SUPREME COURT OF QUEENSLAND

[2003] QSC 014
File No S3752 of 2002

BETWEEN:

ASH & ANOR.

Applicant

AND:

COMANS & ANOR.

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

FILE NO/S:	3752/02
DIVISION:	Supreme Court of Queensland
PROCEEDING:	Appeal
ORIGINATING COURT	Magistrates Court
DELIVERED ON:	29 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGE:	Moynihan J
ORDER:	**Judgment against the applicant for costs set aside** **Return to the Magistrates Court for Judgment** **Second Respondent pay the applicant's costs of the appeal to be assessed on a standard basis** **Indemnity certificate ordered to the second respondent.**
CATCHWORDS:	Appeal from a minor debt claim in the Magistrates Court – where applicant seek an order quashing a judgment against both applicants – whether the rules of natural justice were observed – whether Magistrate exceeded jurisdiction – whether to set the judgment aside – whether to award indemnity certificate *Appeal Costs Fund Act* (1973) *Supreme Court of Queensland Act 1991* *Uniform Civil Procedure Rules 1999*

Carpentaria Electrical Pty Ltd v A Stipendiary Magistrate at Southport (unreported White J 11472 of 1998 BC 9906136).

R v The Judge of District Court at Brisbane and Davies; ex p Allen [1969] QdR 114.

RE *Aherns; A Palmer* (1906) 6SR (NSW) 75

Peterson v Maloney (1951) 85 CLR 91

COUNSEL: D.W. Marks for the applicant

G. Jones (in person) for the second respondent

SOLICITORS: O'Reilly & Lillicrap Solicitors for applicants

[1] The applicants (Lee Ash and Georgina Ash) seek an order quashing a decision of the first respondent (the Magistrate) giving the second respondent (Garry Owen Jones – Jones) judgment against both applicants for $6,625.00 and $125.00 costs in a minor debt claim in the Magistrates Court.

[2] The applicants were represented by counsel, the Magistrate appeared to abide the order of the Court and took no part in the proceedings. Jones appeared on his own behalf.

[3] A minor debt claim is a claim for a debt or liquidated demand in money which the plaintiff elects to have heard in the Magistrates Court under the simplified procedures contained in part 9 division 2 of the *Uniform Civil Procedure Rules* 1999 (UCPR). The relevant definitions are in the dictionary in the *Supreme Court of Queensland Act* 1991: -

> "minor claim means a claim for an amount, including interest, of not more than $7 500, whether as a balance or after an admitted set off, reduction by any amount paid by or credited to the defendant, abandonment of any excess, or otherwise."
>
> " 'minor' debt claim" means a minor claim in which the plaintiff–
>
> claims to recover against a defendant a debt or liquidated demand in money, with or without interest; and
> elects in the claim to have it heard and decided in a Magistrates Court under the simplified procedures in the Uniform Civil Procedure Rules".

[4] The UCPR provide to the effect that in a minor debt claim the plaintiff must file and serve a claim which includes a statement of the amount claimed, how it is worked out and how it came to be owing. A defendant must include in the notice of intention to defend a response answering the plaintiff's assertions.

[5] In hearing a minor debt claim the Magistrate is not bound by the laws of evidence or procedure applying to a Court but must observe the rules or natural justice. The Magistrate is not required to make a record of the evidence but must record the reasons for the decision. The parties are generally denied legal representation, the decision is to be "fair and equitable to the parties" and there is no appeal.

[6] A decision made in excess of jurisdiction or which involves a breach of natural justice may however be quashed by an order of the nature of certiorari; *Carpentaria Electrical Pty Ltd v A Stipendiary Magistrate at Southport* (unreported White J 11472 of 1998 BC 9906136). *R v The Judge of District Court at Brisbane and Davies; ex p Allen* [1969] QdR 114.

[7] The plaintiff's claim was for $6,625.00 "for monies due and owing despite demands for repayment". The annexure to the claim dealt with how the amount was worked out and how it came to be owing. It alleged Lee Ash was the manager of a business called Finance Lenders and Georgina Ash owned it. These matters are not an issue.

[8] The annexure went on to allege that Lee Ash approached Jones with a proposal that he should invest $5000 with Finance Lenders. This money was to be further advanced to Robin Herbert Glass to settle the purchase of 26 Duke Street, Uralla. Finance Lenders would administer the loan and repay all monies to the plaintiff.

[9] It is then alleged that Jones paid $5,000 and the parties signed a "Joint Venture Agreement". It is more convenient to set out the relevant portions than to attempt to summarise them; (the First Party is Finance Lenders the second party is Jones):-

> "The FIRST PARTY will provide logistic control of the pledging of assets, which will include identification, selection and management of pledge, as well as preparation of documents for pledging and ancillary securities, and collection of fees. The FIRST PARTY will incur all costs associated with the pledging of assets on behalf of the JV and execution of the pledge of those assets.
>
> The SECOND PARTY will provide capital for the identified pledge and deposit funds to the identified account of FINANCE LENDERS. The capital shall be FIVE THOUSAND DOLLARS.
>
> After ensuring correct documentation is executed the FIRST PARTY will pledge assets from this account and ensure assets are transferred into the name of the SECOND PARTY. The asset is the deposit on 26 Duke St Uralla and all assets of the proponent ROBERT HERBERT GLASS of 141 JESSIE ST ARMIDALE.

The FIRST PARTY will deposit to the nominated bank account of the SECOND PARTY on the 15th of the following month, payment equal to 2.5% per month (or part thereof) of the capital used for asset purchases under this Joint Venture. Should the 15th of the month fall on a non-working day then the payment will be made on the working day after the 15th.

In the event a pledge agreement is breached and not remedied within one day, the FIRST PARTY will forward to the SECOND PARTY at the address below a summary of the status of the contract. This summary will include a review of the actions taken by the FIRST PARTY, a plan of action in the event compliance is not reached immediately and a review of the likely outcome.

In the event the proponents cannot honour the pledge or buy back the agreement the FIRST PARTY at its cost will collect the assets and sell such assets to return the capital provided for the venture.

On the successful completion of funds and the expiration of all contracts, all capital and payments due will be deposited in the nominated account of the SECOND PARTY".

[10] The annexure to the claim then went on: -

"9) On or about 18 April 2001 the 1st defendant sent the plaintiff an email that included a statement of financial dealings the 1st defendant had with Robin Herbert Glass and Flowerfresh Pty Ltd and which was intended for Clouts Receivers. This statement acknowledges the repayment from Robin Herbert Glass on the loan on 26 Duke Street Uralla to the 1st defendant.

10) On or about 1 June 2001 with Bryan Smith present, the plaintiff asked the 1st defendant for repayment of the debt. The 1st defendant admitted to having the money and said he would repay the plaintiff.

11) On or about 3 June 2001 the plaintiff sent a letter of demand to the 1st defendant and also to the fax number and address of Finance Lenders.

12) At this date the debt has not been repaid.

[11] The Ash's denied the statement in para 10 was made and the allegation in para 9. The defence stated that legal action had been commenced against Glass "for the recovery of all monies, $331,000". It went on that the Ash's had documents "that show that more than one joint venture partner was involved in each agreement with Robin Herbert Glass".

[12] The Magistrates reasons relevantly for present purposes dealt with the matter as follows: He found the $5,000 was paid, that $250 for interest, but the balance of the interest and $5,000 remained outstanding. He went on:

> "The property the subject of the agreement, 26 Duke Street, was pledged. Any charge over that property by way of the pledge has been relinquished by Finance Lenders. That fact has been admitted by Mr Ash today. Finance Lenders are pursing Mr Glass personally. Finance Lenders took no steps to secure 26 Duke Street and it was subsequently transferred out of Mr Glass's name to Flower Fresh Proprietary Limited. That is effectively a breach of Finance Lenders.
>
> As I said, this is a contractual matter and (if) is the joint venture agreement which imposes the liabilities on the parties. Now, the agreement is clearly based on the pledging of the asset, 26 Duke Street. Mr Jones fulfilled his liability by paying $5,000. The first breach by the party, Finance Lenders, is that they did not transfer the asset, 26 Duke Street, into Mr Jone's name as per the agreement. That never happened and probably was not possible anyway.
>
> The second breach by Finance Lenders is not paying the interest ... Two lots were received, but not the rest.
>
> Thirdly, and most significantly, the party Finance Lenders did not, upon Glass failing to honour the pledge or buy it back, they did not collect the asset, 21 Duke Street, and sell it and return the capital provided by Mr Jones."

[13] The Magistrate found that by implication the principal and outstanding interest were to be paid when the pledge was redeemed by Glass or when Finance Lenders collected the asset and sold it. He went on to find that by not properly securing the asset and allowing it to "go beyond its reach" Finance Lenders had breached the contract and that the damages flowing from that breach were the principle and interest. He made no finding about the allegation in para 10 of the Annexure.

[14] The Magistrate went on to find that Jones dealt exclusively with Lee Ash and did not know of Georgina Ash, who he therefore concluded was an undisclosed principal. In reliance on a passage by Bowstead on Agency p 355: -

> "where the principal is entirely undisclosed at the time of contracting, the contract is made with the Agent and he is personally liable. The principal may also intervene to sue and be sued, with the later only subject to the general rule that nothing must prejudice the rights of the third party to sue the agent if he so desires".

he found that this was a case where both agent and principal are liable. He gave judgment against both defendants for $6,625.00 of the claim and $125.00 costs.

[15] It was open to the Magistrate to conclude that Georgina Ash was an undisclosed principal and it is not demonstrated he erred in doing so. It was also open to the

Magistrate to conclude that Finance Lenders was in breach of its obligation under the so called Joint Capital Venture Agreement and he did not err in doing so.

[16] Although on the view I take it is unnecessary to determine it, there is nothing in the record to sustain a conclusion that there was a breach of natural justice. There is no suggestion that Lee Ash, who conducted the proceedings before the Magistrate on behalf of Finance Lenders, sought an adjournment to deal with any difficulty he identified or that Jones was challenged in the course of his evidence on that issue there is in my view no substance in this ground.

[17] I turn to consider whether the Magistrate acted in excess of jurisdiction in awarding damages for breach of contract. Had Finance Lenders collected and sold the assets of the "proponent" as the Joint Venture Agreement contemplated the proceeds of the sale may well have constituted a debt. The proceeds however may not have been sufficient to return to, in this case Jones, the capital provided for the venture. It is not clear whether in terms of the Agreement Finance Lenders would have obliged to make up any short fall and it is unnecessary to decide that issue. The point however serves to illustrate that the damages awarded by the Magistrate for Finance Lenders' breach of contract lack the characteristic of being ascertained or ascertainable by a mere calculation; re *Aherns; A Palmer* (1906) 6SR (NSW) 756 or being a present obligation to pay a fixed sum.

[18] In other words the damages awarded by the Magistrate are not a debt or liquidated demand of money and hence not a minor debt claim. The damages for breach of contract are outside the jurisdiction of a Magistrate dealing with a minor debt claim.

[19] Although on the view I have taken on the matter it is unnecessary to determine it, entering judgment against both applicants, appears to be an error of law. The case is one of alternative liability and in such a case against which judgment is entered is a matter of the plaintiff's election; *Peterson v Maloney* (1951) 85 CLR 91 @ 102-104.

[20] The judgment entered against the applicant for $6,625.00 and $125.00 for costs must therefore be set aside and the claim dismissed. The matter should be returned to the Magistrates Court for judgement.

[21] I turn to the question of costs. No order is sought against the Magistrate. Costs should follow the event and the second respondent should pay the applicants' costs of the appeal assessed or a standard basis. Section 15 of the *Appeal Costs Fund Act* (1973) provides where there is a successful appeal against a decision of the Supreme Court on a question of law the Supreme Court may grant an indemnity certificate in respect of a costs order. In this case the appeal was determined on a question of law the second respondent is not responsible for the errors. He should have an indemnity certificate.