

63/89

SUPREME COURT OF VICTORIA

ALLIANCE ACCEPTANCE CO LTD v O'SULLIVAN

Hampel J

3 July, 12 October 1989

CIVIL PROCEEDINGS – ACTION FOR RECOVERY OF MONEY LENT – INSTALMENT LOAN AGREEMENT – DEFAULT IN PAYMENT OF INSTALMENT – DEMAND MADE FOR MONEY DUE – WHETHER LOAN AGREEMENT TERMINATED BY SUCH DEMAND – WHETHER BORROWER MAY REQUEST PARTICULARS OF AGREEMENT – "CONTINUANCE OF THE CONTRACT": MONEY LENDERS ACT 1958, S30.

1. Section 30 of the *Money Lenders Act* 1958 ('Act') provides that at any time during the continuance of a loan agreement a borrower may request in writing from the lender, a statement setting out certain details such as the rate of interest and the amounts paid or payable under the agreement. Failure to comply with such a request may prevent the lender's recovering monies said to be owing under the agreement.

2. Where, under a loan agreement, a borrower agreed that in default in payment of an instalment all monies remaining unpaid would become due and payable on demand, and the borrower so defaulted whereby the lender issued proceedings to recover the monies owing, the contract was thereby terminated so as to deprive the borrower of the rights provided for in s30 of the Act.

HAMPEL J: [1] This is the return of an order nisi to review the decision of the Magistrates' Court delivered on 12 December 1988. The respondent/complainant brought an action against the applicants/defendants seeking to recover money owing under a loan agreement dated 27 July 1984. The learned Magistrate found for the respondent and ordered the applicants to pay \$7239.96 plus \$767.52 by way of interest and \$1943 in costs to the respondent finance company.

The applicants seek to review the Magistrate's decision on the ground that he erred in law in three of his findings. Under a loan agreement between the parties dated 27 July 1984, the respondent agreed to lend the applicants \$9500 at a rate of 22 per centum per annum interest. The monies were to be repaid in monthly instalments over a five year period, the last instalment being due in July 1989. In May 1987 the applicants requested a payout figure on the loan. The respondent advised them by letter that the payout figure was \$4663.78. According to the respondent's evidence by May 1987 the applicants had failed to pay some of their instalments. The applicants then received a Notice of Demand for \$7295.59 dated 29 October 1987, from the respondent, which was the balance of the principal due, together with unpaid interest up to that date. The respondent issued the Notice of Demand pursuant to Clause 3(a) of the loan agreement. Clause 3(a) provides:

"... on the happening of any one or more of the following acts or events namely :

[2] (i) default in payment on the due date of any instalment or part thereof;

(ii) any default in any term or condition hereunder by me;

(iii) ... (iv) ...

Then the whole of the balance of principal remaining unpaid together with interest thereon as aforesaid accrued up to the date of the making of the demand next referred to shall at your option become due and payable on demand. Such demand shall be deemed made when delivered or posted to me or by the commencement of proceedings against me seeking to recover the amount so payable on demand; .. "

It is apparent that throughout 1987 the exact amount of monies owing to the respondent was not clear. The discrepancies between the payout figures given to the applicants were not explained by the respondent's evidence, either before the learned Magistrate or this Court. In any event the respondent issued against the applicants in January 1988 seeking \$7222.77 by way of unpaid principal plus \$17.19 in interest and \$300 for enforcement expenses. The enforcement expenses were not included in the Magistrate's order.

In June 1988, before the hearing of this matter in the Magistrates' Court, the applicants sent a request for information from the respondent in relation to the loan, pursuant to s30 *Money Lenders Act*. Section 30 provides:

"(1) In respect of every contract whether made before or after the commencement of this Act for the repayment of money lent by a money lender, the money lender shall, on any reasonable demand in writing being made by the borrower at any time during the continuance of the contract and on tender by the borrower of the sum of Ten Cents (\$0.10) for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, [3] a statement signed by the money lender or his agent showing—

(a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum per annum of interest charged;

(b) the amount of any payment already received by the money lender in respect of the loan and the date on which it was made;

(c) the amount of every sum due to the money lender, but unpaid, and the date upon which it became due, and the amount of interest accrued due and unpaid in respect of every such sum; and

(d) the amount of every sum not yet due which remains outstanding, and the date upon which it will become due.

(2) A money lender shall, on any reasonable demand in writing by the borrower, supply a copy of any document relating to a loan made by him or any security therefor to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, and the borrower shall pay therefor Eight cents (\$0.08) for each folio (or part thereof) of seventy-two words.

If a money lender to whom a demand has been made under this section fails without reasonable excuse to comply therewith within one month after the demand has been made he shall not, so long as the default continues, be entitled to sue for or recover any sum due under the contract on account either of principal or interest and interest shall not be chargeable in respect of the period of the default, and if such default is made or continued after proceedings have ceased to lie in respect of the loan the money lender shall be liable to a penalty of not more than 1 penalty unit for every day on which the default continues".

The applicants contended, both before the learned Magistrate and this Court, that they had the right to request the information, that the respondent had failed to comply with the s30 request, and as a consequence of this failure, s30(3) operated to prevent the respondent from recovering the [4] monies owing under the loan agreement. The learned Magistrate found, *inter alia*, that the applicants did not have the right to make such a request since the contract was no longer continuing, as is required by s30. Although as a result of this finding, it was not necessary for him to decide whether the respondent had otherwise complied with s30, the Magistrate found that the request for information was too late and was not reasonable, as required by the section, since it had been made after proceedings were issued. These findings form the grounds of review upon which the application before me is based.

The applicants argued that the learned Magistrate had erred in law in holding that their demand was not made during the continuance of the contract, as the contract continued even after the respondent issued proceedings. This was so, they submitted, because the respondent's action had been based on the contract and by issuing proceedings pursuant to Clause 3(a) of the contract, the respondent was merely seeking specific performance of the agreement. Furthermore, the applicants argued, the respondent did not allege in their pleadings that the applicants had repudiated the agreement. This last point is easily disposed of. Although the respondent did not allege that the applicants had repudiated the contract they did allege that the applicants had breached the contract.

The High Court's decision in *Shevill v The Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620; (1982) 42 ALR 305; 56 ALJR 793 was cited by the applicants to support some of their arguments. They submitted that *Shevill* was authority for the proposition that lateness in payment of rental or instalments due did [5] not constitute repudiation of a lease or contract. This general view of *Shevill's* case does not, in my opinion, deal with the real issues of both *Shevill* and the present case. In *Shevill's* case a lessor exercised a right under the lease in question to re-enter the premises following notice to the lessee of a demand for arrears in rent. Under the relevant clause the lessor had the right to demand rent owing up to the date of the demand but the lessor also claimed damages for its loss of bargain. Since the contract did not give a lessor the right to claim damages for the loss of bargain, the lessor had to rely on a common law right to terminate

the contract and claim damages. The High Court held that the lessor was not entitled to claim damages for the loss of its bargain as it did not have the right at common law, to terminate the lease. At p627 CLR, Gibbs CJ said:

"It is clear that a covenant to pay rent in advance at specified times would not, without more, be a fundamental or essential term having the effect that any failure, however, slight, to make payment at the specified times would entitle the lessor to terminate the lease".

However, since the parties had agreed in the original contract, i.e. the lease, that the lessor would have the right to terminate if the lessee was fourteen days late with rent, the lessor was entitled to re-enter the premises and terminate the lease. The lessor was only entitled though to claim rent due up to the date of termination and not damages for further losses, since this was what the parties had agreed to by clause 9 of the lease. Clause 9 did not confer a right to recover damages for losses in the future.

[6] In argument before me there was some confusion between the common law right to terminate a contract and a contractual right to terminate. They are two separate rights and *Shevill's* case makes this clear. Since the right to request information pursuant to s30 depends on whether the contract was continuing at the time, then the preliminary issue is whether the respondent had effectively terminated the contract in exercising its right under clause 3(a). In my view the respondent did terminate the contract by issuing proceedings pursuant to clause 3(a). Consequently it is not open for me to consider whether, at common law, the applicants' default in payments were so serious a breach as to amount to a repudiation of the contract which would have entitled the respondent to terminate the contract. If the parties to a contract stipulate that a term will be treated as having a fundamental character, although in itself it may seem otherwise, then effect must be given to any such agreement. See Gibbs CJ in *Shevill's* case at CLR p627 and the authorities referred to therein. The respondent in this case had a contractual right to terminate the agreement if certain events took place. The applicants fell behind in their payments and the respondent exercised its right to terminate under clause 3(a). At least by the time proceedings were issued in January 1988 the contract had ceased to continue.

Another question arose in the present case, namely whether an agreement made between the parties' legal representatives on 19th May 1988 demonstrated that the contract had not been terminated by the respondent. This [7] case came on for hearing in the Magistrates' Court on 19th May 1988, but the parties agreed to adjourn the hearing to 30th June 1988 to enable the respondent to provide an explanation of the discrepancy in the payout figures and the applicants to provide a statutory declaration as to their financial state and their ability to repay the debt. The applicants contended that this agreement clearly contemplated the continuance of the loan agreement. The respondent submitted that it was no more than an agreement as to how the applicants were to pay off their debt.

Since I have found that the contract was terminated by the issuing of proceedings in January 1988, then it could not be said that the contract was in existence in May 1988. Moreover, I do not think that the agreement on 19th May 1988 "revived" the loan contract; once terminated a contract is simply not capable of coming "back to life". In my opinion, the agreement of 19th May 1988 was a new one between the parties, by which one was to provide the other with certain information and other benefits. The 19th May 1988 agreement did not contemplate the applicants paying instalments over the balance of the life of the loan, nor did it seek interest for that period. All that the respondent sought was the balance of the principal and interest due thereon up to the date on which proceedings were issued.

It follows from this that the applicants did not have the right to make a request for information, pursuant to s30, in June 1988. Accordingly, I find that the Magistrate did not err in finding that the contract was not continuing. This [8] conclusion makes it unnecessary to decide whether the Magistrate erred in holding that the request for information was too late, and was unreasonable in terms of the section since the request was made well after the respondent had issued proceedings. Such a conclusion was, in my view, open to the Magistrate. For these reasons, the order nisi is discharged with costs.

APPEARANCES: For the applicants O'Sullivan: Mr PA Wilson, counsel. Madden Butler Elder Graham, solicitors. For the respondent: Mr PG Cawthorn, counsel. Meerkin & Appel, solicitors.