33/94

SUPREME COURT OF VICTORIA

VAN ARC PTY LTD v CAFASSO and ORS

O'Bryan J

29 August, 2 September 1994

CIVIL PROCEEDINGS – DISPUTE COMPROMISED – CLAIM/COUNTERCLAIM STRUCK OUT WITH RIGHT OF REINSTATEMENT – TERMS OF SETTLEMENT NOT EXECUTED – WHETHER DISPUTE SETTLED – WHETHER OPEN TO MAGISTRATE TO REINSTATE.

During the hearing of a civil proceeding, the parties agreed to compromise the dispute and requested that the claim and counterclaim be struck out with a right of reinstatement. When a party subsequently refused to execute the Terms of Settlement, the plaintiff successfully applied to a Magistrate for reinstatement of the claim and counterclaim. Upon appeal—

HELD: Appeal dismissed with costs.
The failure by one party to execute the Terms of Settlement meant that there was no settlement of the dispute. Accordingly, it was open to a Magistrate to reinstate the proceeding.

O'BRYAN J: [1] Appeal from an order made in the Magistrates' Court on 19 May 1994. In 1993 the respondents to this appeal (N. Cafasso and S. Montagnese) brought a claim against the appellant (Van Arc Pty Ltd) in the Magistrates' Court. The claim and counterclaim was in the nature of a building dispute. After a hearing occupying four days in court, counsel for the respective parties agreed to compromise the dispute and requested the Court to enter in the record: "claim and counterclaim struck out with a right of reinstatement with no order as to costs". This order was made on 28 May 1993.

Apparently counsel contemplated that the compromise would be reduced to writing, in the form of terms of settlement, and signed by the parties. The material placed before the Magistrates' Court for the purposes of the order sought on 19 May did not reveal whether counsel prepared terms of settlement and initialled them or otherwise recorded in writing the basis upon which the parties had agreed to compromise the dispute. Indeed, the material filed in this Court does not reveal the basis upon which the parties or their counsel agreed to compromise the dispute.

Apparently terms of settlement were prepared by counsel and/or the solicitors for the respondents shortly after 28 May 1993 but the respondents refused to execute the document on the ground that the terms included a "confidentiality" clause which the respondents found objectionable. It appears that counsel for the parties and their respective solicitors had agreed to include a confidentiality clause but the respondents refused to accept the clause and asserted that their legal representatives did **[2]** not have actual authority to do so. As a result, it seems that the compromise came unstuck and moneys payable by the appellant to the respondents have not been paid.

The respondents then sought to reinstate the claim and counterclaim pursuant to the order made on 28 May. The application to the Magistrates' Court was opposed by the appellant on the ground that the proceeding had been settled and the respondents were in default in neglecting or refusing to sign the terms of settlement.

It was further argued that the course of reinstating the claim and counterclaim would cause undue prejudice to the appellant in the way of additional costs and expose the appellant to the risk of judgment for a larger sum than it agreed to pay pursuant to the compromise. The learned Magistrate made orders on 19 May 1994 in these terms:

1. That the complaint be reinstated.
2. That costs thrown away are reserved.
3. That N. Cafasso pay Van Arc Pty. Ltd. costs of $330.

The learned Magistrate gave reasons for his decision as follows:

> "In unusual circumstances counsel reach a settlement. The plaintiff (respondent) refuses to enter the terms of settlement. I am prepared to say that there is no settlement as such because the terms agreed upon were not complied with and therefore the action had not settled."

Counsel for the appellant argued that the learned Magistrate made an error of law in that having found that counsel reached a settlement he proceeded to find there was no settlement because the terms of settlement agreed upon were not complied with "and therefore the action had not **[3]** settled". Either there was a settlement or there wasn't a settlement. If there was a settlement, counsel for the appellant argued, and the terms were not complied with by one of the parties, the remedy for the other party lay in suing on the settlement, not in reinstating the claim.

The reasons of the Magistrate do reveal an inconsistency unless the learned Magistrate meant to say in the first sentence "counsel believed they reached a settlement". On the material placed before the learned Magistrate, I do not consider that it was open to the Magistrate to find that counsel settled the proceeding in a manner which was binding upon the parties. The material did not show whether counsel reduced their settlement to writing or simply agreed orally to prepare an agreement for execution by the parties.

An agreement to enter into an agreement is not binding and enforceable *per se* but is simply the intended basis for a future contract. *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353 at 360-361. The terms of the settlement are not disclosed. Unless a binding settlement was entered into by counsel for the respective parties there was no impediment to one party seeking reinstatement of the claim and counterclaim when the terms of settlement were not executed. The onus lay upon the appellant to satisfy this Court that the learned Magistrate made an error of law on 19 May when he reinstated for hearing the claim and counterclaim. I am not persuaded that an error was made essentially because I consider that the learned Magistrate could not be satisfied that the action was settled by counsel in a manner which was binding upon the parties. If the understanding between counsel at court on 28 May was that formal terms of settlement had to be executed by **[4]** the parties before settlement was complete, as I consider must have been the case, the failure of one party to execute the terms of settlement meant that there was no settlement.

The circumstance that the Court was requested to record "a right of reinstatement" of the claim and counterclaim on 28 May is also consistent with the view I have formed that counsel had an understanding that the action would be settled when they left the Court but, unfortunately, settlement was never perfected.

As the claim and counterclaim must now be reheard in another Magistrates' Court it was reasonable for the learned magistrate to order on 19 May that costs thrown away be reserved. No other order as to the costs thrown away would be just. Accordingly, the appeal must fail. Appeal dismissed with costs.

APPEARANCES: For the appellant Van Arc: Mr Campbell, counsel. RJ Lewis, solicitor. For the respondents: Mr Stanton, counsel. Lewis Hutchinson, solicitors.
