33/08; [2008] VSC 273

SUPREME COURT OF VICTORIA

COOPER MORISON PTY LTD v TENNOZAN PTY LTD

Cavanough J

19 June 2008

CIVIL PROCEEDINGS – BILL OF EXCHANGE (CHEQUE) – CHEQUE TENDERED IN PAYMENT OF WORK DONE – CHEQUE DISHONOURED – COMPLAINT ISSUED IN RESPECT OF CHEQUE – APPLICATION TO MAGISTRATE FOR LEAVE TO DEFEND GRANTED ALLEGEDLY OUT OF TIME – NO EVIDENCE THAT MAGISTRATE DETERMINED WHETHER APPLICATION WAS WITHIN TIME – WHETHER MAGISTRATE'S ERROR AFFECTED BY JURISDICTIONAL ERROR OR BY ERROR ON THE FACE OF THE RECORD: *INSTRUMENTS ACT* 1958, S5(1); *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, Order 24.

As a result of a cheque being dishonoured, CMP/L issued a complaint in the Magistrates' Court in respect of the dishonoured cheque. On a date allegedly outside the time allowed, TP/L applied for Leave to Defend which was granted by a Magistrate. No factual findings or reasons were included in the Notice of Order Made and there was no clear evidence as to the nature of the information as to time or date of service of the complaint that was available to the Magistrate. Upon an originating motion by CMP/L—

HELD: Originating motion dismissed.
1. CMP/L was required to show an error on the face of the record. The "record" in this case meant the record of the Magistrates' Court, but did not include any of the evidentiary material that may have been before the Magistrate. It was confined to the "pleadings", the order and (by virtue of s10 of the *Administrative Law Act* 1978) any reasons.
***Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, applied.**

2. Further, any error of the Magistrate was not shown to have been an error of law, as distinct from an error of fact. There was no or no sufficient evidence that the Magistrate misunderstood or misapplied the provisions of the *Instruments Act* ('Act') or of Order 24 of the *Magistrates' Court Civil Procedure Rules* 1999. Any error was not shown to have been any more than an error as to the date of service or an error of calculation, being in either event an error of fact, not law.

3. Further, CMP/L did not demonstrate jurisdictional error. The objective existence of a timely application for leave to defend is not a requirement that underpins the relevant jurisdiction of the Magistrates' Court. It is not a precondition to the power of the Magistrates' Court to entertain, or to grant, an application for leave to defend. Rather, the legislation makes the power of the Magistrates' Court to grant leave to defend contingent on the Magistrates' Court's own opinion or determination as to compliance by the defendant with the time limit.

4. The legislation in question revealed no clearly expressed intention that the jurisdiction of the Magistrates' Court to entertain, or to grant, an application for leave to defend was to be dependent on the actual fact of compliance by the defendant within the time limit. The basic jurisdiction of the Magistrates' Court to deal with the proceeding as a whole was attracted as soon as the complaint under the *Instruments Act* was filed. Whilst s5 of the Act required the defendant to obtain leave within a specified period after service, there was nothing in the language of s5 or in the terms or the policy of the relevant provisions as a whole (including Order 24) to displace the interpretation that the Magistrates' Court was not deprived of its jurisdiction in the event of a mistake by it as to the date of service or like.

5. Accordingly, CMP/L failed to make out any case for relief in the nature of *certiorari* on the basis of jurisdictional error.

CAVANOUGH J:
1. This proceeding was commenced as an appeal pursuant to s109 of the *Magistrates' Court Act* 1989. However, the decision in question of the Magistrates' Court was later perceived to be an interlocutory decision, as distinct from a final decision, and for that reason Master Daly made orders on 28 May 2008 permitting the plaintiff to convert the proceeding into an application for

judicial review pursuant to Order 56 of the *Supreme Court Rules*. The plaintiff effectuated the permitted conversion by issuing an originating motion dated 30 May 2008.

2. The substantial relief or remedy sought in the originating motion is that "the decision made by his Honour Magistrate Lauritsen in proceeding no X006293555 in the Magistrates' Court of Victoria at Melbourne on 2 April 2008 granting the first defendant leave to defend be set aside or quashed".

3. The decision of Magistrate Lauritsen referred to in the originating motion was a decision under s5(1) of the *Instruments Act* 1958 and Rule 24.04 of the *Magistrates' Court Civil Procedure Rules* 1999 ("the Rules") giving the first defendant leave to defend in a proceeding brought by the plaintiff in the Magistrates' Court pursuant to the *Instruments Act* and Order 24 of the Rules. For convenience, I will refer to the first defendant as "the defendant" from here on. Appropriately, the second defendant, the Magistrates' Court of Victoria, has taken no substantive part in the proceeding before me.

4. The underlying dispute between the parties relates to building work done by the plaintiff for the defendant at the defendant's office premises in Flinders Lane, Melbourne. The defendant claims that flooring work done by a subcontractor to the plaintiff was unsatisfactory. The defendant admits issuing and delivering to the plaintiff a cheque for $47,799.21 on 17 December 2007. But it claims that it did so on the strict condition that the cheque would not be presented until such time as the alleged defects in the flooring were rectified to the defendant's satisfaction. The defendant claims that the plaintiff took no steps at all towards rectification of the alleged defects in the flooring and proceeded to bank the cheque some six weeks after 17 December 2007. The cheque was dishonoured. The defendant claims that there was sufficient money in its account to cover the cheque at the earlier time when the cheque was handed over. These matters are recited merely by way of background. I need make no findings about the merits of the underlying dispute.

5. Part I of the *Instruments Act* 1958 enables summary proceedings to be brought in either the Supreme Court, the County Court or the Magistrates' Court in relation to bills of exchange (including cheques). As relevant to the present case, the provisions of Part I to be noted are as follows:

> "3. ***Definitions***
> In this Part unless inconsistent with the context or subject-matter—
> '**action**' means and includes proceeding in the Supreme Court or in the County Court or complaint in the Magistrates' Court;
> '**bill**' means bill of exchange (including cheque) or promissory note;
> ...
>
> 4. ***Commencement of proceedings in the Supreme Court***
> Any proceeding in the Supreme Court upon a bill after the same has become due may be by writ in the form contained in the Second Schedule to this Act and indorsed as therein mentioned. And it shall be lawful for the plaintiff on filing an affidavit—
> (a) where the defendant is a natural person, of personal service of such writ upon him or, where the Court makes an order for substituted service, of service in accordance with that order; or
> (b) where the defendant is a company within the meaning of the Corporations Act, of service of such writ on the company in accordance with section 109X of that Act; or
> (c) where the defendant is a registered body within the meaning of the Corporations Act, of service of such writ on the registered body in accordance with section 601CX of that Act—
> and a copy of the writ and the indorsements thereon, in case the defendant has not obtained leave to appear and appeared to such writ according to the exigency thereof, at once to enter final judgment for any sum not exceeding the sum indorsed on the writ together with the interest at the rate specified (if any) to the date of the judgment, and such sum as is from time to time specified in the Rules of the Supreme Court for costs unless the plaintiff claims more than such sum, in which case the costs shall be assessed in the ordinary way; and the plaintiff may upon such judgment issue execution forthwith.
>
> 5. ***Appearance may be entered***
> (1) The defendant may, within the relevant period after the service of a writ under section 4, enter an appearance to the writ if the defendant has made application to the Supreme Court and—
> (a) paid into court the sum endorsed on the writ; or
> (b) filed affidavits satisfactory to the Court which disclose—

(i) a defence; or
(ii) such facts as would make it incumbent on the holder to prove consideration; or
(iii) such other facts as the Court deems sufficient to support the application—
and the Court has given leave to appear to the writ and defend the action upon such terms as to security or otherwise as to the Court seems fit.

(2) In subsection (1) ***'relevant period'*** means—
(a) if the defendant resides within 80 kilometres of the post office corner of Bourke and Elizabeth Streets Melbourne —16 days; and
(b) if the defendant resides beyond that distance — 21 days.

6. ***Court may allow proceeding to be defended after judgment***
After judgment the court may under special circumstances set aside the judgment and if necessary stay or set aside execution and may give leave to appear to the writ and to defend the proceeding if it appears to be reasonable to the court so to do, and on such terms as to the court seem just.
...
10. ***Practice in actions to apply***
The practice and procedure for the time being applicable to and regulating actions at law shall (so far as the same are not inconsistent herewith) extend and apply to all proceedings taken under this Part.
...
12. ***This Part to apply to actions on bills in County Court and Magistrates' Courts***
(1) The provisions of sections 3 to 10 shall apply with such adaptations as are necessary to all actions on bills in the County Court and the Magistrates' Court.
(2) An action referred to in subsection (1) shall be conducted in accordance with the rules made for the purposes of this section under the *County Court Act* 1958 or the *Magistrates' Court Act* 1989 (as the case may be)."

6. It is desirable to set out the whole of Order 24 of the Rules:

"24.01. **Definition**
In this Order—
'**the Act**' means the *Instruments Act* 1958.

24.02. **Application of Order**
(1) This Order applies to any proceeding in the Court under Part 1 of the Act.
(2) Except where inconsistent with the Act or this Order the Rules apply to any proceeding under Part I of the Act.

24.03. **Form of complaint**
(1) A complaint upon a bill of exchange commenced after the bill has become due shall be in Form 24A.
(2) The amount of costs stated in the indorsement on the complaint must be the amount of scale costs applicable to the amount claimed plus the fees (if any) for the filing and service of the complaint.
24.04. **Leave to defend**

(1) Leave to defend under section 5 of the Act may be given by the Court.
(2) An application for leave to defend must be made without notice to any person, within the time allowed by section 5 of the Act.
(3) An application for leave must be in Form 24B and must be filed.
(4) The applicant for leave must file in support of the application an affidavit sworn by himself or herself or by another person who can depose to the facts from his or her own knowledge.

24.05. **Order where leave not granted**
(1) A plaintiff who is entitled to an order under section 4 of the Act may apply to the registrar for an order for the amount claimed together with costs and fees (if any) for filing and service of the complaint as the scale allows.
(2) An application for such an order must be filed and must be in Form 24C.
(3) Where the registrar is satisfied that—
(a) the complaint has been served in accordance with section 4 of the Act; and
(b) the defendant has not been given leave to defend under section 5 of the Act—
the registrar must make an order.

24.06. **Notice to parties**
As soon as practicable after the Court has made a decision on an application for leave to defend, the registrar must notify the parties by notice in Form 24D.

24.07. **Leave to defend after order made**

(1) A defendant who wishes to apply under section 6 of the Act must—
(a) file an application in Form 24E; and
(b) not less than five days before the day for hearing of the application serve a copy of the application on the complainant personally.
(2) An application under section 6 must state the special circumstances relied upon by the applicant.
(3) The Court may set aside the order on such terms as the Court thinks fit.
(4) Upon filing an application under section 6, no steps to enforce the order shall be taken for fourteen days from the date of filing or until the application is heard (whichever is the earlier).
(5) An applicant who fails to appear on the hearing of the application shall not make a further application without the leave of the Court."

7. On or about 7 March 2008 the plaintiff filed a complaint, in accordance with Form 24A of the Rules, in the Magistrates' Court at Melbourne. The complaint was based on the cheque in the sum of $47,799.21 to which I have referred.

8. A copy of the complaint, together with associated documentation, was sent by post to the defendant under cover of correspondence from Rigby Cooke Lawyers addressed to the registered office of the defendant. The plaintiff asserts that the documents were posted on 11 March 2008. The parties are in dispute as to the date upon which that material was received at the registered office of the defendant. At one stage the defendant's solicitors told the plaintiff's solicitors that they had instructions that the documents had been received on 13 March 2008. Later the defendant by its solicitor asserted that those instructions were not necessarily correct and that the documentation may not have been received at the registered office until 17 March 2008.

9. By virtue of s5(1) of the *Instruments Act* 1958 and rule 24.04(2) of the Rules, the defendant had sixteen days from the date of service in which to obtain leave to defend the complaint.[1] The Easter period intervened, but no adjustment was applicable on that account.

10. Based on its assertions as to the date of service, the plaintiff contends that the last day on which the defendant could legitimately have obtained leave to defend was Monday 1 April 2008. On the other hand, if the complaint was not served until 17 March 2008, the defendant had until Wednesday 2 April 2008 in which to obtain leave to defend.

11. On Monday 1 April 2008 the defendant filed an application for leave to defend in the Magistrates' Court supported by an affidavit. The application was made *ex parte*, as rule 24.04(2) requires.

12. On 2 April 2008 the plaintiff's solicitors wrote to the defendant's solicitors noting that the defendant's solicitors had previously acknowledged that service had taken place on 13 March 2008, and drawing to their attention that the proper time to obtain leave to defend in this case was within sixteen days after service. The plaintiff's solicitors asserted that that time had expired and informed the defendant's solicitors that the plaintiff intended to make an application for an order on the complaint at 2.30 pm that day. That letter was sent by fax at about 12.50 pm on 2 April 2008.

13. At some stage on that same day, 2 April 2008, the plaintiff's solicitors filed an affidavit of service (deposing to the posting of the complaint on the afternoon of 11 March 2008) with the Magistrates' Court. Later that day they discovered that on the previous day (1 April 2008) the defendant had filed an application for leave to defend.

14. At approximately 4.08 pm on 2 April 2008 the plaintiff's solicitors sent a fax to the Magistrates' Court complaining about the application for leave to defend that had been made by the defendant. The letter asserted that the complaint had been served on the defendant on 13 March 2008 and that the defendant had therefore been required to file an application for leave to defend on or before 31 March 2008; and that therefore the defendant's application was out of time.

15. However, at some stage on 2 April 2008, quite possibly well prior to the sending of the plaintiff's solicitor's fax of approximately 4.08 pm[2], his Honour Magistrate Lauritsen made the decision in question. The Magistrates' Court record, headed Notice of Order Made, is not very informative. It identifies the parties, it describes the proceeding as "dishonoured cheque/bill

of exchange/prom"; and it records that the defendant was granted leave to defend under the *Instruments Act*. No factual findings or reasons are included. There is no clear evidence before me as to what, if any, evidence or information concerning the time or date of service of the complaint was available to the Magistrates' Court at the time of the decision in question.

16. Three grounds are stated in the plaintiff's originating motion, as follows:

> "(1) The learned magistrate erred in law by granting the first defendant leave to defend out of time when there was no power to do so pursuant to Part I of the *Instruments Act* 1958 (Vic).
>
> (2) The first defendant was out of time for the filing [of] application for leave to defend which, in accordance with Part I ... of the *Instruments Act* 1958 (Vic), was required to be filed within sixteen days of him [sic] being served.
>
> (3) The learned magistrate had no discretion to extend the time for the first defendant to make an application for leave to defend pursuant to Part I of the *Instruments Act* 1958 (Vic)."

17. In the plaintiff's outline of submissions which was spoken to by its counsel in argument before me today, the plaintiff claims relief in the nature of *certiorari* "on the basis of error of law on the face of the record and jurisdictional error". The plaintiff refers to *Craig v South Australia*[3]; *RSL v Liquor Licensing Commission & Anor*[4] and *Insurance Manufacturers of Australia Pty Ltd v King and the Magistrates' Court of Victoria*[5]. The plaintiff also submits that s10 of the *Administrative Law Act* 1978 has the effect that the magistrate's order of 2 April 2008 is to be taken to form part of the decision and accordingly to be incorporated in the record. Accordingly, the plaintiff submits, the learned magistrate, in granting the defendant leave to defend out of time, made an error of law on the face of the record which is susceptible to an order in the nature of *certiorari*. Further, the plaintiff submits, the magistrate made a jurisdictional error in that he had no power to grant the first defendant leave to defend out of time.

18. The plaintiff's submissions must be rejected.

19. I will deal with ground 3 first. There is no sufficient indication that the magistrate was purporting to extend time for the making of the application for leave to defend. Nothing to that effect is contained in the Magistrates' Court record or in the other material before me. There is nothing to indicate with any clarity that either party had brought to the magistrate's attention prior to the making of the decision any issue about time. On the plaintiff's own case now, the defendant was only one day out of time. It cannot be said that it must have been obvious to the magistrate on the material before him that the application was out of time. It is true that there is no discretionary or other power to extend time[6], but I am not satisfied that the magistrate believed that any such power did exist or that he purported to exercise any such power. That disposes of ground 3 of the originating motion.

20. Grounds 1 and 2 must also fail.

21. The plaintiff cannot show any error on the face of the record. The "record" in this case means the record of the Magistrates' Court. It does not include the evidentiary material led before me as to the time of service. Moreover "the record" does not include any of the evidentiary material that may have been before the Magistrate. It is confined to the "pleadings", the order and (by virtue of s10 of the *Administrative Law Act* 1978) any reasons: *Craig v South Australia*[7].

22. Neither the "pleadings" (ie the complaint) nor the order reveals the date of service of the complaint. The affidavit of service, even if it did reach the Magistrate in time, cannot be resorted to for present purposes, because it was merely evidence. It forms no part of "the record" as that concept was explained in *Craig v South Australia*. And, as already mentioned, the Magistrate provided no reasons for his decision.

23. Further, any error of the Magistrate is not shown to have been an error of law, as distinct from an error of fact. As indicated in my discussion (above) of ground 3, there is no or no sufficient evidence that the Magistrate misunderstood or misapplied the provisions of the *Instruments Act* or of Order 24. Any error is not shown to have been any more than an error as to the date of service or an error of calculation, being in either event an error of fact, not law.[8]

24. Nor, in my opinion, has the plaintiff demonstrated jurisdictional error. Let it be assumed for the purposes of the argument that it could now be proved in this Court that the defendant was one day out of time in obtaining leave to appear in the Magistrates' Court, as the plaintiff asserts. However, the problem for the plaintiff is that, in my view, the objective existence of a timely application for leave to defend is not a requirement that underpins the relevant jurisdiction of the Magistrates' Court. It is not a precondition to the power of the Magistrates' Court to entertain, or to grant, an application for leave to defend. Rather, in my view, the legislation makes the power of the Magistrates' Court to grant leave to defend contingent on the Magistrates' Court's own opinion or determination as to compliance by the defendant with the time limit. In *Parisienne Basket Shoes Pty Ltd v Whyte*[9], in a passage recently cited with approval by five members of the High Court in *Berowra Holdings Pty Ltd v Gordon*[10], Dixon J (with whom Evatt and McTiernan JJ agreed) said:

> "[I]f the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

25. *Parisienne Basket Shoes* was itself a case dealing with the jurisdiction of justices in Victoria, under legislation in force in the 1930s. A section of the *Factories and Shops Act* 1928 required that an information in respect of certain offences under that Act "shall be laid within two months after the commission thereof". It was held by the whole court that the justices before whom an information came for hearing had jurisdiction to determine whether it was laid within the statutory period or not; that, if they made an erroneous decision in so doing, they were still acting within the limits of their jurisdiction; and, accordingly, that prohibition would not lie.

26. In my view, the legislation presently in question reveals no "clearly expressed"[11] intention that the jurisdiction of the Magistrates' Court to entertain, or to grant, an application for leave to defend is to be dependent on the actual fact of compliance by the defendant within the 16 day time limit. The basic jurisdiction of the Magistrates' Court to deal with the proceeding as a whole will have been attracted as soon as a complaint under the *Instruments Act* has been filed. It is true that s5 requires the defendant to obtain leave within a specified period after service (here, 16 days), but in my view there is nothing in the language of s5 or in the terms or the policy of the relevant provisions as a whole (including Order 24) to displace the usual interpretation referred to in *Parisienne Basket Shoes*. Counsel for the plaintiff has not referred me to any authority that would require such a result. In my view the Magistrates' Court is not deprived of its jurisdiction in the event of a mistake by it as to the date of service or like.

27. The plaintiff points out that the decision complained of was necessarily made without notice to it, pursuant to rule 24.04(2). This denied the plaintiff any opportunity to correct or contradict anything that might have been put to the Magistrate on behalf of the defendant as to the time limit. However, in my view, that circumstance does not lead to a conclusion that compliance with the time limit is a jurisdictional fact. I am reinforced in this view by the consideration that, in my opinion, it is open to any complainant dissatisfied with a decision to grant leave to defend, made upon an *ex parte* application under rule 24.04, to apply to the Magistrates' Court to set the decision aside. A corresponding facility is clearly available where the claim under the *Instruments Act* is made in the Supreme Court or the County Court. In the Supreme Court and the County Court, the plaintiff may obtain, in effect, a re-hearing *de novo*: see Williams, *Civil Procedure Victoria*, I5.04.65 and the cases there cited, especially *Day v Bate*.[12] That is so notwithstanding that the form of writ contained in the Second Schedule to the *Instruments Act* (which is applicable in the Supreme Court and the County Court) contains a statement to the defendant to the effect that it is not necessary to give notice to the plaintiff of an application for leave to defend.[13] The learned author of Williams, *Civil Procedure Victoria*, expresses doubt as to whether the same facility is available in the Magistrates' Court. At [MC 24.01.30] he says:

> "Application by the defendant under s5 of the *Instruments Act* 1958 for leave to defend is made without notice to the plaintiff: r 24.04(2). In the Supreme Court or the County Court, on the application of

> the plaintiff, the court under its inherent jurisdiction and also under r46.08(b) may set aside an order under s5 granting the defendant leave. See [I 5.04.65]. In the Magistrates' Court Rules there is no rule corresponding to r 46.08(b). Further, as the Magistrates' Court is not a superior court, it is doubtful whether an order setting aside the grant of leave to defend could be justified by resort to its limited inherent powers. However, see r 1.14 [sic]."

With respect, I do not share the learned author's doubt. In my view, it would be contrary to the apparent intent of Part I of the *Instruments Act* if the holder of a bill of exchange of relatively low value were forced to sue in the County Court or the Supreme Court in order to be able to challenge any grant of leave to defend that may be made. In my view, the Magistrates' Court has jurisdiction, which may be described either as inherent, implied or incidental jurisdiction[14] to set aside an *ex parte* grant of leave to defend under the *Instruments Act*. In *Duck Boo International Co Pty Ltd v Mizzan Pty Ltd*,[15] a case concerning an application by a party to set aside an interlocutory order made by the County Court in the absence of that party,[16] Maxwell P (with whom Eames JA agreed) said:[17]

> "13. Duck Boo's application to set aside was based on Rule 46.08(b) of the *County Court Rules*, which is in the following terms:
> 'The court may set aside or vary an order which affects a person where the application for the order—
> (a) ...
> (b) was not made on notice to that person'.
> In addition to that rule, the County Court, **like every court,** has inherent jurisdiction to set aside its own orders.[18] Where an order is made *ex parte* without notice to a party affected, that party has the right, *ex debito justitiae*, to approach the court and have the application re-heard.[19] As Gillard AJA noted in *Savcor* [2005] VSCA 213; (2005) 12 VR 639, where an application is made to set aside an order made without notice, whether the application is pursuant to the rule or the inherent power of the court, the court re-hears the original application.
>
> 14. Ordinarily, therefore, the court re-hearing the application will have the benefit of submissions and any material which the opposing party may wish to place before the court. As Gillard AJA said: '... the party affected by the order [has the right] to appear before the court and put submissions as to why the order should not be made on the materials which were before the judge who made the first order. It is a rehearing and the court may reach a different decision after hearing submissions'."[20] [My emphasis]

28. These principles have particular application to procedural or interlocutory orders – such as the order in question in this case – as compared with final orders.[21] Section 110 of the *Magistrates' Court Act* 1989 provides that if a final order is made by the Court in a civil proceeding against a person who did not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and that the proceeding be re-heard. Section 110 surely indicates that a non-final order made in the absence of a party is liable to be set aside by the Magistrates' Court in the exercise of its inherent, implied or incidental jurisdiction.

29. Williams refers to "r 1.14" of the *Rules*, intending, I think, to refer to r 1.12, as a provision which may possibly attract r 46.08(b) of the *Rules of the Supreme Court* and the County Court. Rule 1.12 provides:

> "**1.12** Where the manner or form of the procedure—
> (a) for commencing, or for taking any step, in a proceeding; or
>
> (b) by which the jurisdiction, power or authority of the Court is exercisable—
>
> is not prescribed by these Rules or by or under any Act the general principles of practice and the Rules and forms observed and used in the Supreme Court may, at the discretion of the Court, be adopted and applied to any proceeding with such modification as may be necessary."

Although it is unnecessary to express a concluded view on the point, it seems to me that r1.12 would indeed render r46.08(b) of the Rules of the Supreme Court and of the County Court applicable to an application in the Magistrates' Court to set aside a grant of leave to defend under the *Instruments Act*.

30. In my view the plaintiff could have applied to the Magistrates' Court for, in effect, a re-

hearing of Magistrate Lauritsen's decision. However, it did not do so. Instead, the plaintiff sought judicial review of the decision in this Court, relying on fresh affidavit material. That approach was misconceived.

31. It was a matter for Magistrate Lauritsen to determine whether or not the application for leave to defend was within time, subject only to the possibility that his decision might be impugned on the basis that, on the material before him, the decision was affected by jurisdictional error of one or more of the kinds referred to in *Craig v South Australia* (or by error of law on the face of the record). But the evidence before me is entirely silent as to the material that was before the magistrate at the time of the decision, and no attempt has been made to impugn the decision on that basis. Therefore it seems to me that the plaintiff has not made out any case for relief in the nature of *certiorari* on the basis of jurisdictional error.

32. For these reasons the proceeding will be dismissed. I will hear counsel as to costs.

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[1] The period is not extendable: *Kay's Leasing Corporation Pty Ltd v Burgess* [1961] VicRp 109; [1961] VR 703 at 704, cited with approval in *Constain Australia v Dennehy* [1983] VicRp 96; [1983] 2 VR 353 at 354.
[2] As mentioned above, the defendant's application for leave to defend had been filed the previous day.
[3] [1995] HCA 58; (1995) 184 CLR 163 at 175-177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[4] [1999] VSCA 37; [1999] 2 VR 203; 15 VAR 96.
[5] [2006] VSC 261 (Gillard J).
[6] See footnote 1 above.
[7] [1995] HCA 58; (1995) 184 CLR 163 at 181; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359; *Guss v Magistrates' Court of Victoria* [1998] 2 VR 113 at 118.
[8] See *Guss v Magistrates' Court of Victoria* [1998] 2 VR 113 at 118, referring to *Australian Heritage Commission v Mt Isa Mines* [1997] HCA 10; (1997) 187 CLR 297; (1997) 142 ALR 622; (1997) 71 ALJR 441; [1997] 5 Leg Rep and cases there cited.
[9] [1938] HCA 7; (1938) 59 CLR 369 at 391; [1938] ALR 119.
[10] [2006] HCA 32; (2006) 225 CLR 364 at 375 [31]; (2006) 228 ALR 387; (2006) 80 ALJR 1214. See also, more generally, at CLR 374-376 [28]-[32]. And see Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd edition, 2004 at 326, including footnotes 150-156.
[11] *Parisienne Basket Shoes*, *loc cit*.
[12] (1979) 41 FLR 222 (SCV, Crockett J) at 224-225.
[13] Section 4 of the *Administrative Law Act* 1978 provides another example of a statute which provides for an *ex parte* application to be made to a court (in that case an application for an order nisi to review), in relation to which it has been recognised that the opposite party is at liberty to seek to set aside the order made: see *Charalambous v Carideo* [1988] VicRp 63; [1988] VR 604 at 608.
[14] As to these concepts generally, see *Guss v Magistrates' Court of Victoria* [1998] 2 VR 113 at 119-121. See also *Chitty v Mason* [1926] VicLawRp 60; [1926] VLR 419 (Dixon A-J) at 423; *Taylor v Taylor* [1979] HCA 38; (1979) 143 CLR 1 at 8; (1979) 25 ALR 418; [1979] FLC 90-674; (1979) 53 ALJR 629; 5 Fam LR 289 per Gibbs J; *Champion v Fay* (1983) 2 Qd R 416 at 417; *Parsons v Martin* [1984] FCA 408; (1984) 5 FCR 235 at 241; (1984) 58 ALR 395.
[15] [2006] VSCA 241.
[16] The case did not arise under the *Instruments Act*, but the Court's observations are of general application.
[17] At [13]-[14].
[18] *Taylor v Taylor* [1979] HCA 38; (1979) 143 CLR 1 at 16; (1979) 25 ALR 418; [1979] FLC 90-674; (1979) 53 ALJR 629; 5 Fam LR 289 at 16 per Mason J, provided that the inherent power has not been removed by statute.
[19] *Savcor Pty Ltd v Cathodic Protection International* [2005] VSCA 213; (2005) 12 VR 639 at 646 [20] per Gillard AJA, with whom Ormiston and Buchanan JJA agreed.
[20] *Ibid* at [21].
[21] See the cases referred to in *Booth v Ward* [2007] VSC 364; (2007) 17 VR 195 at 204-205 [39].

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