30/92

SUPREME COURT OF VICTORIA

MARIJANCEVIC v POOLE NORTON & ASSOCIATES PTY LTD

Nathan J

12 March 1992

CIVIL PROCEEDINGS – DEBT – AGREEMENT BETWEEN PARTIES TO FORGO DEBT FOR MANAGEMENT CONTRACT – AGREEMENT TAPE-RECORDED – DEFENCE OF ACCORD AND SATISFACTION – ELEMENTS OF – WHETHER MADE OUT – WHETHER OBJECTIVE TEST TO APPLY.

PN., an estate agent was retained by M. and another to sell their properties by auction; however, these sales failed leaving an amount of $6,000 owing to PN. in respect of auction expenses and disbursements. During a telephone conversation which was tape-recorded, M. and PN. subsequently agreed that in return for a commission of $20 per week, PN. would manage one of M's properties provided that PN. did not look to M. for payment of the $6,000. Later, PN. sued M. for the $6,000. M. asserted by way of defence that accord and satisfaction had been given; a magistrate rejected the defence and made an order for the amount claimed. Upon appeal—

HELD: Appeal upheld. Order quashed. Complaint dismissed.
(1) The defence of accord and satisfaction involves the purchase of a release from a legal obligation by virtue of entering into fresh legal obligations to discharge the prior obligation supported by the usual contractual requirements such as consideration, intent and certainty.
***McDermott v Black* [1940] HCA 4; (1938) 63 CLR 161, applied.**

(2) In view of the contents of the tape-recorded conversation between the parties and applying the test of an objective bystander, it was plain that in return for commissions, PN. accepted the accord and satisfaction offered by M. Accordingly, the magistrate was in error in rejecting the defence.

NATHAN J: [1] This appeal is an appeal from a decision of a magistrate who rejected an accord and satisfaction defence. The defence was asserted by a vendor and lessor of properties by the name of Marijancevic against the respondent, Poole Norton, who had been his estate agents in respect of aborted sales and a successful tenancy arranged concerning one of two properties.

The case turns on its facts and particularly upon the alleged effect of a conversation I shall go on to detail shortly. Before doing so, I detail some of the history. Marijancevic and a business associate by the name of Carnegie, who was at all times referred to as 'a sort of partner' or 'a quasi-partner' of Marijancevic, were the proprietors of three properties in Carlton. Two adjoining properties in Drummond Street were owned, one by Carnegie and the other by Marijancevic and a third property was owned by Marijancevic in Canning Street. Each retained the services of Poole Norton as selling agents. Three auction sales in respect of all properties failed. Subsequently, in respect of the Canning Street property, Marijancevic entered into negotiations with Poole Norton towards having that property leased.

At a meeting between representatives of Poole Norton, Marijancevic and Carnegie a conversation occurred, and so much was found by the magistrate, that Carnegie would become responsible for paying all of Marijancevic's indebtedness to Poole Norton in respect of their auction expenses and disbursements. Again, and so much appears to have been found by the magistrate Carnegie said at this meeting that he would accept responsibility for the **[2]** payment of Marijancevic's indebtedness.

Thereafter, there occurred on 12 July 1990 a telephone conversation between Marijancevic and McKee of Poole Norton. Marijancevic took the extraordinary step of recording that conversation and both the tape of it and a transcript were exhibited before the magistrate and me. It is necessary to recite the major portion of that conversation. It commenced with a discussion about a management contract in respect of the property at Canning Street to be leased. McKee asked, "How did you go with the Authority?" Marijancevic replied that he had it in front of him. There was some discussion about the appropriate commission to be charged and Marijancevic said that

he wanted to get $300 a week clear on the property. There had been some prior discussion as to the rate of commission to be charged, as to whether it was to be restricted to a letting fee or a management fee. The interest rate to be charged in respect of the latter was higher and after some discussion, Marijancevic said to McKee as follows, "All right. Now look - I'm prepared to let you manage the property but I want it clearly understood that the monies that you say I owe you in relation to the two auctions of my properties, that you are to chase Ed for that" (plainly a reference to Carnegie) "not me. Now, if you agree to that, I'll let you manage the property and we will go ahead". McKee replied, "All right, I accept that". Marijancevic said, "All right, you'll accept that. Good. I'll come down and sign now". McKee said, "All right, well I'll work it out that you get $300 clear". Marijancevic, "All right, you put that on paper", and McKee then said, "I'll give you a **[3]** call later when I've got it all organised". In respect of the call later, Marijancevic asserted before the magistrate there was a subsequent telephone conversation in which the agreement was referred to again and that McKee signalled agreement to it. However, the magistrate chose not to accept that conversation as having occurred in those terms and of course, my decision is constrained by that finding.

I turn now to the assertions of the parties. It is contended on behalf of the appellant that the magistrate failed to consider all relevant matters, namely, that the tape recording was itself an accurate record of the conversation and he failed to take into account, that if it was so, the recorded agreement entered into between the parties which showed an intent to bind themselves in a legal relationship. It is then said that the magistrate took into account irrelevant material, and I will need to turn to the magistrate's finding in a moment to spell out the foundation for this contention, and thirdly, it is contended that the magistrate acted on an incorrect principle of the law, in that he assigned to the intent to enter into a contract to give accord and satisfaction to a prior contractual obligation, a subjective test, rather than looking at the matter objectively. Accordingly, he fell into error.

The defendant, on the other hand, suggests that there was obviously no revealed intent in the conversation to enter into a legal relationship and even if there were, it was one which was surrounded by conditions which were either vague or else depended upon a novation or an assignment to Carnegie of the prior obligations of **[4]** Marijancevic to pay for the auction services delivered by Poole Norton.

I turn to the magistrate's findings. The magistrate apparently said that the evidence supported a view that Marijancevic had attempted to assign his indebtedness to Poole Norton to Carnegie but that had never been accepted by Poole Norton. The magistrate said that McKee on behalf of Poole Norton was apparently prepared to look to Carnegie for payment but not that it should look to him for payment. He said there was no waiver of the debt and hence, no accord and satisfaction. He commented that the words in the tape recorded conversation were consistent with his view of the evidence in their overall context. He was of the view that Marijancevic was clutching at straws, it defied logic to accept a view that in return for waiving a debt of some $6,000 Poole Norton was prepared to accept a management fee of $20 a week that would have taken some six and a half years to discharge irrespective of compounded interest. He said that he found McKee's evidence credible and truthful and he went on to comment, and this is significant, that he found it extraordinary that Marijancevic had taped the telephone calls and that he had not produced the tape of the second telephone call, although an explanation for that had been given.

Marijancevic's defence of accord and satisfaction is a legal defence well known to the law. It may be summarised as being the purchase of a release from a legal obligation by virtue of entering into fresh legal obligations to discharge that prior obligation and one supported by the usual contractual requirements of consideration, intent, certainty, et cetera. The **[5]** principles are set out in *McDermott v Black* [1940] HCA 4; (1938) 63 CLR 161.

The magistrate did hear the tape recorded conversation and did find that it properly reflected and was an accurate reflection of the oral exchange between the parties. I return then to the appellant's arguments. Firstly, the magistrate failed to consider all relevant matters. In my view, the magistrate failed to give the proper consideration to the accuracy of the exchange between the parties, as illustrated in the tape recorded conversation. Secondly, it was said that he took into account irrelevant matters and I find the contention made out. The reference by the magistrate to his sense of outrage or surprise that a conversation should have been recorded is

indicative of his disapproval or opprobrium of that conduct undertaken by Marijancevic. But it offers no reason to colour or disapprove of the contents of the conversations once having found they occurred.

It now becomes necessary to characterise closely the contents of that conversation. In my view, the exchange between the parties in respect of the management conversation was an exchange predicated upon the assumption that legal relationships between the parties were to be arrived at which were to be binding. It is plain from the evidence as a whole that the parties were familiar with land buying and selling and the nature of legal obligations. There was some discussion as to the appropriate rates of commission, there was bargaining. The comments to which I have referred followed a process of negotiation and admit, in my view, of no other conclusion that when the parties **[6]** entered into the following exchange, they did so with the intent of formulating a binding legal obligation between them. The offer extended by Marijancevic was a preparedness to let Poole Norton manage the property, that is the Canning Street property, "but it is to be clearly understood that the moneys that you say I owe you in relation to the two auctions of my properties, that you chase Ed for that, not me". In my view, the offer was qualified by a necessity that Poole Norton clearly understand that their allegation of indebtedness by Marijancevic to them which had been discussed at the earlier meeting I have already referred to was to be put to one side and that if there was to be any recovery by Poole Norton it was not to come from Marijancevic. It was to come from Carnegie, whether or not Carnegie was legally obligated by the prior conversation or in some other set of arrangements between himself to pay, Poole Norton had to accept, or to take over, or to re-negotiate the indebtedness by Marijancevic. Insofar as there was such a claim, Marijancevic said, 'You can do what you like in respect of Carnegie, whether or not you have a legal claim is entirely a matter in effect for you, Mr Poole Norton, but what you cannot do, if you want this management contract, is to look to me for it'. He then went on to recite, 'Now, if you agree to that, I'll let you manage the property and we'll go ahead'.

In my view, this was an attempt to reach an accord and satisfaction which did not depend on any act of novation in respect of the prior indebtedness or any assignment of the debt, by Marijancevic to Poole Norton. There were no undertakings given by Marijancevic to Poole Norton that they could **[7]** enforce the claim they asserted against him by looking to Carnegie. The applicant proffered to allow Poole Norton to manage his property on condition their purported claim against him be discharged. It was the classic case of buying a release. The consideration may or may not have been appropriate to the transaction, but it nevertheless was real and substantive and that was at a commission of $20 per week. It is not for me to proffer or speculate upon other collateral business relationships that may have arisen in the future and whether in fact Poole Norton thought there was some wisdom in throwing a sprat in order to catch a mackerel. They are matters of some intricacy between the parties. I simply observe that the consideration was present and real; it was not illusory.

In my view, when McKee had the arrangement proffered to him, he accepted it and the words, in my view, are unequivocal, "All right, I'll accept that". He was then given the chance to resile and did not. Marijancevic then said, "All right, you'll accept that. Good. I'll come down and sign now". McKee's response was "All right. Well, I'll work it out, and you'll get $300 clear". In my view, the accord and its concomitant satisfaction were proffered and accepted by Poole Norton. Accordingly, the defence was, in my view, patently effective, and determinative.

In my view, the magistrate fell into a legal error which is revealed in the terms of his judgment and questions he asked during the course of the hearing. He acted on an incorrect principle of law. He took the view that it was the subjective intent of Mr McKee which determined whether a contractual arrangement, to give **[8]** substance to the defence, had arisen. In my view, that is not the appropriate test or standard. The proper test is that of an objective bystander hearing, or listening to, the conversation. If such a bystander would have taken the view that McKee's response signalled assent to the business proposition, then that determines the issue. A party cannot be heard to say, 'I had secret but unstated reservations about the transaction, and accordingly, I am not bound by it'.

The principles are established by *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41; (1984) 55 ALR 417; (1984) 58 ALJR 587; 4 IPR 291. The principle of law is a party cannot rely upon his secret thoughts to escape liability if his

representations, reasonably considered reveal that contractual promises were proffered and then accepted. (viz. judgment of the Chief Justice at p61). In this case, the magistrate plainly referred to the views of Mr McKee as to what he had done and what he thought he had done.

They illustrate the magistrate adopted a subjective test. The appropriate criteria is not what Mr McKee thought he had done but what he had actually done as objectively assessed by the reasonable bystander. In my view, the assenting words, "All right, I'll agree to that" could not be more plain; he accepted, as I have already said, the accord and satisfaction offered by Marijancevic. It follows then that the appeal which is based upon the question whether any reasonable magistrate on the evidence before the Court could have concluded that the appellant's defence and accord and satisfaction was not made out, must be answered in the terms that a reasonable magistrate could not have dismissed the defence.

[9] The second question, which is substantively in the same form, should be answered in the same way. The third question whether the magistrate was wrong in law in failing to find that a contract in the nature of an accord and satisfaction was made between the appellant and the respondent must be answered affirmatively, "Yes, the magistrate was wrong in law in finding that the conversations did not amount to an accord and satisfaction".

Perhaps for completeness I should refer to a question the magistrate addressed to Mr McKee during the hearing. He asked Mr McKee whether in expressing acceptance of this arrangement he intended to waive Poole Norton's rights to recover against Marijancevic and McKee replied that he did not so intend. That was a question indicative of the subjective test which the magistrate referred to in his reasons for decisions and it manifests the error.

It follows, then, that the appeal will be upheld. The order of the magistrate below, which I have indicated could not be reasonably entertained by any magistrate, must be quashed. There is no point in returning or remitting this matter to any other Magistrates' Court for further hearing. I will, as I say, quash the order of the Magistrates' Court made on 7 March 1991 and I shall hear counsel as to costs.

APPEARANCES: For the applicant Marijancevic: Mr R McGarvie, counsel. Paul Ferraro, solicitor. For the respondent Poole Norton: Mr A Garantziotos, counsel. Burdon-Smith & Associates, solicitors.
