06/08; [2007] VSC 506

SUPREME COURT OF VICTORIA

CYNDAN CHEMICALS v ULTRA WASH HOLDINGS

King J

26 April, 7 December 2007

CIVIL PROCEEDINGS – CLAIM FOR RECTIFICATION OF TILES DAMAGED BY CLEANING PRODUCT – EVIDENCE GIVEN BY EXPERTS ON BOTH SIDES – PREFERENCE BY MAGISTRATE FOR ONE OVER THE OTHER – WHETHER MAGISTRATE IN ERROR – TWO QUOTES PRODUCED FOR REPLACEMENT OF THE TILES – QUOTES TENDERED AS AN EXHIBIT WITHOUT OBJECTION – WAIVER ON ISSUE OF ADMISSIBILITY – MAGISTRATE ENTITLED TO RELY ON THE QUOTES TENDERED – WHETHER MAGISTRATE IN ERROR.

CC supplied a cleaning product to UWH to clean tiles at UWH's car wash. The product was used for some months when UWH was informed that the cleaning fluid contained hydrofluoric acid which could cause the tiles to be etched and damaged. A claim for the damage was issued by UWH and at the hearing, experts were called by each party. In relation to quantum, UWH tendered two quotes for the replacement of the tiles and these were tendered as an exhibit without objection. In making an order on UWHs claim, the magistrate accepted the evidence given by the expert called by UWH, and found that the tiles would have been greatly affected by the application of hydrofluoric acid. In relation to quantum, the magistrate acted on the evidence of the quote and the evidence of future loss and made an order in favour of UWH. Upon appeal—

HELD: Appeal dismissed.

1. The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law. There are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions or ultimate findings of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts so found. The law in respect of findings of fact being challenged as questions of law, is well established. In a case where an appeal lies on matters of law, the failure of a Judge to identify why the evidence of one witness is preferred to another may, in an appropriate case constitute an error of law.

***Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246; (2000) 115 A Crim R 528; and**

***Beale v GIO of NSW* (1977) 48 NSWLR 440, followed.**

2. The two experts were in conflict, and the magistrate clearly stated the findings of the expert called by UWH that she accepted and upon which she relied. This was a question of fact and in those circumstances the requirement for the provision of reasons as to findings of fact by a magistrate is less rigorous than in a case in which an appeal lies on questions of fact. The conclusion that the magistrate reached was clearly open on the evidence.

3. In relation to quantum, once the hearsay documents were tendered without objection, their contents were then capable of being used by the magistrate subject only to weight. By the conduct of CC's counsel at the hearing, there was a waiver of admissibility of the documents and their contents. Accordingly, it was open to the magistrate to rely on the quotations as to the cost of the replacement tiles and the claim in relation to future loss.

KING J:

1. This is an appeal from a finding by the Magistrate, that the appellant pay to the respondent the sum of $52,989.80, being the full amount claimed for the rectification of tiles damaged by the product supplied to the respondent by the appellant, for the cleaning of tiles, in the respondent's car wash premises.

2. The respondent claimed that it purchased cleaning products from the appellant including a product called Cyndan Specialised Acid Wash, which it used to clean the tiles at the car wash owned

and run by the respondent, and that they used the cleaner on a weekly basis for approximately 20 weeks together with a cream cleanser, also supplied by the appellant, from approximately January 2001 until June 2001.

3. The respondent claimed that the use of the cleaning product, Cydan Specialised Acid Wash, caused damage to the tiles as a result of the product containing a quantity of hydrofluoric acid. The respondent further claimed that the appellant, through its sales representative, represented that the product contained no such acid when asked by the respondent in January of 2001.

4. The tiles, the subject of the claim, were imported Spanish tiles with a high gloss, which had been installed at the time of the building of the commercial car wash in 1994, and accordingly had been in use for a period of approximately seven years at the time of the purchase of the cleaner from the respondents. The issue between the parties was whether the cleaner caused damage to the gloss on the respondent's tiles.

5. The gloss tiles were on the walls of each of the six washing bays from the base level to a level approximately 2.4 metres high in respect of the partitioning walls and 6.5 metres high in respect of the end walls. The outside of the end supporting walls was not tiled, but painted.

6. In respect of the cases that were argued in the Magistrates' Court before her Honour there were many areas of disputed facts. The appellant disputed that any warranties were made about the product containing no hydrofluoric acid, claimed that a material data sheet had been provided on the day of purchase to the respondent which clearly stated that the acid wash contained hydrofluoric acid. The appellant further claimed that the product had been incorrectly used by the respondent, and that any deterioration of the tiles resulted from a gradual build up of waxes and other products deposited from the washing of cars over the 7 year period of use. The appellant claimed that the tiles were not in fact damaged by the acid wash, but were capable of being properly cleaned and if that had been done a large amount of the gloss shine on the tiles would be restored.

7. On the 22 August 2006 Master Efthim determined that there were two questions of law to be determined, being:

> (1) Did the learned Magistrate err in holding that there was sufficient evidence as to the costs of rectification of alleged defects caused by the Plaintiff's product to justify an award for substantial damages? And
>
> (2) Did the learned Magistrate err in preferring the expert evidence adduced by the defendant to that adduced by the Plaintiff when the conclusions of both experts were substantially the same?

8. The grounds for appeal upon which the appellant relied were:

> (1) Whether it was open in the absence of any, or any adequate evidence as to loss and damage to award anything other than purely nominal damages.
>
> (2) Whether there was any evidence upon which the learned Magistrate could prefer the expert evidence adduced by the plaintiff to the expert evidence adduced by the defendant.

The law in respect of hearings pursuant to s109 of the *Magistrates' Court Act*

9. Under s109 of the *Magistrates' Court Act*, the right of appeal of a party to a civil proceeding before a magistrate to the Supreme Court is confined to an appeal on a question of law. In those circumstances the requirement for the provision of reasons as to findings of fact by a magistrate is less rigorous than in a case in which an appeal lies on questions of fact. Thus in *Perkins v County Court of Victoria*,[1] Buchanan JA stated:

> The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.

10. In *Beale v Government Insurance Office of NSW*,[2] Meagher JA, in considering an appeal

from a decision of a district court judge, stated that there are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions or ultimate findings of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts so found.

11. The law in respect of findings of fact being challenged as questions of law, is well established. In a case where an appeal lies on matters of law, the failure of a Judge to identify why the evidence of one witness is preferred to another may, in an appropriate case constitute an error of law[3]. That matter, together with other relevant considerations dealt with in the judgment of Phillips JA in *S v Crimes Compensation Tribunal*,[4] make it clear what is required of an appellate Court hearing an appeal of this nature. In that very helpful decision His Honour at pages 86-89 discusses the process of a review and states clearly that the role of the Court on review is to first determine what is the proper meaning, as a matter of construction, of the statutory description which is relevant to the claimant's success or failure, which determination is a matter of law and reviewable. Once that determination is complete, the question whether the claimant's particular circumstances fall within the relevant statutory description is essentially a question of fact. Nevertheless if, in determining whether the particular circumstances of the claimant are such as to fall within the relevant statutory description, the fact finding tribunal arrives at a conclusion which was simply not open to it, that is an error of law; and the question whether it arrived at a conclusion which was not open to it, is a question of law. As His Honour stated;

> It cannot be said, as a matter of principle, that a determination of fact can never give rise to an error of law, but ordinarily it will not be so unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it. In so referring to a "finding" I use the term not only to include a finding of a fact derived from the acceptance of direct evidence to that effect; I include also an inference of fact drawn by the tribunal from other facts found by it. If the finding (be it a finding on direct evidence or inference) is not open to the tribunal, that may bespeak a relevant error of law.[5]

12. As indicated there are circumstances where a mistaken answer to a question of fact may amount to a mistake of law of the kind which brings s109 of the Act to bear. Such a situation is exceptional. In the words of Eames J, it will nevertheless arise[6]:

> Where the analysis of evidence is so deficient as to demonstrate a lack of logic or a failure in the process of reasoning the analysis would constitute an error of law[7], but the mere fact that the appellate court regarded the conclusion reached to be wrong would not establish error of law, provided that there was a rational basis on which the Tribunal could have reached its conclusion.[8]

13. It is in this context that I turn to an examination of the facts. On or about 22 January 2001 the appellant company through its agent, Brian Donald Russell, sold to the respondent company a cleaning product, Cyndan Specialised Acid Wash (the 'acid wash'), specifically for the purpose of cleaning the gloss tiles of the commercial car wash owned and operated by the respondent company. Those premises were located at 41-45 Raleigh Road, Maribyrnong and had been constructed in 1994. The company had purchased the acid wash through its principal director Anthony Sofo and an employee, Vincenzo Alessi. Both of those witnesses were called to give evidence.

14. Mr Sofo gave evidence that over the years there had been a build up of a "light haze" upon the glossy tiles that had been purchased specifically for the purpose of being ultra shiny and therefore appearing attractive and patently 'clean'. He stated that a mild detergent would not remove the 'haze' but that he had never found anything that was not harmful to the tiles and had continued using the mild detergent. Mr Russell had 'cold called' at the premises of the respondent on 21 January 2001 and informed Mr Alessi that there was a specialised acid product designed specifically to clean tiles, and offered a demonstration. Mr Sofo was contacted and returned to the premises and had a conversation with Mr Russell about the product.

15. During that conversation Mr Sofo enquired whether the product contained hydrofluoric acid and Mr Russell stated that it did not. Mr Sofo had previously attended a seminar organized by the Car Wash Association, which had pointed out the problems and the dangers of hydrofluoric acid, which included that it may etch tiles as it is used to etch glass and stainless steel and was a harmful product to the health of people.

16. Mr Russell provided a demonstration of the product, Mr Sofo stated that Mr Thompson the director of the appellant company was not at the first meeting or demonstration, but was present at a second meeting that day. The demonstration indicated the process for using the acid wash and the dilution required. At the conclusion of the demonstration, the respondent company placed an order, and the product was delivered the next day. No material safety data sheet was given to the respondent company on that day but a catalogue was left with Mr Sofo, which he perused and found no mention of hydrofluoric acid. The product was subsequently delivered and upon examination of the product and the safety labels affixed, Mr Sofo found no mention of hydrofluoric acid, only that the product contained hydrochloric acid. A safety data sheet was delivered together with the invoice, which did not contain any reference to the product containing hydrofluoric acid.

17. The product was used until June, when Mr Sofo was informed that the product contained hydrofluoric acid. Mr Sofo stated that prior to this information being provided he had noticed the tiles had a "sort of dull effect, but I didn't really pay too much attention to it because I hadn't (sic) assurance from Mr Russell in reference to the acid"[9] Mr Sofo then contacted Mr Russell who attended at the premises and whom Mr Sofo accused of lying as to the contents of the cleaner. Some weeks later Mr Mike Thompson attended on behalf of the appellant and inspected the tiles. Mr Sofo gave evidence that the tiles were now very dull, with a low reflectivity, similar to a matt finish tile, and that they required cleaning more often and were more difficult to clean. An attempt to have the tiles professionally cleaned by a company called Top Gun Blasting was unsuccessful and the tiles had to be buff polished every six months to try and bring the tiles up to a standard that was acceptable for their initial designated purpose. Mr Sofo gave evidence of two quotations being received for the replacement of the tiles and those quotes were tendered as an exhibit. The manner in which the exhibits were tendered indicated that quantum was a live issue between the parties.

> "Question: ---Have you obtained more than one quote?
> Answer: ---Yes we have, we've obtained two quotes.
> Question:---Are these the quotes that you – have you seen the quotes?
> Mr Sowden (counsel for the appellant at the Magistrates' Court hearing) : --- I have, Your Honour. At this stage the quantum is still in issue, and I will just say that. I've no objection to them being tendered.
> Her Honour; ---- Sorry you do or you don't?
> Mr Sowden:--- Well I don't at this stage. So long as---
> Her Honour:--- I understand quantum is a very live issue in this case, secondary to the primary one. So having taking that into account I'll receive them, thank you
> Question:--- Mr Sofo, ultra wash has also claimed a loss of income from this incident. How do you substantiate the amount that refers to the loss of income component?
> Her Honour:---I'm sorry to interrupt. Is that not referring to a future loss of income in the event that the business was shut down for further work?
> Mr Tisher:---That's right, Your Honour, yes. That's exactly what it is."[10]

18. The accounts figures and calculations were also tendered, as to the expected revenue from each of the washings bays on a weekly basis, and it was indicated that the accountant who prepared the financial returns of the company was available to give evidence as to the preparation of those figures of the company if required.

19. Mr Sofo then gave evidence of the testing of the tiles by the two experts, being Mr John Franceschini for the Respondent and Mr Peter Westlake for the appellant. He described the process of testing performed by Mr Westlake as consisting of the selection of two tiles, one low to the ground and distant from the actual centre of the bay, and one higher up, and again distant from the centre of the bays, being in the same line of tiles as the first selected. These tiles were not from the area where the majority of the damage to the tiles had occurred, which was more in the centre of the bays. He said Mr Westlake cleaned the tiles with 'jif' and a scourer and then tested those two tiles with a machine to measure the gloss.

20. Mr Franceschini examined the tiles in approximately April 2004, and requested that some tiles be removed from the washing bay, which were taken from the same bay as those examined by Mr Westlake but from the centre of the bay and also one at the very end above the green line, which Mr Sofo described as being in perfect condition. The areas above the green line not having been cleaned using the acid wash.

21. Mr Franceschini was also called to give evidence and he stated that he was a chartered chemist who had been involved in the testing of building materials since 1984, holding a Bachelor of Science degree with honours, and was the principal of Sharp and Howells. He examined and compared 2 tiles removed from the walls of a washing bay in the centre area, a tile removed from above the green line in the bay and an unused tile, taken from a box of the original tiles located in the office of Mr Sofo. He gave evidence about the nature of hydrofluoric acid, stating that it was the strongest acid that was available, and one of its purposes is for use in glass and tile etching. In relation to tile etching he said it is used to roughen the surface of the tile to prevent tiles from being too slippery, via a corrosive process where it eats into the surface of the tile. He further stated that it was a very dangerous product in respect of the safety of persons, being capable of eating through the skin and then the bones of a person.

22. Mr Franceschini gave evidence that to identify whether a tile had been affected by acid it would be necessary to examine the tile under an electron microscope or conduct chemical testing on the tile to ascertain the impact or presence of acids upon the tiles. The purpose of his examination was to try and identify what had caused the effect on the tiles and whether the acid wash would affect the tiles. He examined and tested the acid wash supplied to him and gave evidence that upon dilution in the recommended quantities the wash became strongly acidic.

23. He tested the new tile by applying, in different locations, the acid wash undiluted, the acid wash diluted, pure hydrofluoric acid, diluted hydrofluoric acid and then very diluted hydrofluoric acid. He stated, that each of those applications caused a surface effect on the tile, a visual dulling effect. He then tendered two photos taken of tiles by an electron microscope, which demonstrated he said, the differences between the new tile, which had a very smooth surface, a highly polished surface and the second tile which came from the centre of the bay, which showed severe variations or noticeable variations in the surface ridges and pits, which he concluded came from the hydrofluoric acid.

24. Upon her Honour asking the question[11]:

> I'm really only interested though – if you can say – in the impact upon the tiles around mid-2001 and whether the cleaning between 1994 and 2001, weekly by Bulldog Gold, and all other the applications of water and so forth may have attributed to the deterioration in the tile surface that you describe as seeing. Do you understand that question?

Mr Franceschini replied[12]:

> That's an extremely difficult question to answer. I think that it is possible that there was a contribution from the other washing processes but that the majority of effect would be expected from the use of the Cyndan product. It is possible that the tiles were in perfect condition before they used the Cyndan, I couldn't guarantee one way or the other.

25. He gave evidence that corrosion of the type shown in the testing, which created pits and valleys would have made the tiles very difficult to clean, and more prone to picking up dirt and retaining that dirt.

26. It should be noted that her Honour also conducted, with the approval of counsel, a view of the respondent's car wash premises on 24 May 2006, during the hearing of the case, and before delivering her judgment on 13 June 2006. The tiles had not been replaced and she was able to view *in situ* the whole of the selection of tiles, including those below the green line and towards the centre of the bays and contrast that with the tiles above the green line and also observe the areas from which the tiles were removed for testing, in the case of Mr Franceschini, and the tiles tested by Mr Westlake in situ at the premises.

The Findings of the Magistrate

27. On the two issues before this court, in which it is stated that the Magistrate made an error of law, her Honour stated firstly in respect of the evidence of the expert witness Mr Franceschini:[13]

> I turn my mind now to the impact, if any, of the use of the product over the period of the five months between January 2001 and June 2001. Mr John Franceschini is a chartered chemist with expertise in industrial chemistry. At the request of the plaintiff directors he attended on site at the premises in April 2004. With the assistance of Mr Sofo he removed tiles from bay 3 of the car wash and took

them, together with an unused tile also supplied by Mr Sofo, to his laboratory for testing.

I do not propose here to summarise the detailed evidence given in relation to this testing and I note, in any event, that it is encapsulated within the report of the Mr Franceschini dated 12 May 2004 and exhibited in the evidence. Suffice to say that Mr Franceschini did give evidence that hydrofluoric acid is the strongest acid known to chemists. That it is extremely dangerous and very hazardous in its usage, that its main use is for glass etching and tile etching.

Mr Franceschini's evidence was unequivocal in this regard. The application of the hydrofluoric acid, in particular at the first instance ratio of 8 to 1 dilution, did significantly damage the tiles. Surface tiles were altered by the use of the acid wash and the effect of this was to make the tile dull or, in the words of Mr Sofo for the Plaintiff company, to cause the tile to lose its gloss.

Mr Franceschini examined the affected tiles within his laboratory, as I stated, and under microscope. He said in his evidence that this assessment revealed that the surface of the affected tile was pitted and indeed, and I quote him "significantly altered."

Mr Franceschini rejected the proposition, properly put in cross examination, that such damage could have been caused by years of applications of water and other cleaning product including soap based products, noting that the time of the application of the cyndan to the car wash bays that the car wash had been operational for some seven years. As I said that proposition was rejected outright.

Mr Westgate though, for the defendant, gave evidence that he is a ceramicist with qualifications and expertise in industrial ceramics since 1977. Mr Westgate looked at the tiles approximately one year before Mr Franceschini on 11 June 2003, on site at the car wash premises. At no time I note were tiles removed for him to take those tiles away, nor at any time according to the evidence did he request for that to occur. All testing occurred on site in situ, in bay 3 of the car wash and in particularly to a tile or series of tiles located one metre off the ground and exhibited to the court in photograph number 25.

In essence Mr Westgate's evidence was that there not surface damage seen to the tile and the tile tested by him showed significant improvement in its appearance when cleaned simply with an abrasive cleaner and with hot water. In cross examination he conceded that he was not a chemist and could and, I thought appropriately, would not give evidence as to the function and operation of hydrofluoric acid or to any resultant damage to the ceramic tiles from its application. He conceded that where significant improvement in the appearance of the tile tested occurred there still remained "a big difference" between the gloss tile cleaned and that of an unaffected tile.

In all, for the following reasons, I prefer the evidence and expertise of Mr Franceschini. Mr Franceschini is a person of expertise in chemistry applied to building products and general chemical analysis of those products. I prefer the analysis and the evidence given of it to that of the defendant's expert and I accept his evidence ultimately that the tiles would have been greatly affected by the application of hydrofluoric acid as applied by Mr Alessi in 2001 and the evidence of that would have been available to him following laboratory and detailed analysis by him.

28. The appellant submitted that her Honour had erred in relying upon the evidence of Franceschini that he had found the surface of a tile exposed to the acid wash had been pitted and significantly altered. It was submitted that was not the evidence given by the witness. The evidence of the witness extended over some time, and counsel has referred to one question and answer in cross examination as indicating that the witness did not say that the surface of the tile was not pitted and significantly altered. There were many occasions upon which the witness stated quite categorically that it was his opinion that the surface of the tile removed from the bay had been altered. An example of this is when he is talking about the electron microscope pictures of the damaged and undamaged tiles:[14]

Her Honour: that's obviously very stark in contrast. What does that tell me?

Mr Franceschini: --- Okay. What you've got is – yes, the bottom one is a very sort of smooth surface. That's the highly polished – the gloss surface of the tile, just showing up as a very even surface. Then you've got the effect of the tile just showing severe variations or noticeable variations in the surface ridges and pits, and just marks.

Mr Tisher: -- what do you conclude caused those pits or variations as you put them? – Well I concluded that hydrofluoric acid had done it.

29. Equally counsel relied upon a failure of the witness to identify the same etching or alteration on the used tiles, as he was able to identify on the new tile exposed to the acid wash. There was evidence before the Magistrate from the witness Franceschini that the used tiles had been etched, and that they had noticeable variations in the surface ridges and there were pits in the tiles. The witness was reluctant to state that they were identical to those observed in the new tile when exposed and explained his reluctance in the following manner:[15]

> actually look, – when we applied the Cydan product to the surface of the tile in our test on the brand new tile, we saw an effect on the surface which we called an etch. What we haven't done is said that categorically that etch is exactly the same as what is happening on the tile. ... what we've said is, that is definitely affected. What we were unable to do, I suppose, is match exactly the effect of what had been going on at the car wash with what we were doing in the laboratory. So, really, we were just being careful as to how we identified that surface effect.

30. It was further submitted that where there is a dispute between two expert witnesses a trial judge's obligation to give a rational explanation of the basis of preferring a particular view is even stronger. Whilst conceding that the Judge is not obliged to spell out every detail of his or her process of reasoning, counsel submitted that the judge is obliged to expose her reasons for resolving a point critical to the contest between the parties and in to expose them in such a way as to enable the parties to identify the basis of the judge's decision and the extent to which their arguments have been understood and accepted.

31. It is my view that her Honour has explained her reasoning process, in that she referred to the laboratory testing and the findings in that process. Whilst not referring to the pictures of the tiles tendered in evidence specifically she stated "I do not propose to summarise the detailed evidence given in relation to this testing and I note, in any event, that it is encapsulated within the report of Mr Franceschini dated 12 May 2004 and exhibited in the evidence."

32. The two experts were in conflict, and not in agreement as has been submitted, and Her Honour clearly stated the findings of Mr Franceschini that she accepted and upon which she relied. This was a question of fact, and as stated earlier, in those circumstances the requirement for the provision of reasons as to findings of fact by a magistrate is less rigorous than in a case in which an appeal lies on questions of fact.[16]

33. For the appellant to succeed on this ground of appeal they have to demonstrate that the finding made by her Honour was simply not open on the evidence before her. I find that the issue of the expert witnesses was a question of fact, and no error has been demonstrated that would be sufficient to make this capable of becoming a question of law. It is my view that the conclusion that her Honour reached was clearly open on the evidence before her.

34. In respect of the second ground, counsel submitted that there was no evidence, or not adequate evidence, of loss or damage before the Magistrate, upon which she could rely.

35. The respondent in the case before the Magistrate tendered the documents contained in the Court books relating to the quotations for replacement of the tiles to the six washing bays, the documents relating to the profit and loss of the business, upon which was based the calculations of the loss of trading figures for each of the washing bays if the bays were closed for retiling purposes. They called the director of the company who provided the figures to the accountant who prepared the profit and loss statements. During the admission of the profit and loss documents, the plaintiff offered to call the accountant to give evidence if the defence required the witness. No such request was made.

36. In relation to the quotations that were tendered in evidence, the following passage occurred during final submissions:[17]

> Mr Sowden: You don't want to hear submissions to fact, your Honour, and I think that's most commendable of you in all the circumstances. The only point that I would like to make – and it goes to fact slightly, and that is, there's been admission in relation to the tile place, no evidence as to rectification, and it was within the scope of what the plaintiff could have to adduce that evidence. It's not before you and, in my submission, you ought not to have to work in a vacuum.
> Mr Tisher: I don't agree with that, your Honour. There were two quotes that were obtained ----
> Mr Sowden: But no admission.

> Mr Tisher:--- as to what the cost of the replacement tiles was. The lower of those two quotes was tendered.
> Her Honour: that's the $52,000?
> Mr Tisher: No, it's $38,000.
> Her Honour: 38.
> Mr Tisher: Plus the loss of income component that flows from shutting the bays, your Honour.
> Her Honour: Yes
> Mr Tisher: it's a genuine quote. You can't put second hand tiles on.
> Her Honour: I don't think Mr Sowden is saying it's not genuine. He's saying there's no direct evidence of it.
> Mr Sowden: I expressly – as I recall, it was tendered but without admission as to its contents.
> Her Honour: yes, that my ----
> Mr Sowden: that remains the case, your Honour, and I made that very clear.
> Mr Tisher: I think this is a matter as to form rather than substance. If there's any concern that that quote is not bona fide or genuine I'm able to call the person who made that quote to come and verify that that is what ----
> Her Honour: Sit down Mr Sowden. I know ----
> Mr Tisher : That is what the tiles will cost.
> Mr Sowden I made it abundantly clear. It's the only I've (indistinct)
> Her Honour: Gentlemen, thank you for your assistance. I'll deliver a judgment at 9.15 on Tuesday. Unless there are any other matters I'll adjourn the court.

37. Her Honour in her findings stated:[18]

> the plaintiff's claim is established in the following quantum: the cost of the replacement tiles – and I accept Mr Sofo's evidence in relation to the quantum of that replacement cost in the sum of $38,719.00.

38. It should be noted that at the time of the tender of the documents complained of, being the two quotations, this exchange took place between counsel for the appellant and her Honour:

> "Question: ---Have you obtained more than one quote?
> Answer: ---Yes we have, we've obtained two quotes.
> Question:---Are these the quotes that you - have you seen the quotes?
> Mr Sowden: --- I have, Your Honour. At this stage the quantum is still in issue, and I will just say that. I've no objection to them being tendered.
> Her Honour; ---- Sorry you do or you don't?
> Mr Sowden:--- Well I don't at this stage. So long as---
> Her Honour:--- I understand quantum is a very live issue in this case, secondary to the primary one. So having taking that into account I'll receive them, thank you."

39. The fact that counsel indicated that quantum was in issue did not, in any way, indicate that there was an objection to the content of the hearsay document. The fact that quantum was in issue could have had relevance in many other ways, such as the defence having alternative quotations, or evidence being led from their own witnesses as to the cost of having tiles replaced. There was no other basis that the documents could have been tendered except upon the waiver of the hearsay rule, and stating that quantum is still in issue does not, in these circumstances constitute any form of objection to the contents of the document being utilsed.

40. The document having been admitted, its contents are then capable of being used by the magistrate, subject only to weight.[19] There was, in my view, a waiver of the admissibility of the document and its contents by the conduct of counsel at the hearing. If there had been an objection to the tender of the documents, then her Honour would have had to rule on the question of admissibility and the respondent would then have been in a position to call evidence of the facts contained in the quotations if required to do so as a result of the ruling. As was stated in *Hughes v National Trustees Executors and Agency Co. of Australasia Ltd*:[20]

> Where one party by his conduct at the trial has led the other to believe that evidence, although hearsay, may be treated as evidence of the facts stated, and the other in reliance on that belief has refrained from adducing proper evidence, the former party is precluded from objecting to the use of the evidence to prove the facts stated.

41. It was clear in the final exchange between counsel and the Magistrate, which occurred some two weeks after the document had been tendered, that counsel for the respondent had understood and acted upon the basis that there was no issue as to the contents of the document

having been admitted and stated that he was prepared to call the maker of the quotation if that was required. That was not sought by counsel for the appellant, nor addressed by the Magistrate.

42. The document having been admitted in the manner that it was, the learned Magistrate was entitled to rely upon the evidence of Mr Sofo as to the receipt of that quotation, as being the cost of replacement of the tiles. It should be noted also that there was no contradictory evidence placed before the Court as to the cost of replacing the tiles. The defendant was in a position to call evidence as to the cost of replacement, or the lack of need for replacement of any, or all of the tiles, and chose not to proceed in that manner. Accordingly, what was before her Honour was undisputed evidence about the cost of replacing the tiles.

43. Equally in respect of the evidence of future loss in relation to the closing of the bays for retiling purposes, the evidence of the financial records of the business were tendered, those documents having been completed upon the information provided by Mr Sofo to the accountant. An offer to call the accountant was made to the defence at the time of the tender of the financial statements and such offer was not pursued. Again, I am of the view that there was a clear waiver of any objection to the admissibility of those financial records and her Honour was entitled to determine the quantum of the claim upon the basis of those records.

44. The appellant has in my view failed to make out either of the grounds of law upon which it relied and I would dismiss the appeal.

---

[1] [2000] VSCA 171; (2000) 2 VR 246 at 273; (2000) 115 A Crim R 528.
[2] (1977) 48 NSWLR 440, at 443.
[3] *Sumbul v Melbourne All Toyota Wreckers Pty Ltd* [2006] VSCA 292 at [29]; (2006) 14 VR 602; *Insurance Manufacturers of Australia v Vandermeer* [2007] VSC 28 at [29]
[4] [1998] 1 VR 83
[5] S *v Crimes Compensation Tribunal* [1998] 1 VR 89-90
[6] *Eiken v Housing Commission* [2001] VSC 23 at [44]; (2001) 17 VAR 324.
[7] *Watt v Thomas* [1986] UKHL 1; [1947] AC 484, at 487; [1947] 1 All ER 582.
[8] *Ericsson (Aust) Pty Ltd v Popovski*, *supra*, at 265, per Brooking JA.
[9] Transcript page 46
[10] Transcript page 54
[11] Transcript page 192
[12] Transcript page 193
[13] Transcript pages 337-340
[14] Transcript page 189
[15] Transcript pages 224-5
[16] *Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246 at 273; (2000) 115 A Crim R 528.
[17] Transcript page 331-2
[18] Transcript page 340
[19] See *Jones v Sunderland Shire Council* [1979] 2 NSWLR 206 at 219; (1979) 40 LGRA 323; *Ritz Hotel v Charles of the Ritz Ltd* 95 FLR 418; 88 ALR 217; (1988) 12 IPR 417; (1988) 15 NSWLR 158; [1989] AIPC 38,782.
[20] [1979] HCA 2; (1979) 143 CLR 134 at 153; 23 ALR 321; 53 ALJR 249

APPEARANCES: For the appellant Cyndan Chemicals: Mr T Sowden, counsel. Dibbs Abbott Stillman, solicitors. For the respondent Ultra Wash Holdings: Mr P Barton, counsel. Tartaglia & Associates, solicitors.
