36/04; [2004] VSC 389

SUPREME COURT OF VICTORIA

KRIESNER v THE MAGISTRATE SITTING at DANDENONG & ORS

Osborn J

28 September 2004

CIVIL PROCEEDINGS – BAILMENT – GOODS LEFT BY OWNER IN CARE OF FAMILY MEMBER – PROPERTY INCLUDED FURNITURE AND BOXES OF PERSONAL BELONGINGS AND MEMORABILIA – BOXES KEPT IN GARAGE AND UNDER THE HOUSE – OVER PERIOD OF TIME BOXES AND THEIR CONTENTS BECAME WATER DAMAGED AND AFFECTED BY RODENT DAMAGE AND DECAY – OWNER REQUESTED TO REMOVE BOXES – REQUEST IGNORED – BOXES SUBSEQUENTLY DISPOSED OF AS RUBBISH – CLAIM BY OWNER SEEKING RETURN OF THE GOODS OR IN THE ALTERNATIVE DAMAGES – CLAIM DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

Following the breakdown of his marriage, K. moved to the Philippines and left a quantity of furniture and personal belongings with friends. Later, the friends requested K.'s son to remove the goods and take custody of them to his mother's premises which he did. Subsequently certain items of furniture were sold and some sealed boxes of personal belongings and memorabilia were placed under the house and in the garage. Over the years, the boxes in the garage were water damaged and the goods under the house were affected by rodent damage and decay. K.'s son requested K. to remove his belongings over an extended period. Some time later the boxes and their contents were disposed of as rubbish. When K. demanded the return of the goods, and the bulk were not returned, K. issued a claim seeking return of the goods or alternatively, damages. At the hearing K. claimed that his ex-wife was a gratuitous bailee and was under a legal obligation to take reasonable care of the goods. The magistrate rejected the claim. Upon appeal—

HELD: Appeal dismissed.
The magistrate was not bound to conclude on the evidence that Mrs K. was the bailee of the boxes. There was a question whether K.'s son rather than Mrs K. was the bailee. Also, the evidence did not satisfactorily establish that the goods were disposed of without the consent or acquiescence of K.'s son who might have been entrusted with the care and custody of the goods. Further, K. was given more than reasonable notice to remove his belongings before they were disposed of. Finally, there was no evidence to establish that the goods in the boxes were of any monetary value. Accordingly, K. could not recover the boxes themselves or the value of their contents because no value was established in evidence.

OSBORN J:

1. The appellant in this matter is the former husband of the second respondent whom I shall refer to as Mrs Kriesner, and the father of the third respondent whom I shall refer to as Peter and of another son named Martin. Following the breakdown of his marriage to Mrs Kriesner in the 1980s, the appellant moved to the Philippines and left a quantity of furniture and personal belongings with friends named Reader.

2. In 1987, the Readers requested that Martin remove the goods and take custody of them. Martin did this, and took the goods by carrier to the premises at which he resided with his mother, Mrs Kriesner. Mrs Kriesner could not accommodate certain items of furniture and they were sold. Others were placed in the house and, importantly for the present appeal, some sealed boxes of personal belongings were placed under the house and in the garage.

3. The appellant asserts that these belongings included memorabilia of some real personal significance to the appellant. The appellant's claim alleges some 12 boxes of personal belongings were lodged at Mrs Kriesner's residence, but the evidence of Mrs Kriesner and Martin supports the view that three were placed under the house and three in the garage.

4. Over the years, the boxes in the garage were water damaged, and it appears the goods in the boxes under the house were also affected by rodent damage and decay. I shall return to this issue in due course. Mrs Kriesner says that in the early 1990s she requested the appellant, by

way of oral requests made through Martin, to remove the boxes. In the event, the boxes were not removed.

5. In 1996 or 1997, Mrs Kriesner disposed of the boxes and their contents as rubbish. Thereafter, in 1998 and again in 2002, the appellant demanded return of the goods which he believed were at Mrs Kriesner's residence. Some goods were returned but when the bulk of the goods were not returned, the appellant ultimately issued a claim in the Magistrates' Court at Dandenong in 2003 seeking return of the goods or, in the alternative, damages.

6. The particulars of claim allege that Martin acted as the appellant's agent and that Mrs Kriesner "undertook to take due and proper care of the goods and to redeliver them to the plaintiff upon demand". The particulars further allege in substance that this undertaking was breached. Alternatively, Mrs Kriesner was liable in trespass or conversion or in negligence with respect to the loss of or damage to the goods.

7. In final addresses at the hearing before the Magistrates' Court, counsel for the appellant put the matter to the learned Magistrate on the basis that the evidence showed Mrs Kriesner was a gratuitous bailee and was under a legal obligation to take reasonable care of the goods, which obligation was breached. The learned Magistrate rejected the appellant's claim, including that with respect to the boxes of personal belongings. In part, she found as follows:

> "I further accept the evidence of Mrs Kriesner that she did not want to store the items and she begrudgingly did so, and they were in fact kept by Martin in the garage which was his domain. Martin gave evidence which was consistent on this point, that his father gave him the lounge suite and had to arrange for the collection from the Readers. He did so, and the Readers had possession of all of the plaintiff's goods, and on arrival at the Readers, Martin was given all of his father's items and Martin was surprised at that. He did not request them. He did not seek them. He did not expect to take them home to his mother. When he returned to his mother's home with all of the items, she was surprised, to say the least. His father's items were unsolicited and he took them to his mother's home. This was in about 1987."

8. The learned Magistrate went on ultimately to conclude:

> "At no stage during the course of ten years from approximately April 1987 to approximately April 1997 did the plaintiff inquire of his belongings of Mrs Kriesner. He asserts that his belongings have significance, both historical and sentimental, but even on the plaintiff's evidence, if I were to accept it – and I'm not – he has not made any meaningful inquiries of these items, not at the time they were transferred from the Readers to Martin, and not until some time much later.
>
> I accept that Martin has told the plaintiff of the water damage to the boxes and the plaintiff has not made arrangements for these items, knowing the condition of them. I have heard the submissions, and on the evidence find that the plaintiff has not made out its case. *The plaintiff has not established who, if anyone, was the bailee, and I am not satisfied, on the evidence, that there was any bailment. The claims against both defendants are dismissed".* (My emphasis)

9. The appellant now seeks to appeal the Magistrate's decision on the basis of two questions of law. As refined by Mr Wilmoth who appeared as counsel for the appellant, they can be reduced to the following formulation:

> (A) The learned Magistrate was bound, on the evidence, to conclude that Mrs Kriesner was the bailee of the boxes, and
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> (B) the learned Magistrate was bound, on the evidence, to conclude that Mrs Kriesner disposed of the boxes wrongfully.

10. Accepting for present purposes that the Master's formulation of questions of law in this matter embraces these contentions, I am not satisfied that they have been made out. Firstly, it was open to the Magistrate to remain unpersuaded on the evidence that what occurred in 1987 was satisfactorily evidenced at all. After all, she did not accept the appellant's evidence and was faced with the recollection of witnesses going back more than 15 years. Secondly, such evidence as bore on the issue of bailment raised a serious question as to whether Martin, rather than Mrs Kriesner, was the bailee. In particular, I highlight the passages of transcript referred to by Mr Carew in paragraph 2.7 of his outline. On this view Martin retained possession and control of the boxes until their disposal and kept them as a licensee at his mother's home.

11. If the learned Magistrate were not satisfied the plaintiff had established Mrs Kriesner was the bailee of the boxes, then the basis of the claim as set out in the particulars of claim and as put to the Magistrate in final addresses failed. It is highly doubtful whether it can now be put on an alternative basis - see the decision of Justice Batt and the authorities there cited in the City of *Greater Geelong v Herd*[1] including *Coulton v Holcombe*[2] in which Gibbs CJ and Wilson, Brennan and Dawson JJ said at 7:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this court has firmly maintained the principle that the point cannot be taken afterwards ... "

In the present case the learned Magistrate was entitled to assume that her finding as to bailment disposed of the matter in the terms it was put to her. The case cannot in fairness now be put on a different basis.

12. In addition to the fact that the appellant's claim was put to the Magistrate on the premise of bailment, the appellant faces four further fundamental problems. Firstly, the evidence does not satisfactorily establish the goods were disposed of without the consent or acquiescence of Martin who is alleged by the appellant to have been his agent, and who on the evidence, might be regarded as having been entrusted with the care and custody of the goods. Thus Mrs Kriesner gave evidence:

> "I said that I wanted to get rid of all the stuff, yes." Q: "Who to, Martin?" A: "Yes."

13. Secondly, the evidence of Martin, at p89 of the transcript, supports the view that the appellant was given more than reasonable notice to remove his belongings over an extended period of time before they were disposed of.

> "Q: Did your mother ever ask you to tell your father anything about the goods? A: Yes. Q: Do you remember when that happened? A: From the moment that the truck came back after bringing the lounge suite back, my mother was unhappy that all these boxes had arrived. So when he came down on six-monthly visits, she asked me to remind him every time what he's going to do with his possessions and when can he take them. Q: Did you in fact do as your mother had asked you? A: Yes."

14. Thirdly, the identity of the goods within the boxes was not adequately proven, save to a limited degree admitted by Mrs Kriesner, Martin and Peter Kriesner.

15. Fourthly, there is no evidence whatsoever that such goods as have been established to be in the boxes were of any monetary value. Indeed, such evidence as there was as to their condition strongly suggests otherwise. Mrs Kriesner said at transcript p75 with respect to the boxes, "As has been explained in my deposition, because of deterioration over many years, they were destroyed". Again at the same page of the transcript she said "Some of the boxes, as I said before, were under the house. There wasn't room in the garage for all of them. They definitely deteriorated." At p78, she said "I was having the house re-wired and electricians had to get under the house, and also we needed more space in the garage. So we had to look into all of these things, and that's when we discovered the shocking state they were in."

16. At transcript p79, she was asked:

> "Q: The ones in the garage were not kept in the same condition, were they, as the ones under the house? A: They weren't in a good condition, they were falling apart. Q: Do you think you might - - - A: Water got into the garage through the roof as well. It wasn't a particularly secure garage; it isn't. There was a lot of water damage altogether."

17. At transcript p80, she said with respect to the boxes that were disposed of

> "I remember I was shown some jumpers with big holes in - rat holes - and there was some bedding which was all mouldy, that sort of thing. That's all I remember. But after all these years - and I've heard nothing from him in all those years - I assumed he didn't want them any more."

18. Martin in turn said that the boxes in the garage suffered extensive water damage and that he repacked them and that they then suffered further water damage because the roof continued to leak

19. In my view, there was no satisfactory basis on which the Magistrate could have concluded the contents of the boxes were of any monetary value at the date they were disposed of.

20. On the evidence, the appellant could not recover either the boxes themselves, which had been lost many years before or the value of their contents because no value was established in evidence before the Magistrate.

21. In order to succeed in an appeal on a question of law of the type before me, it is well established that an appellant must show not only the possibility that the inferior tribunal proceeded by way of error of law, but that in fact the decision of the inferior tribunal was vitiated by an error of law.[3]

22. In the present case:

(a) it cannot be said the Magistrate was bound to conclude Mrs Kriesner was the bailee of the goods as the appellant claims;

(b) the better view is that the appellant should not now be allowed to put his claim on a basis that was not presented to the Magistrate (namely a basis other than that which proceeds from the proposition Mrs Kriesner was a bailee);

(c) this is particularly so when there is evidence that the goods were disposed of with the consent or acquiescence of Martin and after reasonable notice to the appellant requiring removal of the goods; and

(d) even if liability were established no satisfactory basis for assessing quantum was proven and the evidence strongly suggests the claim concerns goods of no monetary value.

23. Accordingly, the appeal must fail. If the contents of the boxes were of personal value to Mr Kriesner, then he acted unwisely in leaving them with his son at his wife's home for over a decade. Unfortunately, the loss he has now suffered may well be one which has occasioned him real personal hurt but I am of the view he has not established that he is entitled to legal redress with respect to it.

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[1] (1997) 94 LGERA 149; (1997) 20 AATR 293; (1997) 11 VAR 424.
[2] [1986] HCA 33; (1986) 162 CLR 1; 65 ALR 656; (1986) 60 ALJR 470.
[3] See eg *Portland Properties Pty Ltd v Melbourne Metropolitan Board of Works* [1971] 38 LGRA 6 at 18, per Smith J with whom Adam J concurred.

APPEARANCES: For the appellant Ernst Kriesner: Mr S Wilmoth, counsel. Robert Halliday & Associates, solicitors. For the second respondent Enid Kriesner: Mr B Carew, counsel. Springvale Monash Legal Service Inc.
