

33/99; [1999] VSC 150

SUPREME COURT OF VICTORIA

CHETHAMS (a firm) v REMINGTON & Co (a firm)

Balmford J

31 March, 13 May 1999 — [1999] VSC 150; [1999] 3 VR 258

CIVIL PROCEEDINGS – STATUTE OF LIMITATIONS – PART PAYMENT MADE BY SOLICITORS IN REDUCTION OF CLIENT'S DEBT – WHETHER SOLICITOR "ACKNOWLEDGED THE CLAIM" – WHETHER SOLICITOR ADMITTED LEGAL LIABILITY TO PAY – WHETHER PART PAYMENT BOUND "ALL PERSONS LIABLE IN RESPECT THEREOF" – WHETHER PART PAYMENT REVIVED THE CAUSE OF ACTION: LIMITATION OF ACTIONS ACT 1958, SS24(3), 25, 26(6).

Section 24(3) of the *Limitations of Actions Act* 1958 ("Act") provides (so far as relevant):

"Where (a) any right of action has accrued to recover any debt ...; and
(b) the person liable or accountable therefor acknowledges the claim ..."

Section 26(6) of the Act provides (so far as relevant):

"A payment made in respect of any debt ... shall bind all persons liable in respect thereof".

In enclosing a cheque in part-payment of a debt, R. solicitors wrote to C. (so far as relevant):

"Since I last wrote I have had a number of meetings with Charles Northam trying to get money from him to settle all our accounts. Mr Northam is likewise trying to get money from people who are indebted to him so that we can be paid...I have been able to extract a small amount and as evidence of his good faith I have \$1000 a cheque for which is enclosed. Mr Northam believes that it will take up to a year before he will be able finally to settle the balance and as I keep in touch with him I will monitor the situation..." On the hearing of a claim by C. to recover from R. amounts owing in respect of legal work done, a magistrate, in dismissing the claim, held that R. did not acknowledge the debt or make a part payment so as to revive the cause of action. Upon appeal—

HELD: Appeal dismissed.

1. Whether a particular document constitutes an acknowledgment for the purposes of the legislation is a question of construction. There is nothing in the letter in the present case which could be taken to constitute an acknowledgment by R. of its legal liability to pay that which C. sought to recover. The payment of the \$1000 was made out of money which had been paid into R's trust account on account of Mr Northam with instructions that it was to be paid by R. to C. on account of C's outstanding costs. The letter did not provide evidence in the form of an admission by R. that the debt remained due despite the passage of time.

2. In relation to the part payment, s26(6) of the Act should be read so as to provide that a person will be bound where a payment is made by any person liable in respect of any debt. In the present case s26(6) does not operate to give to the payment by Mr Northam in reduction of the debt to C. the characteristic of being a payment by R. so as to revive the cause of action. Accordingly, the magistrate was not in error in dismissing the claim.

BALMFORD J:

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 against an order made on 29 October 1998 by the Magistrates' Court at Melbourne constituted by Mr M Smith, Magistrate, whereby the claim of the appellant in respect of accounts for legal work done and services provided was dismissed and the appellant was ordered to pay the respondent's costs.

2. On 10 November 1998 Master Evans ordered that the questions of law shown by the appellant to be raised on the appeal were:

(i) Whether the learned Magistrate erred in law by finding that the Defendant did not make the payment of \$1,000 to the Plaintiff in May 1992;

(ii) Whether the learned Magistrate erred in law by finding that Charles Northam, alternatively the Favco Group, did not make the payment of \$1,000.00 to the Plaintiff in May 1992 on behalf of and

as agent of the Defendant within the meaning of sections 24 and 25 of the *Limitation of Actions Act* 1958 ("the Act");

(iii) Whether the finding of the learned Magistrate that the Defendant did not make the payment of \$1,000 to the Plaintiff in May 1992 was a finding which upon the evidence a reasonable Magistrate could have made;

(iv) Whether the learned Magistrate erred in law by finding that Charles Northam, alternatively the Favco Group, was not jointly, alternatively, severally liable to the Plaintiff with the Defendant in respect of the debt the subject of the proceeding;

(v) Whether the learned Magistrate erred in law by finding that the Defendant did not acknowledge the debt the subject of the proceeding after January 1992 within the meaning of the Act;

(vi) Whether the learned Magistrate erred in law by finding that the payment of \$1,000 made to the Plaintiff in May 1992 was not a part payment or payment within the meaning of section 26(6) of the Act;

(vii) Whether the learned Magistrate erred in law by importing terms into the language of section 26(6) of the Act in interpreting and applying that provision;

(viii) Whether the learned Magistrate erred in law by his interpretation and application of section 26(6) of the Act;

(ix) Whether the learned Magistrate erred in law in finding the Plaintiff's claim barred by the operation of the Act.

3. The relevant provisions of the Act, which appear under the heading "Acknowledgment and Part Payment" are as follows:

24. Fresh accrual of action on acknowledgment or part payment

(3) Where—

(a) any right of action has accrued to recover any debt or other liquidated pecuniary claim . . . ; and

(b) the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof—

the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

25. Formal provisions as to acknowledgments and part payments

(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last preceding section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

26. Effect of acknowledgment or part payment on persons other than the maker or recipient

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:

4. The appellant is a firm of solicitors carrying on practice in the United Kingdom and the respondent a firm of solicitors carrying on practice in Victoria. The magistrate found that it was not in issue that the appellant performed certain legal services at the request of the respondent in respect of the affairs of the Favco group of companies ("Favco"), a client of the respondent having interests both in Australia and the United Kingdom, and of which Mr Northam was a director. Nor was there any issue as to the quantum of the claim.

5. The magistrate went on to find, in the course of his extensive written reasons, that:

. . . there was a relationship of principal and agent between the defendant and the plaintiff, and unless the defendant can avail itself of the statutory defence it will be liable for the costs incurred by the plaintiff.

In such circumstances, the parties agree that unless there was an acknowledgment or part

payment of the debt subsequent to it falling due, the action will be barred. The bills making up the total claim were delivered 18 January, 1990; 2 March, 1990; and 23 July, 1990. The claim was issued on 15 January, 1998. None of the findings set out in this and the preceding paragraph is in issue here.

6. Thus, in the absence of acknowledgment or part payment, the latest date on which the claim of the appellant could be brought was 23 July 1996 if it were treated as one claim; the latest date for the claim to be brought in respect of the first account was 18 January 1996. The magistrate found that any payment made after 23 July 1990 should be regarded, for the purposes of the Act, as a payment made in respect of the entire debt of £4,666.

7. The only material on which the appellant relies to establish acknowledgment or part payment is a letter written on 11 May 1992 to the appellant by Mr Heydon, the principal of the respondent. The magistrate found in effect that nothing else which passed between the parties could be considered in that light. The letter reads (omitting formal parts):

Since I last wrote I have had a number of meetings with Charles Northam trying to get money from him to settle all our accounts. Mr Northam is likewise trying to get money from people who are indebted to him so that we can be paid.

As you may be aware the economy in Australia is terrible at the present time but I have been able to extract a small amount and as evidence of his good faith I have \$1,000.00 a cheque for which is enclosed. Mr Northam believes that it will take up to a year before he will be able finally to settle the balance and as I keep in touch with him I will monitor the situation.

I agree that this is not very satisfactory but unfortunately we are becoming used to situations like this in Australia.

8. It is not in issue that the cheque enclosed with that letter was drawn on the trust account of the respondent out of money received from Mr Northam. The magistrate found that the letter did not constitute an acknowledgment of liability and the payment was not "sufficient evidence of acknowledgment of debt by the defendant" to bring into operation the provisions of section 24 deeming the appellant's right of action to have accrued on 11 May 1992. Accordingly, he gave judgment for the respondent, on the basis that the claim of the appellant was statute barred.

9. All of the questions of law set out in the order of the Master turn on the effect of that letter and that payment. No relevant distinction was drawn at the hearing between Mr Northam and the Favco Group. The letter of 11 May 1992 refers only to Mr Northam, and it would appear that the distinction between Mr Northam and the Favco group can be ignored for present purposes.

10. As the magistrate pointed out, the legislation considered in the English cases is for all practical purposes identical with that in Victoria. In *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481; [1977] 1 WLR 565, Kerr J examined the history of the provisions of the *Limitation Act 1939* (UK) as to acknowledgment and part payment, and concluded at All ER 489:

What I draw from these authorities, and from the ordinary meaning of "acknowledges the claim", is that the debtor must acknowledge his indebtedness and legal liability to pay the claim in question. . . . he can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover.

11. Lord Sumner said in *Spencer v Hemmerde* [1922] 2 AC 507 at 535 that whether a particular document constitutes an acknowledgment for the purposes of the legislation is a question of construction. In the letter of 11 May 1992, Mr Heydon writes that he is "trying to get money from [Mr Northam] to settle all our accounts" and has been "able to extract a small amount" which is enclosed "as evidence of his [clearly Mr Northam's] good faith". He tells the appellant that "Mr Northam believes that it will take up to a year before he will be able finally to settle the balance". I read nothing in that letter which could be taken to constitute an acknowledgment by the respondent of its "legal liability to pay that which the plaintiff seeks to recover" in the words of Kerr J in *Surrendra*.

12. As to the source of the payment of \$1000, the letter, in my view, can only be read as

meaning that that payment was made out of Mr Northam's money which had been paid by Mr Northam to the trust account of the respondent with instructions that it was to be paid by the respondent to the appellant on account of the outstanding costs of the appellant.

13. The next question is as to on whose behalf that payment was made. Mr Minahan for the appellant submitted first, if I understood him correctly, that the *Legal Profession Practice Act* 1958 ("the *Legal Profession Practice Act*"), which was in operation at the relevant time, as well as general principles of trust law, permitted a solicitor who had incurred a liability on behalf of a beneficiary or fiduciary to pay that liability out of the trust fund, and that was what the respondent had done in this case. He referred to section 36(2) of the *Trustee Act* 1958, authorising a trustee to "reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers".

14. However, section 40 of the *Legal Profession Practice Act* provided that moneys received by a solicitor for or on behalf of any person should be paid into a trust account and should not be available for payment of the debts of the solicitor. Rule 17 of the *Solicitors (Audit and Practising Certificate) Rules* made under that Act, as they stood at the relevant time, provided that a solicitor might apply trust money for the solicitor's own use only in reimbursement of disbursements already paid for the client, or towards payment of the solicitor's costs for work performed for that client if certain specified information had been handed to the client no later than the date on which the solicitor applied the money. Those provisions do not permit the use of trust funds for the payment of a liability incurred by the solicitor. It cannot be inferred from the making of the payment, as Mr Minahan seemed to suggest, that it was intended that it be made on behalf of the respondent.

15. Alternatively, Mr Minahan submitted, if the payment was, as I have found, to be regarded as made by Mr Northam, it had been made, as permitted by section 25(2) of the Act, on behalf of the respondent. This was either because the debt was the liability of the respondent, as the magistrate found, or because it was the joint and several liability of Mr Northam and the respondent.

16. However, the fact that the payment was made in reduction of what has been found to be a debt of the respondent does not necessarily lead to the conclusion that it was made on behalf of the respondent (or, to use the words of section 25(2), "by the agent of" the respondent).

17. Mr Minahan cited *Lawrence v Fletcher* (1879) 12 Ch D 858 as authority for the proposition that the appellant, as solicitor-agent for the respondent, had a lien over moneys for which the respondent had a lien against Mr Northam. The basis on which he submitted that that lien created joint liability in Mr Northam and the respondent was not clear to me.

18. He submitted that, by virtue of section 26(6), the payment bound "all persons liable in respect thereof". Thus, he submitted, it bound the respondent so as to have the effect, provided for by section 24(3), of deeming the appellant's right of action to have accrued on the date of the payment, namely 11 May 1992.

19. The payment was made by the respondent with money paid to the respondent by Mr Northam, and was, the magistrate found, applied by the appellant to the reduction of the bill delivered on 18 January 1990. As has been said, the magistrate found that the respondent was liable for the debt, subject to the operation of the Act.

20. The magistrate referred to the following passage from the judgment of Kerr J at page 490 of *Surrendra*:

A part payment, like an acknowledgment, can only revive the cause of action and start time running afresh if it provides evidence in the form of an admission by the debtor that the debt remains due despite the passage of time.

Following that passage, His Honour referred to a number of authorities and concluded at page 491:

In my judgment the 1939 Act [introducing section 23(4) which is in the same terms as the Victorian section 24(3)] has not altered the law in this respect, because the reasoning underlying the exception remains the same. A part payment, like an acknowledgment, must be evidence of an admission of liability for the debt claimed.

21. His Worship also referred to the following passage from the judgment of Buckley J in *Re Footman Bower & Co Ltd* [1961] 2 All ER 161 at 164, which was one of the authorities relied on by Kerr J in *Surrendra*:

Payment in s23(4) [Section 24(3) of the Victorian Act] is dealt with in close conjunction with acknowledgment. Just as an acknowledgment can only acquire that character by the act of the debtor or his agent, so also, I think, a payment, for the purposes of s23(4) can only acquire the characteristic of being made "in respect of" the debt by the act of the debtor or his agent.

22. The difficulty with this view of the legislation is that while section 25(2) refers to "any such acknowledgment or payment as aforesaid", which may be taken as meaning an acknowledgment or payment made by "the person liable or accountable therefor" in terms of section 24(3)(b), section 26(6) describes the effect of merely "a payment made in respect of any debt". Thus the submission of Mr Minahan was that although Mr Northam, or any other third party, could not effect an acknowledgment of the debt which would bind the debtor for the purposes of the Act, a payment made by Mr Northam, in contrast to an acknowledgment effected by him, would so bind the debtor.

23. The magistrate, however, tacitly accepting the views of Kerr J and Buckley J, found it necessary to construe section 26(6) more narrowly than at first appears, that is, as if the words "by any person liable" appeared between the words "made" and "in". On that construction, a payment by a person who was himself liable for the debt would bind all persons who were so liable, but a payment by a third person not so liable would not have that effect. He considered that any other reading would not accord with the purpose and language of the statute or the dicta in the relevant cases. The wider construction, which would result from the reading suggested in the preceding paragraph, would have the effect that a payment by a volunteer or by an agent of the creditor would be sufficient to allow the creditor the advantage of the statute.

24. Having considered the matter, I am in agreement with the view of the magistrate. Mr Minahan drew my attention to various authorities as to the undesirability of reading words into a statute which are not there. However, this is to my mind, for the reasons of the magistrate which I have set out in the preceding paragraph, one of those cases where, adapting to the present matter the words of Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 307; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434:

the intention of the legislature sufficiently appears when sections [24, 25 and 26] are read together and . . . it is permissible to depart from the literal meaning of the words of section [24(3)] in order to give effect to that intention.

25. If interpreted on the basis set out in paragraph 23 above, section 26(6) does not operate to give to the payment by Mr Northam in reduction of the debt of the respondent the characteristic of being a payment by the respondent for the purposes of section 24(3).

26. I consider that when the three sections dealing with acknowledgment and part payment are read together, the interpretation placed upon them by the magistrate is, as he said, consistent with the purpose and language of the statute. The dicta cited above from *Surrendra* and *Re Footman Bower* serve to confirm that view.

27. For the reasons given I find the answers to the questions in the order of the Master to be: (i) No. (ii) Yes. (iii) No. (iv) No. (v) No. (vi) No. (vii) No. (viii) No. (ix) No.

28. The appeal will be dismissed. Counsel may wish to make submissions as to costs.

APPEARANCES: For the appellant Chethams: Mr S Minahan, counsel. Rigby Cooke, solicitors. For the respondent: Mr R Millar, counsel. Remington & Co, solicitors.