04/12; [2012] VSC 46

SUPREME COURT OF VICTORIA

TONISSEN-McGRATH v HUGHES & ANOR

Beach J

16, 20 February 2012

CIVIL PROCEEDINGS – CONTRACT – OFFER AND ACCEPTANCE – OFFER BY TWO OTHER SHAREHOLDERS TO BUY SHARES IN A COMPANY – DEALINGS BETWEEN PARTIES CONDUCTED IN A SERIES OF EMAILS – COPIES OF EMAILS SENT TO OTHER PARTY – CONTRACT OF AGREEMENT DRAWN UP BY LEGAL REPRESENTATIVE – IDENTITY OF CONTRACTING PARTIES – INTENTION OF PARTIES TO BE LEGALLY BOUND – CERTAINTY OF TERMS – SHARES TO BE PAID FOR IN EQUAL INSTALMENTS – A NUMBER OF PAYMENTS MADE – REFUSAL TO PAY REMAINDER – FINDING BY MAGISTRATE THAT CONTRACT EXISTED AND BREACHED – ORDER THAT PURCHASERS PAY FOR THE SHARES AS AGREED – SPECIFIC PERFORMANCE – DAMAGES – WHETHER MAGISTRATE IN ERROR.

The three parties to this action were employed by and held shares in a company called Burter Pty Ltd. When one of the parties – Hughes (H.) – left the employment, meetings between the shareholders were held to discuss the sale of H's shares to the other two. Negotiations for the sale of the shares were conducted by H's husband in a series of emails between him and one of the other shareholders (R.) with copies sent to the other party (T-McG). Eventually the parties agreed on a price payable by instalments over 12 months and a written agreement was drawn up which reflected the terms of the agreement between the parties. Ultimately the agreement was not signed because H. was not happy with some of the terms. A number of payments were made but ceased due to financial circumstances. H. claimed payment from the other two shareholders for the amount owing and the claim was allowed by the Magistrate plus costs. Upon appeal—

HELD: Appeal dismissed.

1. The shareholders' agreement attached to the email of 4 November provided that H. would sell her shares in Burter and the purchasers would be R. and T-McG. Recital B provided that "The purchasers have agreed to buy and the vendor has agreed to sell the vendor's shares in the company [Burter] on the terms hereinafter set out". The terms provided that the purchase price of $90,000 would be paid by 12 equal monthly instalments of $7,500 payable on the first of each month commencing on 1 November 2009 and that share transfers to R. and T-McG. would be executed and released to them over time as the purchase price was paid.

2. The unsigned shareholders agreement set out the terms as R. understood and represented them to be. Nothing in the subsequent emails suggested that the fundamental terms in the unsigned document were relevantly disputed. To the contrary, the evidence disclosed a meeting of the minds where it was not thought necessary for lawyers to have any further involvement. The fact that H. gave evidence that she did not sign the shareholder agreement because it contained some terms with which she was not happy did not tell against the conclusions reached by the Magistrate. By the end of 23 November 2009, the purchase price had been agreed, the fact that the purchase price was payable in 12 monthly instalments was agreed, the parties to the agreement were known and the provision of progressive share transfers was agreed.

3. There was evidence which the Magistrate was entitled to accept and which, having regard to the relevant principles, entitled his Honour to conclude that the agreement contended for by H. came into existence following the emails of 23 November 2009. The evidence was in the emails referred to and the conduct of the parties. The ultimate conclusions made by the Magistrate were open.

4. Accordingly, it followed that the appellant failed to make out the errors of law as alleged.

BEACH J:

Introduction

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 on a question of law, from orders made in the Magistrates' Court sitting at Ringwood on 14 June 2011. The claim in the Magistrates' Court was a claim by Ms Jeanie-Maree Hughes against Mr James Raistrick and Ms Samantha Tonissen-McGrath. Ms Hughes, as plaintiff, alleged that Mr Raistrick and Ms Tonissen-McGrath had breached an agreement to purchase certain shares from her. Ms Hughes contended that the sum of $52,500 was outstanding. She sought specific performance of the

agreement alleged. Alternatively, Ms Hughes sought damages or the sum of $52,500. She also sought interest and costs.

2. Mr Raistrick and Ms Tonissen-McGrath defended Ms Hughes' claim in the Magistrates' Court, contending, amongst other things, that they were not party to any agreement with Ms Hughes concerning the sale of her shares. The trial of the proceeding was heard on 30 and 31 May and 1 June 2011 by Cashmore M. On 14 June 2011, his Honour delivered judgment[1] and made orders in favour of Ms Hughes and ordered Mr Raistrick and Ms Tonissen-McGrath to pay Ms Hughes the sum of $52,500, interest fixed at $5,249.28 and costs fixed in the sum of $11,329. His Honour also ordered Mr Raistrick and Ms Tonissen-McGrath to pay Ms Hughes' costs of an application made on 18 April 2011 fixed in the sum of $1,132. Additionally, his Honour ordered that upon payment of the judgment sum, Ms Hughes was to transfer, at the direction of Mr Raistrick and Ms Tonissen-McGrath, the shares that were the subject of the agreement.

3. In this proceeding, Ms Tonissen-McGrath, the appellant, appeals against the orders made against her by Cashmore M on 14 June 2011. The appellant seeks orders that the appeal be allowed and judgment be given in her favour. The grounds of appeal are:

> (1) The Magistrate misapplied the law regarding formation of contracts in finding that an enforceable contract had been concluded between the appellant, the first respondent [Ms Hughes] and the second respondent [Mr Raistrick] and should have found instead that no contract had been formed due to:
> (a) lack of intention by the parties to be legally bound;
> (b) lack of offer and acceptance; and/or
> (c) uncertainty.
>
> (2) The Magistrate misapplied the law regarding damages by finding that the quantum of the plaintiff's damage for breach of contract was not dependent upon the value of her shares at the time of breach and should have found instead that the plaintiff's damage was the sum of $52,500 less the value of the shares at the time of the breach of contract.
>
> (3) There was no evidence upon which the Magistrate could find that the plaintiff's damages for breach of contract was $52,500 as there was no admissible evidence adduced of the value of the plaintiff's shares at the time of the breach of contract.

4. Mr Raistrick, the second respondent (and first defendant in the Magistrates' Court proceeding below), took no part in the appeal.

Background facts

5. The shares that were the subject of the alleged agreement were in a company named Burter Pty Ltd. Burter was a company that conducted a business of buying and selling real estate in the Yarra Valley area. Ms Hughes worked for Burter from about February 2006 to February 2008. At the relevant time of the dispute between the parties, there were three shareholders in Burter: Ms Hughes held 25 shares, Mr Raistrick held 38 shares and Ms Tonissen-McGrath held 37 shares. At all relevant times from March 2004, Mr Raistrick was the sole director and secretary of Burter.

6. As was recited by the Magistrate in his reasons, Ms Hughes worked for Burter from about February 2006 to February 2008. There was a falling out and meetings were held to discuss, amongst other things, the sale of Ms Hughes' shares. The issue was not resolved and Ms Hughes' husband, Mr Allan Hughes, took up negotiations on her behalf. On 7 September 2009, Mr Hughes sent an email to Mr Raistrick in the following terms:

> "Hi Jim,
> It's been some time since this was discussed and it would be fair to say that it is long overdue for resolution. Moving forward, how do you want to approach it?
> Regards,
> Allan Hughes"

7. On 1 October 2009, Mr Raistrick sent Mr Hughes an email in the following terms:

> "Hi Allan,
> The last communication I have received regarding this was that Jeanie-Maree was considering an offer to sell shares and settle the matter.
> We believe the best way to approach this is for you to make an offer to us and we will respond.

Regards,
Jim Raistrick"

8. Later on 1 October 2009, Mr Hughes replied by email to Mr Raistrick:

"Hi Jim,
Thanks for a very prompt and positive response. Per your request, $90,000.
Regards,
Allan Hughes"

9. On 2 October 2009, Mr Raistrick responded to Mr Hughes with an email copied to Ms Tonissen-McGrath. The email identified two things that were said to be "important to consider in our making an offer to purchase the shares" (emphasis mine). The email went on:

"With these things in mind I advise you that *Samantha [Ms Tonissen-McGrath] and I will investigate our own financial positions and make you an offer* within 14 days *that we would be able to complete to settle* this matter." (emphasis mine)

10. Mr Raistrick's email of 2 October 2009 was responded to by Mr Hughes on the same day, and then Mr Raistrick sent another email on 2 October to Mr Hughes. This email was also copied to Ms Tonissen-McGrath. In that email, Mr Hughes said:

"Moving on; as mentioned in my last email, we will investigate our ability to purchase the shares and settle this matter with you and get back to you within 14 days."

11. On 16 October 2009, Mr Raistrick sent an email to Mr Hughes copied to Ms Tonissen-McGrath. The email provided:

"Hi Allan,
We have investigated our ability to purchase the shares and resolve this matter and are prepared to offer to pay $90,000 over a period of 12 months, consisting of $7,500 per month.
Please let me know if this will be acceptable and we will work out the semantics of how this is to occur.
Regards,
Jim Raistrick"

12. The next day (17 October 2009), Mr Hughes sent an email to Mr Raistrick in the following terms:

"Hi Jim,
For this to go forward it will require a high level of trust so we need to start that process now!!!
On that basis what assurances do we have that you will fulfil your commitments and comply with the intent of your offer. Do we need to take the undesirable/expensive option and involve legal representatives?

I'm a tad disappointed it has taken 14 days to get to this point. I would've thought that such a determination could've been arrived at within a couple of days.
Regardless, I confirm that we accept your offer provided that:

- The agreement commences 1st November 2009.
- Monthly payments attract interest equal to the prevailing average variable rate (currently around 5.5%).
- Twelve consecutive monthly payments of $7,500 plus interest shall be paid with the first being due on the 1st November 2009.
- Monthly payments are due on the first day of the applicable month.
- Late payments shall attract penalty interest (as prescribed by current legislation plus 5%) on the full amount.
- Any payment in default greater than 14 days shall constitute default of this agreement and require the total balance to be paid + interest on the full amount.
- All costs associated with any default are to be paid by you.
- Any/all costs associated with formalising an agreement are to be paid by you.
- Jeanie-Maree retains full shareholder entitlements until all monthly payments have been completed.
-

It would be fair to say that this is highly unusual considering the amount hence I need to make it very clear that I will not entertain nor accept any non-compliance whatsoever.

> Jim, I want this resolved by COB Monday 19th October 2009. If you wish to negotiate further, please do so as a matter of urgency.
> Regards,
> Allan Hughes"

13. Half an hour later on the same day (17 October), Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email contained the following:

> "I won't go into why it has taken so long to get to this point. Regarding the provisions you have laid out below I can advise the following:
>
> We are prepared to have legal contract drawn up for your consideration where bank cheque for $7,500 could be collected from G.A. Black's office in Yarra Junction on the first of each month where an exchange of two shares would be signed across. On the twelfth payment being due, the $7,500 bank cheque could be collected for the signing across of three shares (thereby making it 25 shares in total). We are not offering any interest but we are prepared to place a clause regarding the 14 days default as long as this default is not because of a collection issue not caused by us. Jeanie-Maree would have a shareholder entitlements (sic) (fully frank dividends) paid only on the shareholding as at 30th June 2010 if there are any payments due.
>
> Look forward to getting the ball rolling to complete this matter.
> Regards,
> Jim Raistrick"

14. Two and a half hours later, Mr Hughes responded by email:

> "Hi Jim,
> Payment shall be via EFT to a nominated account. We will advise when appropriate.
> I'm sure Greg can accommodate payment, shareholder and default requirements within the contract.
> Looks like we're there. Look forward to reviewing Greg's handiwork.
> Regards,
> Allan Hughes"

15. On 21 October 2009, Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email was in the following terms:

> "Hi Allan,
> Just letting you know that Greg Black has started work on the contract and expects that he will have a draft ready early next week. Feel free to contact him if there is anything you would like to clarify.
> Regards,
> Jim"

16. On 31 October 2009, Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email provided:

> "Hi Allan,
> I spoke again with Greg yesterday but he has not yet completed the contract. He suggested that he would have it next week but we are not happy to wait. As a show of good faith we will deposit the first payment to your nominated account tomorrow under the understanding that the terms we discussed would be central to the agreement. Please let us know if you find this acceptable.
> Regards,
> Jim Raistrick"[2]

17. On 4 November 2009, Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email attached a document headed "Shareholders agreement". The substance of the email was as follows:

> "Please see attached PDF document regarding the contract that Greg Black has drawn up. If you review and agree we will arrange."

18. The shareholders agreement attached to the email of 4 November provided that Ms Hughes would sell her shares in Burter and the purchasers would be Mr Raistrick and Ms Tonissen-McGrath. Recital B provided that "The purchasers [Mr Raistrick and Ms Tonissen-McGrath] have agreed to buy and the vendor [Ms Hughes] has agreed to sell the vendor's shares in the company

[Burter] on the terms hereinafter set out". The terms provided that the purchase price of $90,000 would be paid by 12 equal monthly instalments of $7,500 payable on the first of each month commencing on 1 November 2009 and that share transfers to Mr Raistrick and Ms Tonissen-McGrath would be executed and released to them over time as the purchase price was paid. The shareholders agreement provided for the execution of it by Mr Raistrick, Ms Tonissen-McGrath and Ms Hughes.

19. On 5 November 2009, Mr Hughes responded by email to Mr Raistrick, copied to Ms Tonissen-McGrath. The email provided:

> "Further to my last .. it strikes me strange that we have established a more than reasonable rapport with regard to this matter but we pursue a process that conflicts with that rapport, a process that raises issues that conflict with what we have agreed and resolved.
>
> It would be fair to say that we have been able to resolve any issue raised in a reasonable manner and with equal equity to each party's interests hence .. I think it strange that we would deviate from that. May I suggest that we review our current status on that basis and continue as we have. I am more than satisfied and comfortable with the current arrangement and am more than happy to resolve any outstanding issues as we have previously.
>
> I think at the moment the only issue to be resolved is the reasonable transfer of shares from us to you ... I have no problem if you wish to put pen to paper and draft from your point of view.
> Please be advised that it is accepted that each payment we acknowledge that two shares are transferred to your consideration and ownership.
>
> At the end of the day .. with each party being in possession of each other's communications, there is sufficient to establish each other's intent in the point of Law.
> Please consider and let me know."

20. On 23 November 2009, Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email was in the following terms:

> "I have read and thought about your emails and I am happy to have a basic arrangement where I send you share transfer forms that you can have signed them (sic) post back to me once you have sighted deposit into your account each month (sic) the sum of $7,500. If you want to proceed on this basis I will post to you share transfer documents on your reply to this email."

21. A little over two hours later on the same day (23 November 2009), Mr Hughes responded with an email to both Mr Raistrick and Ms Tonissen-McGrath:

> "Yes!!! ... I think that will work very well.
> If you are happy with scanned returns then that will make it that much simpler .. and provide a form of traceability.
> Not fussed either way, 'snail mail' or 'email'.
> Now, on that basis, could you please forward transfer forms for Payment #1. Albeit we are working on 'good faith' and the transfer has been well documented, it is probably and properly appropriate that you have an official transfer."

22. There were then emails passing between the parties in February and March concerning forms to be signed by Ms Hughes and transfers of the monthly amounts. In all, five payments of $7,500 were made to Ms Hughes for the months of November 2009 to March 2010 inclusive.

23. On 24 March 2010, Mr Raistrick sent an email to Mr Hughes, copied to Ms Tonissen-McGrath. The email provided:

> "We had a meeting to discuss our financial position last night and have found that we are unable to meet the next three months' payments of $7,500. We propose to suspend our agreement for three months and resume the payments to Jeanie-Maree July 1st. Please note that it is our expectation that the company will not be paying dividends this year for the same reason."

24. Immediately, three matters may be noted:

> (a) First, the discussion referred to in the email of 24 March 2010 was clearly a discussion between Mr Raistrick and Ms Tonissen-McGrath.
>
> (b) Secondly, the reference to "our expectation" is clearly a reference to the expectations of Mr Raistrick

> and Ms Tonissen-McGrath who, for the purpose of the email, were to be differentiated from "the company [Burter]" as referred to in the last sentence of that email.
>
> (c) Thirdly, the email of 24 March 2010 is consistent with the email of 2 October 2009 (in which it is stated that Mr Raistrick and Ms Tonissen-McGrath were investigating their own financial positions to make Ms Hughes an offer) and the unsigned shareholders agreement, upon which the emails of 5 and 23 November 2009 were predicated.

25. The email of 24 March 2010 provoked further emails between the parties in March and April 2010. On 23 June 2010, Mr Raistrick sent an email to Mr Hughes in the following terms:

> "Unfortunately I am unable to comply with my email of 24th March, but my intention is still to honour the terms of our agreement. I know that despite our differences of the past that you have maintained discretion in our dealings so I advise you that the reason that I have not been able to meet these payments is because the company has a tax debt that I have been working through. It is my expectation that this will be sorted out within four weeks and I will make the payment to Jeanie-Maree then."

The trial below

26. At trial, the plaintiff (Ms Hughes) contended that the defendants (Mr Raistrick and Ms Tonissen-McGrath) were in breach of the contract to which they were parties. The plaintiff's case was that the defendants had agreed to purchase her shares in Burter for the sum of $90,000, payable in monthly instalments of $7,500, commencing on 1 November 2009. The plaintiff contended that it was a term of the agreement that upon each monthly payment she would transfer two of her shares to the defendants, with the last three shares being transferred at the time of the last payment. Whilst the agreement proceeded satisfactorily from November 2009 to March 2010, the defendants ceased performing their obligations under the agreement from 1 April 2010. The plaintiff sought specific performance of the remainder of the agreement; alternatively, the balance of the contract price – $52,500.

27. The defendants denied the existence of any relevant agreement, and specifically any agreement to which they were parties. The defendants contended that if there was any agreement, it was an agreement between Ms Hughes and Burter whereby Burter agreed to buy back Ms Hughes' shares. That any agreement Ms Hughes entered into was entered into with Burter was said to be supported by the use from time to time of the expression "relinquish the shares".

28. At trial, evidence was given by the three parties, Ms Hughes, Mr Raistrick and Ms Tonissen-McGrath, and also by Mr Hughes. Each of the four witnesses gave evidence consistently with the position for which he or she contended. Various documents were tendered, including the emails to which I have already referred, the unsigned shareholders agreement and receipts signed by the plaintiff in 2010 "relinquishing" individual shares in Burter. Lengthy submissions were made to his Honour in relation to both the facts and the law.

29. Of importance, so far as the appellant is concerned, was evidence given by Ms Hughes in cross-examination that she did not sign the shareholders agreement because it contained some terms that she was not happy with.[3] However, when one examines Ms Hughes' evidence in detail one sees that her concerns were limited to matters that might fairly be described as peripheral when compared to the essential terms of the agreement. Specifically, the terms which Ms Hughes did not like related to defaults having to be dealt with through the purchasers' solicitors (clause 5 of the unsigned shareholders agreement) and the requirement that signed share transfers for all of the shares had to be given to the same solicitors before the purchase price was paid (clause 3).[4] As the emails subsequent to 4 November 2009 show, these clauses were not pursued by Mr Raistrick.

30. In her evidence, Ms Tonissen-McGrath did not deny receiving (and being aware of) the various emails into which she was copied. She gave evidence that she became increasingly angry at Mr Raistrick for sending emails which, at the very least, appeared to potentially impose obligations upon her in respect of the contemplated purchase of the plaintiff's shares. However, notwithstanding her increasing levels of anger, Ms Tonissen-McGrath never responded by email (or communicated in any other way) to Ms Hughes her contended position that Mr Raistrick was acting for himself or Burter, and that she was not personally involved in whatever arrangement was being contemplated or consummated.

The judgment below

31. On 14 June 2011, his Honour delivered judgment. His Honour identified the main issues in the proceeding as follows:

> "(1) Has the plaintiff established on the balance of probabilities that a concluded enforceable agreement came into existence late in November 2009 between the plaintiff and the defendants?
>
> (2) In the alternative, has the plaintiff established the agreement against either of the defendants?
>
> (3) What were the terms of any such agreement and has any term been breached?
>
> (4) If so, what measure of damages or relief is the plaintiff entitled to?"

32. No issue was taken by the appellant with his Honour's identification of these issues. Indeed, Senior Counsel for the appellant submitted that his Honour was entirely correct in identifying these issues.

33. In a careful and, in my view, appropriately detailed manner, his Honour analysed the evidence and concluded that by the time of the emails sent on 23 November 2009 "there was a meeting of minds by the three parties constituting the agreement and the agreement basically reflected the basic terms of [the unsigned shareholders agreement]". Additionally, after a detailed analysis of the evidence on the issue of authority, his Honour concluded that Mr Raistrick had actual authority from Ms Tonissen-McGrath. Along the way to his conclusions, his Honour said that he found Ms Hughes and Mr Hughes to be "honest and truthful witnesses, not gilding the lily". Whereas, in respect of the defendants, his Honour said "both defendants gave unsatisfactory evidence on the critical issues, would say or do anything to escape personal liability or attribute wrongly a responsibility to the company [Burter]".

Ground 1

34. In ground one, complaint is made that his Honour erred in law in finding that an enforceable contract had been concluded between the parties. The appellant contended that his Honour should have found that no contract had been formed due to a lack of intention by the parties to be legally bound and/or a lack of a relevant offer and acceptance and/or relevant uncertainty as to the terms of any alleged agreement. There is nothing in these complaints. It was well open to his Honour to conclude that by 23 November 2009, there was a concluded agreement of sufficient certainty between the parties whereby Mr Raistrick and Ms Tonissen-McGrath were contractually bound to purchase Ms Hughes' shares in Burter for the sum of $90,000 – which sum was to be paid by monthly instalments of $7,500.

35. Notwithstanding the appellant's submissions as to lack of intention to be legally bound, lack of a relevant offer and acceptance and uncertainty, there can be little doubt, in my view, on the evidence led before the Magistrate that there was a concluded agreement as at 23 November 2009. The only real issue before his Honour was whether Ms Hughes was contracting with the defendants (as she contended) or Burter (as the defendants contended) or Mr Raistrick alone (as the appellant contended was a possibility, during the hearing of this appeal). That said, it is of course to be remembered that his Honour's conclusions of fact need merely to have been open for any attack on them made by the appellant to fail.

36. Ultimately, the appellant's arguments on ground one crystallised into a contention that there was no evidence upon which the Magistrate could have concluded that there was an agreement between Ms Hughes as vendor and Mr Raistrick and Ms Tonissen-McGrath as purchasers. In attempting to make good this submission, the appellant contended that Ms Hughes had abandoned any reliance upon the unsigned shareholders agreement during the hearing before the Magistrate. I was taken to two passages in the transcript.[5] It was said that there were other passages and that these, in combination with the two I was taken to, demonstrated this abandonment. I reject these submissions. A reading of the whole of the transcript demonstrates that the case at trial for Ms Hughes always relied on the unsigned shareholders agreement as part of the chain of emails set out above. Further, reference to the unsigned shareholders agreement is, at the very least, necessary to give context and meaning to the emails sent on 5 and 23 November 2009.

37. In the course of his submissions, Senior Counsel took me to the following exchange between

counsel for Ms Hughes and the Magistrate in the opening of the plaintiff's case below and the following questions and answers in Ms Hughes' evidence:[6]

> "COUNSEL: Presumably we could, but the precise figure, Your Honour, we say isn't important. What matters is there was an agreement as to price between the plaintiff and the defendant (sic), and that was for $90,000 and it was to be paid over 12 months.
> HIS HONOUR: Was that in writing, this agreement?
> COUNSEL: The emails constitute the agreement, yes, Your Honour. We say the agreement - - -[7]
> ...
> CROSS-EXAMINING COUNSEL: The agreement is not constituted by the shareholders agreement?---That's right.
> As you say, and as I put to you and you've accepted, the agreement was constituted by the email exchange and that email exchange was in the main between your husband and the first defendant [Mr Raistrick] copied onto the second defendant [Ms Tonissen-McGrath]?---That's my understanding."[8]

38. In my view, nothing said by Ms Hughes' counsel in opening (or indeed at any other point in the trial) contained any abandonment of Ms Hughes' reliance upon the unsigned shareholders agreement as part of the chain of emails leading to the emails of 23 November 2009. Similarly, it is not a fair construction of Ms Hughes' evidence that she abandoned reliance upon the document in the way I have described. The unsigned shareholders agreement set out the terms as Mr Raistrick understood and represented them to be. Nothing in the subsequent emails suggests that the fundamental terms in the unsigned document were relevantly disputed. To the contrary, the evidence disclosed a meeting of the minds where it was not thought necessary for lawyers to have any further involvement. The fact that Ms Hughes gave evidence that she did not sign the shareholder agreement because it contained some terms with which she was not happy does not tell against the conclusions reached by the Magistrate. By the end of 23 November 2009, the purchase price had been agreed, the fact that the purchase price was payable in 12 monthly instalments was agreed, the parties to the agreement were known and the provision of progressive share transfers was agreed.

39. During the course of the appellant's submissions, considerable attention was given to the different uses of the words "I", "we" and "us" in the relevant emails of 2009 in an attempt to show that in truth, Ms Hughes was dealing with (and entered into any agreement with) Burter; alternatively, that there was such uncertainty arising from the relevant emails as to deny the existence of an agreement to which Ms Tonissen-McGrath was a party. These submissions must also be rejected. A fair reading of the emails sent between the parties in October and November 2009 discloses objectively that Mr Raistrick was negotiating and contracting on behalf of himself and Ms Tonissen-McGrath. Ms Tonissen-McGrath was copied in on all relevant emails. The emails disclosed on their face that she was a party to the arrangements being negotiated and the ultimate contract.[9] Indeed, consistently with her evidence as to her increasing anger with Mr Raistrick (but which evidence was rejected by the Magistrate), Ms Tonissen-McGrath was aware that the effect of the emails was to commit her (with Mr Raistrick) to buying Ms Hughes' shares.

40. In the appellant's written submissions, the appellant contended:[10]

> "Each subsequent email[11] (prior to 23 November 2009 at least) is a counter offer, even where there is purported acceptance, as additional terms or modification to offered terms are proposed. The terms of [the shareholders agreement] were not signed by any party, nor were they otherwise accepted. Accordingly, each offer and counter offer was in turn rejected, including the offer contained in [the unsigned shareholders agreement].
>
> The email from the second respondent to the first respondent's husband dated 23 November 2009 is a fresh offer. Even this offer contained sufficient essential terms so that any acceptance would form an enforceable contract, it is an offer which changes the terms as to parties as it is made by the first respondent and uses first person singular pronouns exclusively, in contradistinction to the first person plural generally used in previous offers made by the second respondent. Exhibit F consists of 'transfer forms' which were subsequently signed by the appellant and addressed only to the second respondent ...".

41. There is nothing in these submissions. Properly construed, Mr Raistrick's email of 23 November 2009 did not purport to change the identity or identities of the parties to the agreement or the arrangements then under discussion. Having regard to the fact that it was Mr Raistrick who was taking responsibility for negotiating and communicating on behalf of both himself and

Ms Tonissen-McGrath, there is nothing surprising in the use of the first person singular pronoun in Mr Raistrick's email of 23 November 2009.

42. In argument, Senior Counsel for the appellant accepted (correctly in my view) that ground one came down to a contention that if the Magistrate applied basic contractual principles concerning the issue of whether particular parties intend to be legally bound, the issue of the existence (or otherwise) of a relevant offer and acceptance and the issue of uncertainty (or otherwise) in respect of an alleged agreement, then there was no evidence upon which his Honour could find that the contract contended for by Ms Hughes in this case ever came into existence. Indeed, it was accepted ultimately that the appellant's case was in essence an attack on his Honour's conclusion that a contract (which the appellant contended was entered into between Ms Hughes and Burter) was in fact a contract to which the appellant was a party.[12] However, the short point is that the present case is not a "no evidence" case so far as the finding that the appellant was a party to the contract alleged by Ms Hughes. There was evidence which the Magistrate was entitled to accept and which, having regard to the relevant principles, entitled his Honour to conclude that the agreement contended for by Ms Hughes came into existence following the emails of 23 November 2009. The evidence was in the emails to which I have already referred and the conduct of the parties described above. The fact that the appellant could point to other evidence (which other evidence was, I note, dealt with in the Magistrate's reasons) tending to support a conclusion favourable to her case is beside the point. The ultimate conclusions made by the Magistrate were open.

43. It follows that the appellant has not made out the errors of law alleged in ground one. Accordingly, ground one must fail.

Grounds 2 and 3

44. The relief granted by the Magistrate was relief akin to specific performance. Mr Raistrick and Ms Tonissen-McGrath were ordered to pay the balance of the purchase price then outstanding and, in exchange, Ms Hughes was required to transfer the balance of her shares. In ground two, complaint is made that the Magistrate should have found Ms Hughes' damages to assess in the sum of $52,500 (the balance of the purchase price) less the value of the shares at the time of the breach of contract. In ground three, complaint is made that there was no admissible evidence adduced as to the value of Ms Hughes' shares at the time of the breach of contract. These complaints are without merit.

45. The Magistrate, having found Mr Raistrick and Ms Tonissen-McGrath in breach of the contract alleged by Ms Hughes, was more than entitled to grant the relief he granted. In making the orders he did, his Honour did not purport to assess damages. His Honour exercised a discretion that was open to him. There was no error in the exercise of that discretion. With respect, in my view, the relief granted by his Honour was entirely appropriate having regard to the conclusions he made on the issue of liability. It follows that grounds two and three must be rejected.

A further complaint

46. During the course of the hearing of this appeal, Senior Counsel for the appellant also made complaint about his Honour's reasons. The usual authorities were relied upon.[13] There is nothing in this complaint. With respect, in my view, his Honour's reasons (as well as being careful and considered) disclosed a path of reasoning and enabled the appellant to know the reasons why she lost the case. No application was made to amend the grounds of appeal to add a complaint in respect of inadequate reasons. Having heard what could be said in support of the appellant's complaints as to inadequacy of reasons, I would have rejected any application to amend on the basis that any such proposed ground was foredoomed to fail. Further, and in any event, success in respect of any such ground would not have entitled the appellant to the judgment she sought in her notice of appeal.

Conclusion

47. The appeal must be dismissed.

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[1] His Honour's reasons for judgment were given orally and then transcribed.

[2] It appears this email may have been a response to an email from Mr Hughes to Mr Raistrick sent ten minutes earlier saying: "Jim how is this progressing???".

[3] T123.22 of the trial below.

[4] See T65.24 – 66.5.
[5] Set out below (being T9.7 - .14 and 83.6 - .12 of the transcript of the trial below).
[6] These are the two passages referred to in the previous paragraph.
[7] T9.7 - .14 of the trial below.
[8] T83.6 - .12 of the trial below.
[9] See in particular the first of the three emails sent on 2 October 2009 and the emails of 4, 5 and 23 November 2009.
[10] Paragraphs 10 and 11 of the appellant's written submissions dated 23 September 2011.
[11] In the previous paragraph of the appellant's written submissions (paragraph 9) there is reference to the email of 16 October 2009. For present purposes, as will be seen in the reasons below, it does not matter whether the reference to "each subsequent email" is limited to emails after 16 October 2009 or all emails subsequent to the first relevant email.
[12] T1.5 – 2.25.
[13] Cf *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279-280 and 282; *Fletcher Constructions Australia Limited v Lines MacFarlane & Marshall Pty Ltd* [2001] VSCA 167; (2001) 4 VR 28, 35 [18]; *Hunter v Transport Accident Commission & Anor* [2005] VSCA 1, [21]; *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317, [38] and *Transport Accident Commission v Kamel* [2011] VSCA 110, [71].

APPEARANCES: For the appellant Tonissen-McGrath: Dr JD Wilson SC with Mr SP Matters, counsel. TSA Lawyers. For the first respondent Hughes: Mr KJ Naish, counsel. Alpass & Associates, solicitors. No appearance of or for the second respondent Raistrick.
