6/99; [1999] VSC 189

SUPREME COURT OF VICTORIA

BENJAMIN v BAILEY and MAGISTRATES' COURT OF VICTORIA

Smith J

19, 26 May 1999

CIVIL PROCEEDINGS – APPLICATION TO AMEND NAME OF PARTY AFTER ARBITRATION HELD – WHETHER COURT HAS POWER TO MAKE AMENDMENT – IDENTITY OF DEFENDANT NOT IN DISPUTE AT ORIGINAL HEARING – SLIP RULE – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION TO AMEND DESCRIPTION OF PARTY.

1. A magistrate has an inherent jurisdiction to correct an error in the record at a later date and may correct clerical mistakes in a judgment or order or an error arising from an accidental slip or omission.

***Kelly v Von Einem* (1995) 84 A Crim R 37; and**

***Bailey v Marinoff* [1971] HCA 49; (1971) 125 CLR 529; [1972] ALR 259; (1971) 45 ALJR 598, applied.**

2. Where a notice of defence filed did not claim that the defendant did not exist or was incorrectly named and the original hearing proceeded on the basis that the defendant was correctly named and the defendant accepted that fact, a subsequent application to amend the description of the defendant was to litigate an issue that could have been litigated at the original hearing. In those circumstances the slip rule did not apply and a magistrate was not in error in refusing an application to amend the description of the defendant.

SMITH J:

1. This is an appeal from an order made by the Magistrates' Court of Victoria on 7 December 1998. The respondents did not appear.

2. The order appealed from was an order refusing the application of the appellant, John Robert Benjamin (Benjamin), to amend the name of the defendant in a complaint filed by John William Bailey (Bailey), and in orders made in that complaint, from "John Benjamin trading as Simdas Pty Ltd" to "Simdas Pty Ltd (ACN 069 307 035)"

3. The original complaint described the defendant as "John Benjamin trading as Simdas Pty Ltd". In the complaint, Bailey sought to recover $3,750 from the defendant "John Benjamin trading as Simdas Pty Ltd" which he alleged was payable for work done, namely, demolition work in October and November 1986. The complaint was dealt with in the arbitration system of the Magistrates' Court.

4. A defence was filed by "the defendant". It stated that the defendant denied any indebtedness to the plaintiff. It complained of the vagueness of the claim alleging that it did not disclose any cause of action by the plaintiff as against the defendant. It alleged the complaint was defective because it had been issued out of the Magistrates' Court at Echuca, whereas the cause of action arose in Bendigo, that the details of the complaint were so vague as to be uncertain and, finally, legal costs had been claimed while the solicitors shown as the plaintiff's address for service did not act in the matter and no change of practitioner had been filed. The defence also raised a substantive defence that the work was not done in accordance with the instructions of the defendant and that "the defendant" had suffered loss and damage in excess of $40,000 as a result of the breaches of contract by the plaintiff. The defence concluded with a general denial. The defence was prepared by solicitors acting for "the defendant".

5. The matter was heard on 15 September 1998 at the Magistrates' Court of Victoria at Bendigo. The evidence before me indicates that some documentary evidence was tendered, namely, three invoices dated 15 January 1996, 4 March 1996 and 16 December 1997 all of which were addressed simply to "Simdas Pty Ltd" by Bailey. The affidavit material does not elaborate upon

what else transpired at that original hearing but counsel for the appellant acknowledged that it would be proper to proceed on the basis that the issue of the correctness of the naming of the defendant was not expressly raised below.

6. At the arbitration hearing the learned magistrate ruled in favour of Bailey and gave judgment against Benjamin personally. The following is the order recorded in the court printout:

> "ORDER/S MADE - ARB
> JOHN WILLIAM BAILEY V JOHN BENJAMIN
> DEFENCE TO CLAIM (I)
> Claim order:
> For $4,000 and Interest $287.11, costs $1,241 stay one month."

7. On 14 October 1998 the appellant Benjamin filed and served an application to amend the name of the defendant in the complaint and the subsequent order of 15 September 1998 from "John Benjamin trading as Simdas Pty Ltd" to "Simdas Pty Ltd". Application was made on the basis that judgment was entered against the wrong party and, according to counsel for the appellant, it was put that this was due to inadvertence, the matter not being addressed on the day of the arbitration. The application was heard on 7 December 1998 and was refused. According to the affidavit in these proceedings the learned magistrate stated that he considered he had made no mistake and that the September arbitration had been conducted in a manner which was beyond reproach. He held that it was inappropriate to amend the order so that it was made against the company rather than the individual. A cost order was made.

8. The appellant, Benjamin, has appealed from the order made on 7 December 1998, not the order made on 15 September 1998. The following questions of law were identified by Beach J on 15 January 1999 as questions of law raised by the appeal:

> "(a) Whether His Worship ought properly to have allowed the application and ordered that the amendment be made as sought.
>
> (b) Whether, on any view of the evidence which was before the court, the only possible decision open to His Worship was that the Defendant to the action named in the complaint and order, 'John Benjamin trading as Simdas Pty Ltd', was a non-existent party and an incorrectly named defendant to the action and that the correct and appropriate party to the action was 'Simdas Pty Ltd (ACN 069 307 035)' and whether a finding of fact contrary to that conclusion was available to His Worship on any view of the evidence which was before the court.
>
> (c) Whether, when considering an application to amend pleadings and orders pursuant to Rule 36.07 of the *Supreme Court Rules*, where the evidence before the court is sufficient to support only the conclusion sought, that the amendment ought properly be made, and in the absence of any intervening thing or fact, a magistrate may, in the exercise of discretion, refuse to allow the amendments sought."

9. It was submitted for the appellant that the learned magistrate had an inherent jurisdiction to correct an error in the record at a later date: *Kelly v Von Einem* (1995) 84 A Crim R 37. It was put that the jurisdiction extends to correcting clerical mistakes in a judgment or order or an error arising from an accidental slip or omission: *Bailey v Marinoff* [1971] HCA 49; 125 CLR 529 at 539; [1972] ALR 259; (1971) 45 ALJR 598. It was conceded, however, that it is a matter of discretion and an application should be refused if anything intervenes to render the making of an order inexpedient or inequitable: *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* [1982] HCA 59; (1982) 151 CLR 590; 43 ALR 473; (1982) 56 ALJR 875.

10. As to the first question of law, it was put that the evidence before the magistrate at the original arbitration did not support a finding that Mr Benjamin was the contracting party. It was put that on the evidence the proper contracting party was Simdas Pty Ltd. It was further submitted that there was nothing that had occurred to intervene which would have rendered it inexpedient or inequitable to grant the order sought.

11. In relation to the second question of law it was put that "John Benjamin trading as Simdas Pty Ltd" was a non-existent party and an incorrectly named defendant. It was neither an incorporated company nor a trading name. The correct defendant it is said on the evidence was Simdas Pty Ltd. It is argued therefore that a finding of fact against any other party other than

Simdas Pty Ltd was not open to the magistrate on the evidence before the court and there was no evidence adduced at trial which supported a contrary conclusion.

12. Finally relying on the above matters it was submitted that the third question should be answered in favour of the appellant - that is, that the magistrate should not, in the exercise of his discretion have refused to allow the amendments sought when the evidence before the court was sufficient to support only one conclusion.

13. It will be seen from the foregoing summary of argument put for the appellant that there is an underlying assumption that the findings of fact by the magistrate could be based solely on the evidence adduced at the hearing. This, of course, is not so. Much depends, particularly in civil proceedings, on what matters are put in issue or conceded.

14. It must be remembered that the issue of whether a contract is entered into with an individual or that individual's company is an issue that often arises in debt collecting situations. It will not be unusual however, for a case to proceed on an accepted basis without the issue being canvassed as to whether in fact the contract was with the individual or the company. The issue, in many cases, may be of no consequence because, as here, if judgment were entered against the proprietor of the company incorrectly, the proprietor can pay the bill and be reimbursed by the company. Civil litigation can be conducted on an agreed factual basis or on a conceded factual basis. Not every fact must be proved by evidence.

15. In the present case, the complaint was addressed to a defendant identified as "John Benjamin T/A Simdas Pty Ltd". The defendant so identified filed a defence in which the defendant set out the issues to be raised. It is true that the defendant denied any liability as such but nowhere in the defence does it appear that it was put in the defence or at the hearing either that the defendant did not exist or that the defendant was incorrectly named and that the proper defendant was Simdas Pty Ltd not "John Benjamin trading as Simdas Pty Ltd". Rather at the hearing lawyers appeared and purported to represent the defendant named. Thus, it was open to the learned magistrate at the original hearing of the arbitration to proceed on the basis that the defendant named was correctly named and the defendant accepted that fact. His entitlement to do so would have been reinforced I suggest by the fact that the defence attempted to raise some highly technical matters going to the validity of the proceedings. I refer to the matters mentioned above about the arguments raised in the defence concerning the location of the issuing of the complaint, the vagueness of the complaint and the legal costs claimed, all of which "the defendant" said went to the validity of the complaint. The learned magistrate was entitled to conclude that every conceivable point had been raised that the defendant named wished to raise.

16. The issue then for the magistrate was to identify the defendant. It was, in my view, plainly open to the learned magistrate to conclude that the plaintiff had named the individual, John Benjamin, as the defendant and had referred to the company simply to demonstrate that the company name had been used but that the liability rested with John Benjamin personally. It was open, therefore, to the magistrate to deal with the arbitration on the basis that the defendant named accepted that it would be appropriate for any order to be made against John Benjamin personally assuming that the other issues that were in dispute between the parties were resolved in favour of the plaintiff.

17. On the material before me, it was plainly open to the learned magistrate to take the view that what was being sought in the application to amend the description of the defendant was to litigate an issue that could have been litigated at the original hearing but was conceded at that hearing. That is not something which can be addressed in my view by the slip rule and, therefore, it was open to the learned magistrate to act as he did.

18. The appeal should therefore be dismissed.

APPEARANCES: For the appellant Benjamin: Mr M Walsh, counsel. Logie-Smith Lanyon, solicitors. No appearance for respondents.
