16/09; [2009] VSC 229

SUPREME COURT OF VICTORIA

C-TECH LASER PTY LTD v TRUONG

Beach J

5, 15 June 2009

CIVIL PROCEEDINGS – TORT – MALICIOUS FALSEHOOD – UNLAWFUL INTERFERENCE WITH BUSINESS – CLAIM BY EMPLOYER THAT EMPLOYEE GAVE CONFIDENTIAL INFORMATION TO A THIRD PARTY – CLAIM THAT EMPLOYEE MADE FALSE STATEMENTS TO THIRD PARTY – CLAIM THAT EMPLOYER SUFFERED LOSS AND DAMAGE – EMPLOYEE'S CLAIM UPHELD BY MAGISTRATE – EMPLOYER'S COUNTERCLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR.

T. worked for C-Tech and had access to their confidential customer lists. T. gave to a third party a disk which contained a copy of the lists and said that the disk contained certain details about customers. Letters were sent to these persons. In response to T's claim, C-Tech counterclaimed for damages for the torts of malicious falsehoods and unlawful interference with business, and alleged that T. made false statements with the intention of causing the third party to believe certain things and to take legal action against C-Tech. The magistrate upheld T's claim and dismissed the counterclaim. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrates' Court for further hearing and determination.

1. The elements of the tort of malicious falsehood may be summarised as follows:

(1) The defendant published to a third party words which are false.

(2) The words refer to the plaintiff or his property or his business.

(3) The words were published maliciously.

(4) Special damage has followed as a direct and natural result of the publication of the words.

2. In order to determine the malicious falsehood claim, the magistrate needed to make a finding as to the terms of the statement before determining whether the statement he found to have been published was false. Further, in making a finding as to the statement actually published, the Magistrate was required to determine whether the statements referred to in C-Tech's counterclaim had been made by T. It was only when these issues had been determined that the Magistrate could then proceed to the issue of falsity.

3. The Magistrate failed to consider that part of C-Tech's case involving the false statement that C-Tech were using the third party's confidential information. Even if it is accepted that the customer list referred to by the magistrate was owned by the third party, a question that arose for determination was whether or not C-Tech were wrongfully using it. This was a factual matter and the Magistrate's reasons did not disclose whether this issue had been considered. In failing to make a finding as to what (if any) statement was made by T. to the third party, the magistrate failed to give consideration to the claim pleaded by C-Tech and/or failed to give sufficient reasons for dismissing that claim.

4. C-Tech's claim for damages for unlawful interference with business in the present case was put on two bases: first, the making of a false statement by T. and secondly, a breach of confidence – in that it was claimed that T. committed a breach of confidence when he disclosed C-Tech's confidential information to the third party. While the Magistrate referred to C-Tech's complaint concerning the provision of "information confidential to them" in the early part of his reasons, this aspect was not referred to in that part of the Magistrate's reasons dismissing the counterclaim. Indeed, it would appear that the Magistrate did not consider C-Tech's case that the tort of unlawful interference with business was committed by T. with the unlawful element being the breach of confidence alleged by C-Tech. From his reasons, it would appear that the Magistrate only considered the tort of unlawful interference with business on the basis that the unlawful means were constituted by a false statement. This constitutes an additional reason why the appeal must be allowed.

***Ansett (Operations) v Australian Federation of Air Pilots* [1991] VicRp 98; [1991] 1 VR 637; (1989) 95 ALR 211; and**

***Sanders v Snell* [1998] HCA 64; (1998) 196 CLR 329; 157 ALR 491; [1998] Aust Torts Reports 81-493; (1998) 72 ALJR 1508; (1998) 16 Leg Rep 2, referred to.**

BEACH J:

Introduction

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 on a question of law, from a decision of the Magistrates' Court constituted by Barrett M dismissing the counterclaim of C-Tech Laser Pty Ltd and Mr Kym Vu ("the appellants") against Mr Cuong Truong ("the respondent"). The counterclaim was a claim for damages by the appellants for the torts of malicious falsehood and unlawful interference with business.

2. In their further amended notice of appeal[1], the appellants seek orders that:

> (1) The order of the Magistrates' Court made on 1 August 2008 dismissing their counterclaim be set aside.
>
> (2) The counterclaim be remitted back to the Magistrates' Court as originally constituted for the giving of full and adequate reasons for decision and consequential orders in accordance with that decision.

However, in draft orders submitted on behalf of the appellants, the appellants seek orders that:

> (1) The appeal be allowed.
>
> (2) The matter be remitted for reconsideration in accordance with these reasons before the Magistrates' Court as originally constituted.

3. For the reasons given below the appeal will be allowed. The appellants' counterclaim will be remitted back to the Magistrates' Court. However, I do not propose to direct how the Magistrates' Court should be reconstituted.

The appellants' counterclaim as pleaded

4. The material parts of the appellants' counterclaim pleading the torts relied upon were as follows:

> 19. During the course of his employment with the [first appellant] the [respondent]:
> (a) Was provided with and had access to confidential customer lists of the [appellants] to be used in establishing the business of the [first appellant];
> (b) saved the said customer lists of the [appellants] on a computer disk for the purposes of doing mail merges and sending out marketing letters to the customers on the lists.
>
> 20. On or about 4 April 2006 the [respondent] took the computer disk containing the confidential customer lists and handed it to a representative of a third party, Profile Cutting Pty Ltd.
>
> 21. At or about the time of handing the compact disk to Profile Cutting Pty Ltd the [respondent] knew that:
> (a) the [second appellant] had been in an employment relationship with Profile Cutting Pty Ltd;
> (b) the [second appellant] had left Profile Cutting Pty Ltd to commence the business of the [first appellant].
>
> 22. At or about the time of handing the compact disk to Profile Cutting Pty Ltd the [respondent] stated to Profile Cutting Pty Ltd that:
> (a) the disk contained information of Profile Cutting Pty Ltd, namely its Brisbane data base;
> (b) the [respondent] had, on the instruction of the [second appellant], conducted a mail merge of the names on the Brisbane data base and had forwarded 522 letters to these names marketing the services of the [first appellant] ("the statements").
>
> 23. The statements and each of them were:
> (a) false;
> (b) made with intention of causing Profile Cutting Pty Ltd to believe that the [appellants] had unlawfully accessed and used the confidential information of Profile Cutting Pty Ltd;
> (c) made with the intention of causing Profile Cutting Pty Ltd to take action, including legal action, against the [appellants] and each of them;
> (d) made with the malice with the intention of causing harm to the [appellants] and each of them because the [respondent] believed that he was owed monies by the [appellants] which they were refusing to pay to him.
>
> 24. By reason of the matters pleaded in paragraphs 16 to 19 (sic, 19-22) (both inclusive) and as a

natural and probable consequence of the conduct of the [respondent] the [appellants] and each of them have suffered loss and damages[2].

The judgment below

5. The judgment below is some nine and a half pages in length. It commences with a description of the litigation. The "genesis" of the litigation is then described. His Honour then gives reasons for upholding Mr Truong's claim against the appellants in the sum of $20,016.02[3].

6. In the course of setting out the details of the litigation and giving reasons in respect of his determinations of Mr Truong's claims, his Honour said:

> The defendants [appellants] allege that Mr Truong deliberately and maliciously provided information confidential to them and made a false statement to Profile Cutting. Those allegations relate to the passing of a disk by Mr Truong to Mr Done, which contained, Mr Truong asserted, a list of Profile Cutting customers. The defendants [appellants] were a competitor of Profile Cutting, and that, at that time, involved as defendants in the County Court proceedings issued by Profile Cutting. The defendants [appellants] challenge Mr Truong's assertion. Mr Vu gave evidence that the list comprised his own personal customer list. He claimed Mr Truong's false statement, and the passing of the information to Profile Cutting, constituted the torts alleged. The [appellants] assert the damages incurred (sic) comprise the $90,000 paid by them in settlement of the County Court proceedings. Aspects of the evidence of Mr Truong were tainted by a number of contradictions. They comprised, (1) his admission that a number of his assertions in his affidavit on 18 April, in the Profile Cutting County Court proceeding, were false. These involved that Mr Vu gave him a floppy disk, and the details set out in paragraphs 13, 14 and 15. (2) The absence of reference to the debt acknowledgment in Mr Truong's affidavit. (3) The absence of the debt acknowledge (sic) in the disk given to Mr Done on 4 April 2006, and (4) the absence of the 50 page hard copy customer list in his affidavit, and a reference to it for the first time in these proceedings.
>
> Because of these matters, I find that reliance cannot be placed on the evidence of Mr Truong, unless it is supported by independent ... evidence.

7. The heart of the lower court's reasons for dismissing the counterclaim is to be found in the last two pages of the reasons. His Honour said:

> The defendant's counterclaim is based on the tort of malicious falsehood and unlawful interference with business. I note that the High Court has not yet definitely mandated the tort of unlawful interference with business in Australia. In the case of *Sanders v Snell* [1998] HCA 64; (1998) 196 CLR 329; (1998) 157 ALR 491; [1998] Aust Torts Reports 81-493; (1998) 72 ALJR 1508; (1998) 16 Leg Rep 2, the majority judgment was delivered by Chief Justice Gleeson and Justices Gaudron, Kirby, and Hayne. They stated, "We do not think it necessary to decide in this case whether the tort of inference with trade or business interests by an unlawful act should be recognised in Australia". It is obvious that this court, in these proceedings, should not attempt to determine this issue.
>
> The premise of the defendant's counterclaim is that Mr Truong maliciously, (a) provided information confidential to the defendants, and (b) made a false statement concerning the defendants to Profile Cutting. The evidence relied upon was Mr Truong's statement to Mr Done, that Mr Vu was using Profile Cutting's confidential information, being its customer list, and the disk given to Mr Done contained that information. To succeed in that counterclaim, the defendants need to establish that Mr Truong's statement was false.
>
> In my opinion, there are a number of aspects of the evidence that prohibit such a finding. They are, (1) the inventory of the customer list, which documented that only five of the 715 names were not Profile Cutting customers, (2) the settlement of the County Court proceedings between Profile Cutting and the defendants, despite the generally accepted wisdom of the benefits of negotiating a commercial settlement, rather than risk the inherent uncertainty of litigation, the defendant's payment of 90,000 in settlement was incompatible with Mr Vu's claim to ownership of the customer list. In such circumstances (indistinct) that the falsity of Mr Truong's statements, nor any unlawful interference, can be established. The counterclaim must fail.

The malicious falsehood claim

8. The elements of the tort of malicious falsehood may be summarised as follows:

(1) The defendant published to a third party words which are false.
(2) The words refer to the plaintiff or his property or his business.
(3) The words were published maliciously.
(4) Special damage has followed as a direct and natural result of the publication of the words.

9. The difficulty in the present case concerns the first two elements of the tort. In the reasons below, reference is made to a "false statement concerning the [appellants] to Profile Cutting". However, the specific statement is not identified. The evidence relied upon in relation to the statement is said to be "Mr Truong's statement to Mr Done, that Mr Vu was using Profile Cutting's confidential information, being its customer list, and the disk given to Mr Done contained that information". The magistrate then dismissed the malicious falsehood claim because he was not satisfied that the defendants (appellants) owned the customer list he identified. The problem with the reasons below is that there is no specific finding by the magistrate as to what statement was actually made by Mr Truong. In this respect the reasons are inadequate[4]. In order to determine the malicious falsehood claim, the magistrate needed to make a finding as to the terms of the statement before then determining whether the statement he found to have been published was false. Further, in making a finding as to the statement actually published, the court below was required to determine whether the statements referred to in paragraph 22 of the appellants' counterclaim had been made by Mr Truong. It was only when these issues had been determined that the court below could then proceed to the issue of falsity.

10. In proceeding the way it did, the court below risked embarking upon a false issue. It may be that on a proper understanding of the facts the customer list identified by the magistrate was not one which was owned by the appellants. However such a finding does not preclude a finding that Mr Truong made the statements referred to in paragraph 22 of the appellants' counterclaim and that those statements were false[5]. While the respondent seeks to defend the magistrate's decision as a question of fact (namely the failure of the appellants to establish the falsity of a statement that Mr Vu was using Profile Cutting's confidential information), the error of law in this case was the court below's failure to consider the appellants' case[6] that the false statements relied upon were those pleaded in paragraph 22 of the appellants' counterclaim or (perhaps more specifically) that the "statement" was constituted by the provision (to Profile Cutting) of the affidavit of Mr Truong sworn 18 April 2006 (being exhibit D below: AB3 D771)[7]. This failure has additional significance in this case because Mr Truong made concessions about the falsity of this affidavit[8] – whereas no concession as to the falsity of the more general statement that Mr Vu was using Profile Cutting's confidential information was made by Mr Truong[9].

11. Further, in analysing the matter in the way that it did, the court below failed to consider that part of the appellants' case involving the false statement that the appellants were using Profile Cutting's confidential information. Even if it is accepted that the customer list referred to by the magistrate was owned by Profile Cutting, a question that arose for determination was whether or not the appellants were wrongfully using it. This is, of course, a factual matter – and a factual matter that may or may not be determined against the appellants. Nevertheless, the magistrate's reasons do not disclose whether this issue has been considered. In failing to make a finding as to what (if any) statement was made by Mr Truong to Profile Cutting in early April 2006, the magistrate failed to give consideration to the claim pleaded by the appellants and/or failed to give sufficient reasons for dismissing that claim. For these reasons, the appeal must be allowed and the matter remitted to the Magistrates' Court for further findings of fact to be made and reasons to be given in respect of the same. I turn now to consider the appellants' claim for unlawful interference with business.

The claim for unlawful interference with business

12. In his reasons, the magistrate noted that the High Court had not "definitely mandated the tort of unlawful interference with business in Australia". His Honour then referred to the statement in the plurality judgment in *Sanders v Snell*[10]:

> We do not think it necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia.

His Honour then said:

> It is obvious that this Court, in these proceedings, should not attempt to determine this issue.

13. The appellants contend that this part of the court below's reasons discloses that the court below failed to consider their claim for damages in respect of this tort. The respondent answers this submission by saying that in fact the magistrate considered this claim – as evidenced by the

last sentence of his reasons. Properly construed, in my view the magistrate considered the claim and dismissed it for the same reason he dismissed the malicious falsehood claim (namely that the customer list identified by him was owned by Profile Cutting).

14. While the High Court said in *Sanders v Snell* that in that case it was not necessary to decide whether a tort of interference with trade or business by an unlawful act should be recognised in Australia, the magistrate was bound to follow the judgment of Brooking J in *Ansett (Operations) v Australian Federation of Air Pilots*[11]. In that case his Honour said[12]:

> "The plaintiffs say that there is a tort that may be very compendiously described as unlawful interference with trade or business. The defendants deny this. It is not, I think, for me as a judge sitting at first instance to consider the matter from the standpoint or principle or to review the earlier authorities or to discuss the authorities at length, if I am able to find in recent decisions either binding authority for the view that the tort exists or persuasive authority which it would be wrong for me not to follow. I therefore say nothing about the early cases nor do I discuss the significance in this regard of *Rookes v Barnard* [1964] UKHL 1; [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269; [1964] 1 Lloyds Rep 28. It will be enough for me to refer to the speeches of Lord Reid and Viscount Radcliffe in *J.T. Stratford & Son Ltd v Lindley* [1965] AC 269, at p324 and pp328-9; to the decision of the Court of Appeal in *Acrow (Automation) Ltd v Rex Chainbelt Inc.* [1971] 3 All ER 1175; [1971] 1 WLR 1676 (a decision that has been criticised in so far as it regarded the means used as unlawful); to what was said by Lord Denning MR, who has had so much to do with this tort, in *Torquay Hotel Ltd v Cousins* [1968] EWCA Civ 2; [1969] 1 All ER 522; [1969] 2 WLR 289; [1969] 2 Ch 106, at p139; *Ex parte Island Records Ltd* [1978] Ch 122 at p136 and *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at pp201-3; [1982] 1 All ER 1042; [1982] IRLR 104; [1982] ICR 114; [1982] 2 WLR 322; 126 Sol Jo 134; to the speech of Lord Diplock in the last-mentioned case, at pp228-9; to *Brekkes Ltd v Cattel* [1971] 2 WLR 647; to *Emms v Brad Lovett Ltd* [1973] 1 NZLR 282; to *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354; and if I may say so respectfully, last but not least, to the decision of the House of Lords in *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, where Lord Diplock, in a speech with which the other Law Lords expressed their agreement, accepted, at p609, the existence of a common law tort of 'interfering with the trade or business of another person by doing unlawful acts'. The speech accepts that for the purposes of this genus of torts 'unlawful act' includes the procuring of another person to break a subsisting contract or interference with the performance of a subsisting contract. I mention also *Lonrho Plc v Fayed* [1990] 2 QB 479; [1989] 2 All ER 65; [1989] 3 WLR 631. As a judge of first instance, I do not think I need go beyond these authorities, especially in view of what was said by Lord Diplock. What the law is in Australia on this subject was await the authoritative determination of the High Court, but my duty is to apply the law as laid down by the House of Lords."

15. While the High Court in *Sanders v Snell* did not consider it was necessary in that case to decide whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia, the court went on to discuss the tort – referring to it as an "emerging" one. Specifically, the plurality discussed one element of the tort – being "the element of unlawful act". Ultimately the court held that the plaintiff/respondent in that case did not make out a case of interference with his trade or business interests by unlawful means[13].

16. The appellants' claim for damages for unlawful interference with business in the present case was put on two bases: first, the making of a false statement by Mr Truong[14]; and secondly, a breach of confidence[15] – in that it was claimed that Mr Truong committed a breach of confidence when he disclosed the appellants' confidential information to Profile Cutting. While the Magistrate referred to the appellants' complaint concerning the provision of "information confidential to them" in the early part of his reasons[16], this aspect was not referred to in that part of the Magistrate's reasons dismissing the counterclaim[17]. Indeed, it would appear that the Magistrate did not consider the appellants' case that the tort of unlawful interference with business was committed by Mr Truong with the unlawful element being the breach of confidence alleged by the appellants. From his reasons, it would appear that the magistrate only considered the tort of unlawful interference with business on the basis that the unlawful means were constituted by a false statement. This constitutes an additional reason why the appeal must be allowed[18].

Remittal to the court as originally constituted

17. The appellants originally sought to have the matter remitted to the Magistrates' Court as originally constituted if they were successful in establishing an error of law. However, in my view that course poses potential embarrassment. While I have found that Barrett M did not specifically find the content of the statement made by Mr Truong upon which the appellants' claims were

based, it may be that his Honour (without expressly saying so) has concluded that the statements contended for by the appellants were not false and thus the claim must be dismissed in any event (subject to the unlawful interference with business claim premised upon a breach of confidence being determined).

18. Remitting the counterclaim to the court as originally constituted may pose the problem referred to by Ormiston J in *Body Corporate Strata Plan (No. 4166) and Ors v Stirling Properties Limited*[19], namely that "where the reasons are partly defective, in the sense that not all issues have been dealt with, then an order compelling delivery of further or better reasons would have an air of unreality about it. Such an order would merely give a tribunal an opportunity to patch up what has been shown to be defective in circumstances where it is more than likely that the tribunal overlooked the issue altogether". In my view there is a potential for this problem to occur in this case. For that reason, I will not order that the counterclaim be remitted to the Magistrates' Court as originally constituted[20].

Conclusion

19. It follows from what I have said above that the appeal will be allowed. Subject to any submissions counsel may make as to the form of the orders, the orders I will make will be:

(1) The appeal be allowed.

(2) The decision of the Magistrates' Court made 1 August 2008 dismissing the appellants' counterclaim be set aside.

(3) The appellants' counterclaim be remitted to the Magistrates' Court for further hearing and determination in accordance with these reasons.

20. I will hear counsel on the question of costs.

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[1] AB1 A22-A32.
[2] While the counterclaim is pleaded as a counterclaim for both appellants, curiously the prayer for relief in the second further amended counterclaim only claims relief on behalf of the first appellant.
[3] Mr Truong's claims against the appellants are no longer the subject of this proceeding.
[4] As was said by Ashley JA (with whom Warren CJ and Nettle JA agreed) in *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317 at para [38]:
"Reasons must be such as reveal – although in a particular case it may be by necessary inference – the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error or law."
[5] The issue might then be what (if any) damage was suffered by the appellants if they prove such statements were made and were false in the circumstances where they did not own the identified customer list.
[6] Cf. *State of Victoria v Subramanian* [2008] VSC 9; (2008) 19 VR 335 at para [15] and following.
[7] See para 48 of the appellants' closing submissions below (at AB1 D32). See further AB1 D115 and AB1 D124-5.
[8] See for example AB1 D250.17-.18.
[9] Cf. AB1 B11.1.
[10] [1998] HCA 64; (1998) 196 CLR 329 at 341 [30]; 157 ALR 491; [1998] Aust Torts Reports 81-493; (1998) 72 ALJR 1508; (1998) 16 Leg Rep 2.
[11] [1991] VicRp 98; [1991] 1 VR 637.
[12] At p667.
[13] [1998] HCA 64; 196 CLR 346 [41]; (1998) 157 ALR 491; (1998) 16 Leg Rep 2.
[14] Cf. para 22 of the appellants' counterclaim.
[15] Cf. *Van Camp Chocolates Limited v Aulsebrooks Limited* [1984] 1 NZLR 354.
[16] See para 6 above.
[17] See para 7 above.
[18] Over and above the failure of the court below to identify (and make a finding in respect of) the statement upon which the appellants based their cause of action.
[19] [1984] VicRp 73; [1984] VR 903 at 912; (1984) 56 LGRA 227.
[20] However, if the parties are content for Barrett M to conduct the further hearing and determination of the matter and if Barrett M is similarly content, then nothing in this judgment should be construed as prohibiting the matter from being heard further by his Honour.

APPEARANCES: For the appellants C-Tech Laser Pty Ltd: Ms KJD Anderson, counsel. Challenge Legal, solicitors. For the respondent Truong: Mr AM Dinelli, solicitor. Koroneos Lawyers.