01/09; [2009] VSC 26

SUPREME COURT OF VICTORIA

BRIMBANK AUTOMOTIVE PTY LTD & ANOR v MURPHY & ANOR

Kaye J

4, 10 February 2009

CIVIL PROCEEDINGS – CLAIM FOR BOOKKEEPING SERVICES – ARRANGEMENTS WITH BOOKKEEPER THAT SHE WOULD PAY COMPANY'S CREDITORS FROM A CREDIT CARD ISSUED TO HER BY THE COMPANY – COMPANY TO REIMBURSE BOOKKEEPER – CLAIM BY BOOKKEEPER THAT COMPANY OWED HER MONEY – DEFENCE FILED – MATTER LISTED FOR HEARING NEARLY ONE YEAR LATER – A FEW DAYS PRIOR TO HEARING APPLICATION BY COMPANY FOR AN ADJOURNMENT SO THAT ACCOUNTANT COULD RECONSTRUCT THE COMPANY'S ACCOUNTS – MAGISTRATE TOLD DEFENDANT IT MUST PRODUCE SUBSTANTIAL EVIDENCE TO SUPPORT APPLICATION FOR ADJOURNMENT – AT TRIAL NO SUBSTANTIAL EVIDENCE PRODUCED – APPLICATION FOR ADJOURNMENT REFUSED – HEARING PROCEEDED – CLAIM MADE IN FAVOUR OF BOOKKEEPER – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION.

1. The guiding principle for the exercise of the discretion is that a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise. Justice is the paramount consideration. In determining whether to grant an adjournment, a court is entitled to take into account, as a relevant circumstance, the exigencies of case management. However, that consideration should not be permitted to prevail over the rights of the parties before the court, and in particular it should not predominate over the right of a particular party to be able to present its case properly to the court.

2. A court is not required on the mere application of a party to grant an adjournment. A court is entitled to expect, in an appropriate case, that proper material be put before it to justify the indulgence sought by the party seeking the adjournment.

3. Where a case had been listed for trial for nearly 12 months and another 7 months if the matter were adjourned, and the delay would occasion personal and financial stress to the plaintiff, and the defendant failed to produce substantial evidence as to why the matter should be adjourned, a magistrate was not in error in refusing an application for adjournment and proceeding to hear and determine the claim in the plaintiff's favour.

KAYE J:

1. The plaintiffs seek relief in the nature of *certiorari* to quash orders made by the Magistrates' Court at Sunshine on 28 February 2008 and 4 March 2008. In those proceedings the first named plaintiff, Brimbank Automotive Pty Ltd ("Brimbank"), and the second plaintiff, Jeffrey Moloney ("Moloney"), were defendants to a claim brought against them by the first defendant to these proceedings, Patricia Murphy ("Murphy").

2. Moloney is a director of Brimbank. It was common ground in the Magistrates' Court proceedings that, before 2007, there was an agreement between Brimbank and Murphy, whereby the latter would provide bookkeeping services to Brimbank. That agreement came to an end in March 2007 in circumstances which were controversial before the Magistrates' Court, but which are irrelevant to the current application. In July 2007, Murphy commenced the proceedings in the Magistrates' Court against Brimbank and Moloney. She claimed that by an agreement made between herself and Brimbank in 2004, she agreed to provide professional bookkeeping services to Brimbank. In July 2005, she agreed with Brimbank that she would pay monies to various creditors of Brimbank by using a Commonwealth Bank credit card issued to her, and that Brimbank would reimburse her for any money so paid on its behalf, together with any additional interest charged by the bank as a consequence of those payments. Pursuant to that agreement, the plaintiff alleged that she made various payments to creditors of Brimbank between July 2005 and March 2007. In the Magistrates' Court proceeding she claimed that, under that agreement, Brimbank owed her

the sum of $23,776.13. Alternatively, Murphy claimed that, in contravention of s52 of the *Trade Practices Act* and s9 of the *Fair Trading Act*, Brimbank and Murphy had falsely represented to her that Brimbank would reimburse her for any payments made to creditors on behalf of Brimbank.

3. In August 2007, Brimbank and Moloney delivered a notice of defence in the Magistrates' Court. On the same day, Brimbank also served a counterclaim on Murphy. By that counterclaim, Brimbank alleged that, in breach of the terms of the agreement between Murphy and itself, Murphy paid to herself, from Brimbank's monies, sums of money which were not authorised by Brimbank. Brimbank also alleged that, in breach of the agreement, Murphy paid sums to creditors other than those authorised by the agreement, used credit cards other than that issued to her by the Commonwealth Bank, and reimbursed herself and her husband from monies of Brimbank for interest and fees incurred on those credit cards. Brimbank claimed damages against Murphy in respect of those breaches. That claim for damages was not particularised. In addition, Brimbank claimed the sum of $5,000, which it alleged had been paid by it to Murphy under a mistake of fact in March 2007. Finally, Brimbank claimed that Murphy had taken and detained some of the books of account of Brimbank, and Brimbank claimed an order for restitution or alternatively damages.

4. Ultimately, the Magistrates' Court proceeding was set down for trial on 4 March 2008. By an application dated 25 February 2008, Murphy sought orders against Brimbank and Moloney for discovery and for further and better particulars of the counterclaim. On 28 February 2008, and in response to that application, Ms Yana Saba, a solicitor acting for Brimbank and Moloney, swore an affidavit to which I shall further refer in these reasons. The application came before the magistrate on 28 February 2008. In the course of resisting that application, counsel then appearing for Brimbank and Moloney, Mr Martin, made an oral submission that the trial date be vacated, on the grounds that his clients were not ready to proceed with the case on that date. Counsel told the magistrate that his instructing solicitor had not received material from an accountant, who had been instructed on behalf of his clients. Counsel further stated that his clients were prepared to pay the costs of Murphy. In response, the magistrate declined to make an order vacating the trial date. His Honour stated that if an application for adjournment was to be made, it would need to be supported by "substantial evidence".

5. After that hearing, and in response to Ms Saba's affidavit, Murphy swore an affidavit dated 3 March 2008. The proceeding came on for trial on 4 March 2008. Counsel acting for Brimbank and Moloney, Mr Adami, made a further application for an adjournment of the hearing date due to the unavailability of the forensic accountant. The magistrate refused that application. His Honour noted that Mr Adami had not produced any evidence as to the retainer by Brimbank and Moloney of the forensic accountant. He observed that the case had been proceeding for one year and stated: "There's going to be no adjournment, this matter is starting today". His Honour then stood the matter down to enable Mr Adami to seek further instructions.

6. After a short adjournment, Mr Adami told the magistrate that he had spoken to his instructing solicitor, who stated that he wished to have the opportunity to come to court to give evidence concerning the application for an adjournment. Mr Adami stated that his solicitor was in a better position than he was to assist the court in relation to the application. The magistrate responded that the solicitor, Mr Griffin, should have been in court, and that both Mr Martin and Mr Adami had had an opportunity to present the application for the adjournment. His Honour then concluded:

> "Well Mr Griffin, he could have come along himself in either of the applications and done the application himself but he's decided to instruct counsel and now when I've denied the application to counsel he wants to come along and have another bite of the cherry, no."

7. In the course of further discussion, the magistrate stated that the matter had been on foot for twelve months, and that Mr Adami's clients had had sufficient opportunity to brief "the so-called forensic accountant". The magistrate queried what evidence could be given by a forensic accountant in any event. He again stated that, as he had already heard two applications for an adjournment, he was not inclined to permit a further delay in the proceeding so that the solicitor could himself have a "third bite". In response, Mr Adami stated that he was instructed to withdraw from the case.

8. The magistrate then proceeded to hear and determine the claim made by Murphy. His Honour made orders: that Brimbank and Moloney pay Murphy $23,776.13 on the claim, together with $1,782.65 interest; that Brimbank and Moloney pay Murphy's costs fixed at $8,220.20; and that the counterclaim be dismissed.

9. The plaintiffs in this proceeding seek relief, in the form of *certiorari*, to quash orders which they claim were made by the magistrate on 28 February and 4 March 2008. In fact, the magistrate did not make any formal order on 28 February 2008. Rather, his Honour, on that date, declined the application made on behalf of Brimbank and Moloney to vacate the trial date which had been set for the proceeding. Thus, the claim for relief in the present application is directed to the order made by the magistrate on 4 March 2008, by which judgment was given in favour of Murphy on her claim, and the counterclaim was dismissed. In essence, Brimbank and Moloney allege that, in refusing to adjourn the proceeding on 4 March, and in hearing and determining the claim and the counterclaim, the learned magistrate failed to comply with the principles of procedural fairness.

Legal principles

10. It is well established that where a court or tribunal has failed to comply with a relevant principle of procedural fairness or natural justice, such a failure may constitute an appropriate basis for relief by way of *certiorari*.[1]

11. It is fundamental to the present application to bear in mind that a decision by a trial judge, as to whether to grant an adjournment, is a discretionary decision. Appellate courts, and this Court on review of such a decision, have repeatedly emphasised that the court should only interfere with such a decision in exceptional circumstances. In particular, an appellate court will only intervene, if it is satisfied that the decision relating to the adjournment would cause irreparable injustice to the party affected by it.[2] Thus, in *Maxwell v Keun*[3], Atkin LJ stated:

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to refuse such an order, and it is, to my mind, its duty to do so."

12. The guiding principle for the exercise of the discretion is that a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise.[4] Thus, in *Walker v Walker*[5] Simon P stated:

> "... Where the refusal of an adjournment would result in a serious injustice to the party requesting the adjournment, the adjournment should only be refused if that is the only way that justice can be done to the other party ... ."

13. In determining whether to grant an adjournment, a court is entitled to take into account, as a relevant circumstance, the exigencies of case management. However, that consideration should not be permitted to prevail over the rights of the parties before the court, and in particular it should not predominate over the right of a particular party to be able to present its case properly to the court.[6] The exercise by the court of its discretion in such a case is not the occasion to punish a party, or its practitioners, for oversight, mistake or tardiness. Rather, the overriding requirement is that the court must do justice between the parties.[7] The point was stated in authoritative terms in the joint judgment of Dawson J, Gaudron J and McHugh J in *The State of Queensland & Anor v JL Holdings Pty Ltd*[8], as follows:

> "In our view the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising

an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

Counsel's submissions

14. Mr J Catlin, who appeared for the plaintiffs on the application before me, submitted that the magistrate wrongly applied the relevant principles in refusing his client's application for an adjournment. He submitted that, on their face, the pleadings in the Magistrates' Court proceeding, and in particular Brimbank's counterclaim, necessarily raised issues of accounting. In her affidavit, Ms Saba had deposed that Brimbank had had difficulty reconstructing its accounts relevant to the proceeding. On 4 March 2008, the magistrate had before him new counsel, who had not previously appeared on behalf of Brimbank and Moloney, and who, quite evidently, was not fully *au fait* with what had occurred on 28 February. Mr Catlin submitted that the magistrate should have acceded to the application by Mr Adami that he be granted a further indulgence to enable him to call evidence from his solicitor, Mr Griffin, to explain the relevance of the accountant to the issues in the proceeding. Instead, Mr Catlin submitted, the magistrate punished Brimbank and Moloney for the deficiencies of their legal representatives, by forcing the proceeding on there and then. In doing so, the magistrate erroneously gave undue prominence to the requirements of case management, contrary to the principle stated by the High Court in *The State of Queensland v JL Holdings Pty Ltd*[9] and by the Court of Appeal in *Smith & Anor v Gannawarra Shire Council & Anor*[10].

15. In response, Mr Lombardi, who appeared on behalf of the first defendant (Murphy) to this proceeding, submitted that the magistrate did not err in the exercise of his discretion to decline the application for an adjournment. Mr Lombardi relied on six factors which, he submitted, were evident from the proceedings before the magistrate, namely:

(1) The application for adjournment was made at a particularly late stage. It was first raised in the course of the application on behalf of Murphy for further particulars and discovery on 28 February 2008. No previous warning had been given to Murphy's legal representatives that such an application would be made. When the proceeding returned to the court on 4 March, Brimbank and Moloney had not provided any affidavit in support of the application for an adjournment, nor had they put any other material before the court in support of that application.

(2) In those circumstances, the magistrate was justified in doubting the *bona fides* of the application for an adjournment. In particular, he was justified in questioning whether it was necessary for Brimbank to rely on the services of a forensic accountant. When questioned, Mr Adami did not even know the name of the forensic accountant who, it was said, had been engaged on behalf of Brimbank, nor could he inform the court of the terms of the expert's retainer.

(3) Accordingly, the magistrate was entitled to regard the application for an adjournment as a stalling tactic on behalf of Brimbank and Moloney. The counterclaim was cast in general terms. No particulars of loss had been provided on behalf of Brimbank. It bore the hallmarks of a "holding" defence.

(4) In any event, the claim made on behalf of Murphy against the defendants in the Magistrates' Court was discrete from the counterclaim propounded on behalf of Brimbank. Thus, on 4 March, Brimbank could have withdrawn its counterclaim, and resisted the claim by Murphy. Instead, it withdrew the instructions of its counsel, and permitted the claim by Murphy to proceed unopposed.

(5) The magistrate was entitled to take into account the fact that, if he granted the application for the adjournment, the case would not be able to accommodated by the court before October 2008. The magistrate was entitled to take that into account as a matter of case management. In doing so, the learned magistrate did not give undue weight to that consideration.

(6) The magistrate was also entitled to take into account the affidavit sworn by Ms Murphy, as to the potential effect of an adjournment on her. In her affidavit sworn 3 March 2008, Ms Murphy had deposed that her husband suffered from lung cancer, which at that time was in remission. Ms Murphy had stated that she wished the matter to proceed as her husband was under medical surveillance, and she wished to take care of him and run her small business. She also deposed that she had had to sell shares to pay the Visa card debt, which she had incurred in discharging the debts of Brimbank.

16. In reply, Mr Catlin submitted that the claim and the counterclaim had unusual features, so that it was important that Brimbank had the services of an accountant to assist it, particularly in respect of the counterclaim. He submitted that it would have been quite inappropriate to separate the counterclaim from the claim, since the two matters were interrelated. He further submitted

that the delay caused by the adjournment would not occasion undue prejudice to Ms Murphy, since if she succeeded on her claim, she would be entitled to interest.

Decision

17. In my view, the plaintiffs in this proceeding have failed to demonstrate that the learned magistrate erred in the exercise of his discretion to refuse the application made on their behalf for an adjournment of the proceedings in the Magistrates' Court.

18. It is clear, from the transcript of the proceedings in the Magistrates' Court, that the magistrate entertained genuine doubts as to the reason given for the adjournment sought by Brimbank and Moloney. Indeed, his Honour entertained serious reservations as to the *bona fides* of the application made on behalf of Brimbank and Moloney for an adjournment. As Mr Lombardi pointed out, no notice had been given to the court, or to Murphy's legal representatives, before 28 February 2008, of the intention of Brimbank and Moloney to apply for an adjournment. Rather, in the course of the hearing of the application by Murphy for particulars and discovery, an oral application was made on behalf of Brimbank and Moloney "on the run". The application was not supported by any material. The affidavit of Ms Saba sworn 28 February 2008 was before the court, but it had been filed in response to the application made on behalf of Murphy for discovery and further particulars. The magistrate, understandably, specified, in the clearest terms, that if Brimbank and Moloney wished to make an application for an adjournment, it would need to be supported by "substantial evidence" identifying the need for that adjournment.

19. When Mr Adami renewed the application for an adjournment on 4 March, no further material had been supplied on behalf of Brimbank and Moloney in support of that application. Indeed, while Ms Saba's affidavit did refer to the need by Brimbank to reconstruct its accounts, the affidavit did not refer to the fact that Brimbank had engaged a forensic accountant to undertake that exercise. When questioned by the magistrate, Mr Adami had no information as to the identity of the accountant, as to the task for which he had been retained, or as to the terms of his retainer. No proper explanation was given to the magistrate why the accountant was not ready to give evidence to the court on that date. The magistrate correctly pointed out that the proceeding had been on foot for almost one year. Brimbank and Moloney had had more than ample time to brief a forensic accountant, and to have that accountant undertake whatever exercise was required of him. It was clear, from the terms in which the application for an adjournment was made, that Mr Adami had little, if any, information in his brief justifying the need by his clients for an adjournment.

20. It is true that the authorities make it clear that an application for an adjournment should be granted, where that application is necessary to enable a party to be in a position to put forward its case in a proceeding. However, that does not mean that a court must, on the mere application of a particular party, grant an adjournment for that purpose. A court is entitled to expect, in an appropriate case, that proper material be put before it to justify the indulgence sought by the party seeking the adjournment.[11] In this case, in my view, the magistrate was perfectly correct in warning counsel for Brimbank and Moloney, on 28 February, that, in order to make an application for an adjournment, appropriate material be placed before the court in support of it. The fact that no such material was put forward, but rather, that counsel who then appeared for the present plaintiffs could not even identify the forensic accountant, justified the magistrate in entertaining substantial reservations as to whether the application for an adjournment was genuinely made.

21. Mr Catlin is correct in observing that the pleadings in the Magistrates' Court proceeding, and in particular the counterclaim, raised issues relating to the accounts of Brimbank. However, that circumstance did not, of itself, mean that Brimbank was not able to defend the claim and counterclaim adequately without the assistance of a forensic accountant. It was therefore necessary, at the hearing before the magistrate, for Brimbank and Moloney to put forward appropriate material to substantiate their claim that they needed the services of that accountant. The fact that the application for adjournment was made shortly before trial, and after the proceedings had been on foot for a number of months, fully justified the magistrate in taking the view, as he did, that in the absence of any such material, the application for an adjournment lacked an appropriate foundation.

22. In this context Mr Catlin, in his submissions to me, placed significant emphasis on the

refusal of the magistrate to stand the matter down further on 4 March 2008, in order to enable Brimbank's solicitor, Mr Griffin, to attend at court and explain why it was necessary to have the services of a forensic accountant in order to defend the claim by Ms Murphy, and to properly advance the counterclaim. Mr Catlin submitted that it was evident that Mr Adami had not been appropriately briefed. He submitted that, given the issues raised by the pleadings, the magistrate should have "joined the dots", and realised that any application for an adjournment could only have been properly advanced by the solicitor. Rather, Mr Catlin submitted, the magistrate gave priority to the imperatives of case management, and proceeded to hear the case without giving Mr Griffin the opportunity to attend at court.

23. In my view, the submission by Mr Catlin does not take into account the events which preceded the decision of the magistrate not to stand the case down, again, to enable Mr Griffin to come to court. One application for an adjournment had already been made on 28 February. Counsel had then been warned that any such application must be supported by appropriate material. On the return of the matter on 4 March, a further application was made by counsel. If the application was serious, the magistrate was entitled to expect that it would be supported by appropriate material, and that, at the very least, counsel would have, in his brief, sufficient information to properly argue the application. On the contrary, no further material had been adduced, and Mr Adami was bereft of any sensible instructions as to his clients' need for the adjournment. The magistrate had given Brimbank and Moloney ample opportunity to make their application for adjournment. His Honour was entitled to infer, as he did, that if Mr Griffin had been able to assist in making that application, he would already have been at court. In those circumstances, in my view the magistrate was justified in refusing to further defer the hearing of the proceeding in order to enable Mr Griffin to attend.

24. On the other hand, the magistrate did take into account the fact that, if he acceded to the application for an adjournment, the case would not be heard for another seven months. Counsel before me both considered that the magistrate, by referring to that matter, was relying on matters relating to case management. In fact, it would seem to me that the magistrate, correctly, was taking into account that, if he adjourned the matter, the plaintiff would not be entitled to have her claim heard and determined for a substantial period of time. To the extent that the magistrate also took that circumstance into account as an issue relating to case management, in my view he did not give it excessive weight in the circumstances.

25. The magistrate also had before him the affidavit of Ms Murphy sworn on 3 March 2008. In fact, he referred to a part of that affidavit in discussion with Mr Adami. In debating the issue of an adjournment with Mr Adami, he did not refer to the part of the affidavit of Ms Murphy, in which she deposed to her husband's illness, and to the fact that she had been required to sell shares she owned in order to discharge the Visa card debt incurred by her when she paid monies to the creditors of Brimbank. Certainly, the magistrate would have been justified in taking into account the prejudice to Ms Murphy, both financial and personal, which would have been occasioned by any further adjournment of the case. Contrary to the submissions of Mr Catlin, I do not consider that that prejudice could have been suitably allayed by an order for costs, nor by the fact that, if Ms Murphy ultimately succeeded on her claim, she would be entitled to an award of interest. Her affidavit revealed that, by paying creditors of Brimbank pursuant to the arrangement which she had with Brimbank, Ms Murphy had already placed herself in a difficult financial position. Due to her husband's illness, she was under some personal stress. Those factors were relevant to the decision as to whether an adjournment should be granted. They reinforce the conclusion, which I have reached, that, in the circumstances of this case, the plaintiffs in this proceeding have failed to establish that the magistrate erred in the exercise of his discretion to refuse the application made on behalf of Brimbank and Moloney for an adjournment of the proceedings in the Magistrates' Court. For those reasons, the claim made by the plaintiffs for relief by way of *certiorari* should be dismissed.

26. For the purpose of completeness, I should also briefly refer to one other matter. In the present proceeding, both parties filed affidavits deposing to matters which were not before the magistrate. While on a claim for relief by way of *certiorari*, on the basis of a departure from natural justice, a plaintiff is entitled to put affidavit material before the court[12], the question raised by the plaintiffs' proceedings in this Court is whether, in the circumstances then before the magistrate, his Honour failed to comply with the principles of procedural fairness. That question was to be

answered by reference to the materials which were then before the magistrate.[13]

Conclusion

27. Thus, for the reasons which I have set out above, I am not satisfied that the learned magistrate erred in the exercise of his discretion to refuse the application by the present plaintiffs for an adjournment of the proceeding in the Magistrates' Court. It follows that the plaintiffs have failed to make out the basis of their claim for relief by way of *certiorari*. Accordingly, the originating motion should be dismissed.

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[1] *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163, 176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[2] See for example *Maxwell v Keun & Ors* [1928] 1 KB 648, 649-650 (Lord Hanworth MR), 658 (Lawrence LJ; [1927] All ER 335); *Smith & Anor v Gannawarra Shire Council & Anor* [2002] VSCA 69; (2002) 4 VR 344, 347 (Charles JA), 352 (Winneke P); *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234, 506 (Kaye J); *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390, 395-396; (1981) 37 ALR 55; (1981) 55 ALJR 701 (Wilson J).
[3] Ibid, 653.
[4] See for example *Smith & Anor v Gannawarra Shire Council &Anor* [2002] VSCA 69; (2002) 4 VR 344, 350 (Charles JA); *The State of Queensland & Anor v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146, 155; (1997) 141 ALR 353; 71 ALJR 294.
[5] [1967] 1 All ER 412; [1967] 1 WLR 327, 330.
[6] See for example *Howarth v Adey* [1996] VICSC 4; [1996] VicRp 85; [1996] 2 VR 535, 544 (Winneke P); *Smith v Gannawarra Shire Council* [2002] VSCA 69; (2002) 4 VR 344, 350 (Charles JA), 352-353 (Winneke P).
[7] Compare *Kostakanellis v Allen* [1974] VicRp 71; [1974] VR 596, 607.
[8] [1997] HCA 1; (1997) 189 CLR 146, 155; (1997) 141 ALR 353; 71 ALJR 294.
[9] Ibid.
[10] [2002] VSCA 69; (2002) 4 VR 344.
[11] *R v Jones* [1971] VicRp 7; [1971] VR 72, 78 (Winneke CJ, Gillard and Barber JJ); *Humphrey v Wills* [1989] VicRp 42; [1989] VR 439, 443-444 (Kaye J).
[12] *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163, 176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[13] *M v M* (*Marrington & Ors v Millar & Ors)* [1993] VicRp 29; [1993] 1 VR 391, 396 (Brooking J) .

APPEARANCES: For the plaintiffs Brimbank and Moloney: Mr J Catlin, counsel. Griffin Law Firm, solicitors. For the first-named defendant Murphy: Mr RMJ Lombardi, counsel. John Micallef & Co, solicitors.
