25/70

SUPREME COURT OF VICTORIA

KIMPTON v KOUSAL

Smith J

28 September 1970

CIVIL PROCEEDINGS – COMPLAINANT AGREED TO HIRE A SANDER FROM THE DEFENDANT AND SIGNED A HIRING AGREEMENT – COMPLAINANT SOUGHT TO RECOVER THE AMOUNT PAID TO THE DEFENDANT – COMPLAINANT CLAIMED THAT HE HAD ENTERED INTO AN ORAL AGREEMENT – MAGISTRATE UPHELD THE CLAIM AND MADE AN ORDER AGAINST THE DEFENDANT – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Complaint to stand dismissed.
1. There was no difference between the nature of the bargain contemplated in the oral discussion and the nature of the bargain set out in the hiring document. What the document did was to include in the bargain a highly oppressive set of conditions but a set of conditions which was unmistakably a form of hiring agreement.

2. Accordingly, the Magistrate was wrong in holding that the document was not the contract, and was no part of the contract. His proper conclusion on the evidence, and the only conclusion reasonably open to him was that the document embodied the contract.

SMITH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Prahran upon a complainant seeking to recover a sum of $38 as money had and received by the defendant for the use of the complainant.

The complainant's case was that he had entered into an oral agreement with the defendant to hire from the defendant a sanding machine and had paid a deposit of $30 and a sum of $8 for hire in advance; that it was an implied term of the agreement that the machine should be reasonably fit for the purpose of sanding a certain verandah of which he had spoken to the defendant; and that that condition was broken and there was in consequence a total failure of the consideration for which the $38 was paid.

The Magistrate found in favour of the complainant and made an order for the amount claimed with costs.

The defence to the claim was rested upon a document dated the 14 January 1970, headed "Proposal" and containing a very large number of printed clauses relating to the rights of the parties to a proposed hiring. The defendant contended that this document, which had been signed by the complainant, constituted or formed part of the hiring contract between them and he relied upon clauses in the written document as providing an answer to the complainant's claim. It is not necessary to refer to all the clauses relied on. It is sufficient to say that one of those clauses was an arbitration clause which made the obtaining of an award a condition precedent to action upon the contract.

The Magistrate, who preferred the complainant's evidence to that of the defendant, considered that the complainant had signed the document on the 14 January in the mistaken belief that it was not a contractual document but was a receipt for the goods to be hired, and he held that the document had never become the repository of or a part of, the contract between the parties.

It appears, however, that the matters which led him so to hold were in the first place, matters which merely went to support the allegation that there was a mistake on the part of the complainant, and secondly, findings by the Magistrate, in general terms, that the parties did not intend the document to be the agreement or did not intend to accept it as the agreement. He did

not direct his attention to the question whether the complainant had so acted as to create an estoppel in favour of the defendant, preventing the complainant from denying that by his signature he intended to bind himself by the terms of the document.

As the Magistrate found that the complainant thought that the document was merely a receipt and as the complainant had in fact so sworn in the box, it is obviously necessary for this court to proceed, in its consideration of the case, upon the assumption that the complainant did sign under the mistake to which I have referred. But it is not easy to see any way in which the complainant can escape from the defence contention that the complainant is estopped from setting up a mistake.

Upon the affidavit of the complainant supporting the Magistrate's decision, it appears that the complainant, in his evidence in the court below, deposed that the sequence of events was this. First there was a preliminary discussion between the parties regarding the complainant hiring a sander from the defendant, as a result of which, after various types of machines had been mentioned, the complainant indicated the type that he desired to have. Next the defendant filled in, on the first page of the document of the 14 January, in blanks in certain printed columns on that page the intended hour and date for the commencement of the hiring and the hour and date for its termination; the rate of what was called, in the printed clauses of the document, the "reduced rental", namely, $8; and a description of the sander to be hired and of a cord that was to go with it He also filled in, in relation to that cord, a separate rental figure of fifty cents. Further down the page a figure of $38 was inserted opposite an item "deposit, booking", and under a heading "paid".

The complainant then, in the defendant's presence, read or appeared to read that first page of the document; and it begins by saying that the intending hirer requires and proposes to hire from the owner during the period and at the rental specified in the schedule the goods and effects named therein. The defendant then told the complainant that the $8 was for hire and that the $30 was for security. The next step was that the complainant, in the presence of the defendant, signed his name at the foot of the fourth page of the document alongside the printed words "signed, sealed and delivered by the hirer) and above that signature on the fourth page there appear numerous printed clauses, obviously of a contractual character. Next the complainant handed over the document he had signed into the defendant's possession and the defendant handed the complainant a yellow copy of that document. The complainant then paid to the defendant the sum of $38, and a sanding machine was produced and after some form of testing, was handed over to the complainant.

It is obvious, and indeed it is common ground, that by what happened on that occasion the parties intended to enter into a contract of hiring; and on the complainant's own version of what he said in the court below, his conduct was the clearest possible representation to the defendant that he, the complainant, intended to be bound by the terms of the document that he signed, whatever those terms might be found to be. Furthermore, in the material that was before the Magistrate there was, in my view, nothing to indicate any possible reason for the defendant to suppose that the complainant was not intending to be bound by the document. The defendant obviously was seeking the complainant's consent to be bound by the terms of the document and the conduct of the complainant would have conveyed unmistakably that the defendant had got what he was seeking. In those circumstances, it appears to me that the Magistrate's conclusion that the printed document was not the repository of the bargain, and was no part of the bargain, is wholly unreasonable and cannot be supported on the evidence.

Before me it was argued that the language of the document in question is so far away from anything that was actually discussed between the parties, and is so oppressive in the obligations that it imposes on the complainant and in the limiting or negativing of obligations upon the defendant, that a contract in terms of the document should be regarded as different in its nature from any oral agreement that the parties had in mind. And it was urged that in those circumstances there could be no estoppel, because the defendant was well aware of this disparity.

In my view, however, the matters pointed to do not show anything amounting to a difference between the nature of the bargain contemplated in the oral discussion and the nature of the bargain set out in the document. What the document has done is to include in the bargain a

highly oppressive set of conditions but a set of conditions which is unmistakably a form of hiring agreement. In my opinion, therefore, the Magistrate was wrong in holding that the document was not the contract, and was no part of the contract. His proper conclusion on the evidence, and the only conclusion reasonably open to him, in my view, was that the document embodied the contract.

That being so, the arbitration clause as it appears to me provided a complete defence to the claim and he should have dismissed the claim. I may say that I feel considerable sympathy for the Magistrate's disinclination to treat this document as embodying a bargain between the parties. It is the kind of document which, though not uncommon in dealings of this general character, amounts, I think, to an abuse of the trusting nature of the customer. However, in law, I see no basis on which the Magistrate could properly decline to treat the document as embodying the contract.

The order nisi is made absolute. The order below is set aside. In lieu thereof, I order, that the complaint stand dismissed. [After discussion about costs] No order for costs. Application for a certificate under s13 of the *Appeal Costs Fund Act* granted.
