that defence is couched in terms of an alleged breach of contract on the part of the complainant, but it is also quite clear and quite apparent from those particulars that the defendant was giving notice that it proposed to allege that the work that was attempted to be carried out on that day was being carried out illegally and it was for that reason that he had not permitted it to be done. It seems to me to be entirely inappropriate to subject particulars of defence given in the Magistrates' Court to the degree of scrutiny that is normally given to pleadings in this court as the Magistrate apparently did. Magistrates' Courts are courts of summary jurisdiction which have the task of disposing speedily and expeditiously with matters that are brought before them.

[12] It was clear enough that the legislature has required that notice and particulars of defences such as this one should be given, but it seems to me that it is important that magistrates look at the substance rather than the form of the notice that has been given, and I am confident that anyone looking at the substance of the particulars of defence delivered in this case would be left in no doubt whatever that it was proposed to allege that the complainant had acted illegally or purported to act illegally in pouring the concrete on the day in question. It therefore should have come as no surprise to the complainant, and I have no doubt it did come as no surprise to the complainant, that the defence of illegality was sought to be raised. I do not regard it necessary for separate notice of such defence to be given if that defence is clearly signalled, as it was, in the particulars of defence, and if sufficient particulars are given. In my view sufficient particulars were given because it must have been crystal clear to the complainant that what was being alleged was failure to comply with the provisions of the *Uniform Building Regulations*, Regulation 508 of which provided:

> "Building work for which building approval has been granted shall not be undertaken other than in accordance with that approval and the approved drawings and specifications unless the prior

> written consent of the Co-ordinator, after consultation with the appropriate relevant authority, has been obtained."

It would, in my view, be a travesty of justice to shut a defendant out from a defence of this sort in circumstances such as occurred in this case, and, accordingly, the second ground of the Order Nisi is made out and will be made absolute. **[13]** In support of his argument Counsel for the respondent referred me to the decision of King J in the case of *Cunningham v Cannon* [1983] VicRp 59; [1983] 1 VR 641. That was a case where a defence of illegality was sought to be raised in circumstances where notice of it was not given in writing and it was only given *viva voce* by the defendant's solicitor on the day of the hearing. King J took the view that such notice was insufficient and it did not comply with the requirements of the Act to which I have adverted. It is clear from His Honour's decision that His Honour was moved by the fact that no notice in writing had been given at all and by the shortness of time in relation to which such notice as had been given was given. It seems to me that entirely different considerations apply to the present case, in that notice was given in ample time, notice was given in writing and, in my view, the notice contained sufficient particulars to raise the defence.

Mr Derham, who appeared for the applicant before me, argued that in seeking to pursue the pour on the day in question the respondent was clearly acting in contravention of Regulation 508 of the *Uniform Building Regulations*. I think it is clear that it was. Indeed, it was not argued that the required approval had in fact been given by the relevant authority on the day that the pour was attempted. Mr Derham referred me to a passage which appears in Brooking J's book on *Building Contracts* 2nd edition at p38, where it is pointed out that a contract may be lawfully entered into, as in the present case, but performed in a manner which is contrary to a statute.

The learned author says:

> "In such cases the result may be in doubt. If there is a failure to obtain a necessary permit or licence, or if work is done in excess of the amount permitted by the permit or licence which **[14]** has been obtained the contracts may become a contract prohibited by statute, so as to prevent recovery of any sum or (it may be) a sum in excess of the amount specified in the permit or licence."

At p39 the learned author points out:

> "By cl511 of the (Vic) *Uniform Building Regulations* as previously in force, no variation from or alteration of approved plans and specifications should be made by the builder without the prior consent in writing of the municipal surveyor."

I interpolate that that clause bears a substantial similarity to the present clause 508. The learned author continues:

> "During the course of construction of a house the plans for the roof were altered and a hipped roof was built instead of a gabled roof. To the plans for this alteration the consent in writing of the building surveyor was never obtained. The manner in which the contract had been performed vitiated the whole contract."

In support of that proposition is cited the case of *Bond v Frederick*, which is an unreported decision of Martin J delivered in 1952 and referred to with approval by Herring CJ in *Varley v Spatt* [1955] VicLawRp 67; [1955] VLR 403 at 406. At the date of publication of the 2nd edition of Brooking J's book it appears the *Uniform Building Regulations* had been amended to insert Regulation 512, which provides:

> "No work shall be undertaken except in accordance with approved plans and specifications unless the written consent of the council or its proper officer has been obtained, but nothing in this clause shall be construed as affecting with illegality any contract relating to works for the carrying out of approved plans and specifications by reason only of the fact that any work was undertaken otherwise than in accordance with such plans and specifications if such work otherwise conforms to the provisions of these regulations."

It is not without significance, in my opinion, to note the regulations have now reverted to their earlier form, albeit not in exact terms, and in particular it is not without **[15]** significance to note that that particular proviso no longer appears in the regulations. It seems to me that in those

circumstances there is a very clear indication in the regulations, and this was the view taken in *Bond v Frederick*, that a failure to comply with the regulations vitiated the contract. Accordingly, it seems to me that far from being able to claim damages in respect of what occurred on the day in question by reason of being refused entry to the premises, the respondent was in fact in breach of contract itself, was seeking to perform a contract in a illegal fashion, and that the applicant was entirely justified in refusing admission to the premises in those circumstances. It was put by Mr Styant-Browne on behalf of the respondent that the illegality was a trivial illegality and that if a building owner was permitted to rely upon such an illegality to act in the way that this owner did, that in effect the flood gates would be opened and that building contracts would become unworkable. I do not regard that as a proper characterisation of what occurred. It seems to me that if an owner is faced with the situation where a builder has not obtained the necessary approval from the local authority pursuant to the *Uniform Building Regulations* and is nevertheless intent upon proceeding with the construction operation, the owner is placed in a position of considerable potential jeopardy, either because the authority eventually refuses to approve the variation and requires the construction undertaken to be removed by the owner or because, even if it directs its relevant notice to the builder, the builder is either unable to or unwilling to perform thus leaving the owner to face the potential liability arising therefrom.

[16] I am satisfied that this is hardly a trivial or minor illegality but is a matter which goes to the very essence of the contractual arrangement between the parties and I have no hesitation in finding that it did so. It was put by Mr Derham on behalf of the applicant that in acting as he did he had properly repudiated the contract, but it seems to me on analysis that whether he repudiated the contract or not matters little because the fact of the matter is that he was simply requiring the respondent to perform the works in accordance with the contract and in accordance with law. While I can sympathise with the respondent in the sense that it probably thought that all was well, it seems to me that it saw fit to take the chance on breaching the contract, and breaching the law and while I can understand the circumstances in which it claimed to do so, I can also understand the very real concern which the building owner would have had when faced with the situation that he was faced with.

I, therefore, find that grounds 1(a) (b) (c) (d) and (e) of the Order Nisi are also made out and the order will be made absolute on those grounds also. Accordingly I order that the order of the Magistrates' Court at Sunbury made on 7th February 1984 to which I have adverted, be set aside, and that the respondents pay the applicant's taxed costs, including the costs of the proceedings below.
