45/86

SUPREME COURT OF VICTORIA

PAROUKAS and ANOR v KATSARIS

McGarvie J

24-26, 30 September 1985; 5 June 1986 — [1987] VicRp 4; [1987] VR 39

PROCEDURE – CIVIL PROCEEDINGS – PRELIMINARY OBJECTION TO VENUE – INTERSTATE COURT SAID TO BE MORE CONVENIENT – WHETHER COURT SHOULD DISPOSE OF SUCH PRELIMINARY OBJECTIONS – ADJOURNMENT OF PROCEEDINGS – PRINCIPLES TO BE APPLIED – WHETHER ADJOURNMENT *SINE DIE* AVAILABLE – WHEN ORDER OF COURT MADE – WHEN ENTERED INTO COURT RECORDS – WHETHER CAPABLE OF ALTERATION BEFORE ENTRY: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS68, 76, 78, 79; *MAGISTRATES' COURTS ACT* 1971, S24.

P's live in South Vermont (Vic.); K. in Shepparton. In 1985, P's caused the issue of a default summons returnable at Shepparton, for money due on a sale and delivery to K. of a commercial refrigerator. When the matter came on for hearing, K. sought a stay of proceedings on the ground that the Court at Coober Pedy, South Australia was more convenient. He said that the contract was entered into, executed and breached in Coober Pedy; that he wished to rely on provisions of the *Misrepresentation Act* 1971-72 (SA); and that financial hardship would be imposed on him by calling to Shepparton, four witnesses from Coober Pedy and two from Adelaide. K. also said he was prepared to give an undertaking in respect of the reasonable costs incurred by P's in travelling to Coober Pedy. After hearing submissions from Counsel on this preliminary point, the magistrate accepted K's submission, adjourned the matter to a date to be fixed with costs reserved and adjourned the court temporarily. Upon resuming, P's Counsel submitted that under s76 of the *Magistrates (Summary Proceedings) Act* 1975 ('Act'), the court had no power to adjourn the complaint *sine die*; it could either hear it or adjourn it to another Magistrates' Court in Victoria. The magistrate agreed with this submission but said he had no power to undo the order he had made a short time previously. Upon order nisi to review—

HELD: Order nisi discharged.
(1) It is open to a Magistrate to determine preliminary objections and interlocutory applications, notwithstanding that evidence has not been given by the witnesses.
***Knight v Henderson* [1958] VicRp 26; (1958) VR 134; [1958] ALR 504, applied.**

(2) In dealing with an application for a change of forum, a mere balance of inconvenience is not enough. The change of forum is to be ordered only if the balance of relevant considerations relied on by the parties indicates that real injustice would otherwise result to the party seeking the change.

(3) The magistrate had power to adjourn the hearing of the complaint to a date to be fixed on the basis that another Court was a more convenient forum. Having regard to the reasons given by the magistrate, it could not be said that he erred in the exercise of his discretion.

(4) In civil proceedings, an order is entered into the Court records when the magistrate signs his signature below the order in the register. Until the order is so entered, it is capable of alteration or reversal.
***Carroll v Price* [1960] VicRp 101; (1960) VR 651; and**
***R v Billington* [1980] VicRp 58; (1980) VR 625, applied.**

McGARVIE J: *[After setting out the issues, His Honour continued]:* ... **[2]** The complaint came on for hearing before a magistrate at Shepparton on 30 August 1985. Mr Stephen O'Bryan of counsel appeared for the complainants and Mr Shane Stone of counsel for the defendant. Those counsel also appeared before me. No evidence whatever was given before the Magistrate but counsel, without objection, made their submissions and informed the magistrate of facts on which they relied. That is often the most **[3]** convenient and inexpensive way of disposing of preliminary interlocutory applications. In this Court, business in the Practice Court by the express or implied consent of the parties is often disposed of in this way. In effect the judge is asked to dispose of the application on the footing that he accepts what he is told by counsel of the facts and the law to the extent that it is uncontradicted. He decides any contested issues of fact or law. On the basis of the uncontradicted fact and law and what he has decided on the contested issues, he decides the application. It is open to a magistrate to determine a preliminary objection in this way. See for example: *Knight v Henderson* [1958] VicRp 26; (1958) VR 134; *Cornehls v Cornehls* [1965]

VicRp 101; (1965) VR 788; (1965) 7 FLR 373. This is the way in which the magistrate decided the preliminary application by Mr Stone for the defendant that the proceedings be stayed because the Magistrates' Court at Shepparton was an inconvenient forum and the Court at Coober Pedy the convenient forum for the hearing of the complainant's claim.

This informal way of dealing with the preliminary application has presented real difficulties on the application now before me. At the hearing at the Magistrates' Court it appears to have been common ground that there is a court at Coober Pedy which is available to hear the claim. I set out an outline of what the affidavits before me show to have occurred. In accordance with the usual practice, where there is a conflict as to what occurred I adopt the version in the answering affidavit which supports the decision. While that practice is not inflexible I do not regard this as a case in which I would be justified in departing from it. Compare *Lindgran v Lindgran* [1956] VicLawRp 34; (1956) VLR 215 at 221-3; [1956] ALR 731. The conflicts between the affidavits are not great.

[His Honour then set out the submissions made by Counsel to the Magistrate, examined the power of a Magistrates' Court to adjourn indefinitely because another forum is more convenient, and continued): …
[10] Mr O'Bryan argued that where a complaint is brought before the proper court within the meaning of sub-section (1) of s76 it is mandatory for that court to hear and determine it. For this proposition he relied on ss76(1), 78(1)(b), (i) and (o) of the *Magistrates (Summary Proceedings) Act* 1975. He submitted that where a complaint has been brought before the wrong court, the only power which that court can exercise to overcome the error is the power expressly given by s76(2). As that power can only be used to adjourn the complaint to another Magistrates' Court in Victoria, it followed, he submitted, that the magistrate had no power to adjourn the complaint indefinitely on the basis that the Court at Coober Pedy was a more convenient court to hear the complainant's claim.

In view of the express power of the court to adjourn the hearing of a complaint without appointing any time for the hearing if it appears advisable, the essence of Mr O'Bryan's argument is that upon the proper construction of the Act that power of adjournment may not be exercised with a view to having the subject of the complaint heard in the court of another State. **[11]** The submission is that by giving a specific power when a complaint is brought before the wrong court, to adjourn it in the way prescribed by the specific provisions of s76, the Act is to be construed as excluding from the general power of adjournment any power to adjourn because an inappropriate court has been selected. See: *R v Wallis* [1949] HCA 30; (1949) 78 CLR 529 at pp520-2; [1949] ALR 689; (1949) 23 ALJR 299; *Commissioner of Taxation v Gulland* [1985] HCA 83; (1985) 160 CLR 55; (1985) 62 ALR 545; 60 ALJR 150, 157; 17 ATR 1; (1986) 7 Leg Rep 1R 150 per Brennan J. I consider that on the application of that principle of construction, s76 is to be treated as exclusively covering its own field but the question is: What is its field? In my opinion s76 has exclusive application to all adjournments to be made on the basis that another Magistrates' Court in Victoria is a more convenient forum. I do not, however, regard the Act as carrying the implication that the provision in s76 deprives a magistrate of power to adjourn a complaint because another court other than a Victorian Magistrates' Court will provide a more convenient forum.

It is well established that a superior court has power to decline to proceed to hear a claim before it, on the basis that another forum is more convenient, if, on considering the relevant criteria, it exercises its discretion to do so. The considerations which are relevant are the same whether the application is for a stay or for an indefinite adjournment. Compare: *Castanho v Brown & Root* (UK) Ltd (1981) AC 557 at p574; [1981] 1 All ER 143; [1981] 1 Lloyds Rep 113; [1980] 3 WLR 991. The principles established by Australian decisions are relevant to the exercise of a discretion to stay proceedings brought in an inconvenient forum were recently summaries by Nader J. I gratefully adopt his statement as a concise summary of present Australian law. He said, in *Ranger Uranium Mines Pty Ltd v BTR Trading (Qld) Pty Ltd* (1985) 34 NTR 1 at pp5-6; (1985) 75 FLR 422:

> **[12]** "Griffith CJ, in whose decision Barton, O'Connor and Higgins JJ concurred, decided *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* [1908] HCA 37; (1908) 6 CLR 194, on the basis that the respondents (plaintiffs) who had sued in the Supreme Court of Victoria, if they were not allowed to continue and were required to sue in Cape Colony, would suffer injustice quite as great as that done to the appellant (defendant) if the proceedings were to continue in Victoria. I read that case as authority for the proposition that where a plaintiff chooses a forum in which the case is justiciable, unless the defendant shows that the injustice it would suffer if the case were to

proceed there outweighs any injustice that the plaintiff would suffer if it were required to proceed in the jurisdiction preferred by the defendant, he should not be prevented from continuing in the forum of choice. In relation to *Maritime Insurance* I believe it would be correct to say that the word 'injustice' used by Griffith CJ as the criterion of determination was, in its context, closely related to 'inconvenience', although 'injustice' is the far stronger word. Griffiths CJ was speaking of injustice flowing from great inconvenience.

Maritime Insurance, *supra*, was followed by Gibbs J in *Cope Allman (Australia) Ltd v Celermajer* (1968) 11 FLR 488, where the import of the use of the word 'injustice' was elaborated (at p493) by reference to what was said by Vaughan Williams LJ in *Re Norton's Settlement; Norton v Norton* (1908) 1 Ch 471 at 482: 'I have gone into the matter at this length in order to make it quite clear that questions of expense or inconvenience are not sufficient to justify the court in staying proceedings. It must be shewn, further, that the expense and inconvenience are of such a character that to allow the action to go on would result in real injustice to the other litigant'. Gibbs J concluded by saying (11 FLR at 494): 'Before I may decline to exercise jurisdiction and deny to the plaintiff its *prima facie* right to proceed in this court I must be satisfied that there would be something amounting to vexation, oppression or injustice to the defendant. I am not so satisfied'.

In *Telford Panel and Engineering Works Pty Ltd v Elder Smith Goldsbrough Mort Ltd* [1969] VicRp 23; (1969) VR 193, Lush J rejected the argument that a mere balance of convenience is sufficient determinant and, following *Norton's Settlement*, *supra*, and other authorities, said that it must be proved that the inconvenience must be such as to amount to injustice before the court will stay proceedings, duly instituted and not vexatious."

[His Honour then considered English authorities and continued]: ... **[14]** It would not be in accordance with the principles of law applied in Australia for judicial decisions to be treated as going further than establishing the basis and objective of the exercise of the discretion. The decisions establish that a mere balance of convenience is not enough; a change of forum is to be ordered only if the balance of relevant considerations relied on by the parties indicates that real injustice would otherwise result to the party seeking the change. That discretion is not to be treated as being fettered or as having conditions prescribed for its exercise by earlier judicial decisions. See *Mallet v Mallet* [1984] HCA 21; (1984) 156 CLR 605; (1984) 52 ALR 193; [1984] FLC 91-507; (1984) 9 Fam LR 449; (1984) 58 ALJR 248 at p249; *McKenna v McKenna* [1984] VicRp 58; (1984) VR 665 at pp674-5. **[15]** I consider that there is no difference between the Australian law and the English law as restated in *Castanho's case* and more recently in the *The Abidin Daver* (1984) AC 398; [1984] 1 All ER 470; [1984] 1 Lloyds Rep 339; [1984] 2 WLR 196. In the context in which it was said, I do not regard the statement by Lord Brandon in the last-mentioned case, that the discretion is not unfettered (p417), as inconsistent with what I have stated above.

The principles to be applied when a stay or adjournment is sought so as to lead the claim to be brought in a more convenient forum are of the same nature as those which apply where the aim of the stay or adjournment is to have the claim determined in proceedings already commenced in the more convenient forum: *The Abidin Daver* (1984) AC 399; [1984] 1 All ER 470; [1984] 1 Lloyds Rep 339; [1984] 2 WLR 196. It is necessary to ask whether the fact that the Court involved here is a Magistrates' Court, an inferior court at the base of the hierarchy of courts, should lead to the conclusion that the general power of adjournment conferred by the Act is not to be construed as giving it the power of declining to hear a claim in circumstances where its inconvenience as a forum would justify a superior court in taking that course.

At the outset it is difficult to see why the principles of justice which make it appropriate for superior courts to decline to hear claims before them, should not have equal application to the courts which deal with the bulk of the community's litigation. Compare: *Ex parte Tubman: Re Lucas* (1970) 72 SR (NSW) 555; [1970] 3 NSWR 41; (1970) 92 WN (NSW) 520 at p532. Magistrates' Courts are to be regarded today in the way in which the Court of Appeal of New South Wales regarded the equivalent courts in *Bogeta Pty Ltd v Wales* (1977) 1 NSWLR 139. In considering the inherent powers of Courts of Petty Sessions Nutley JA, (with whom Hope and Glass JJA agreed) said:

[16] "As all courts, including the Supreme Court, in this country are creatures of statute, the fact that the Courts of Petty Sessions are governed by the *Justices Act* ... provides no reason for denying to those courts inherent powers. The issues with which Courts of Petty Sessions are concerned have in the last half century involved substantial rights and are of considerable complexity ... The general principle where a court is properly seized with a matter, and there is no procedure laid down which

> enables it to deal with the particular problem facing it, that it should devise its own procedure, is in my opinion, applicable to all Courts of Petty Session in this day and age."

The fact that courts were inferior courts has not deprived them of inherent power to adjourn proceedings. *Lee v Saint* [1973] VicRp 83; [1973] VR 833 and *Howard v Pacholli* [1973] VicRp 83; [1973] VR 833 and also *R v Cox* [1960] VicRp 102; (1960) VR 665 and *Ex parte Morrison, Re Finley* (1957) 74 WN (NSW) 402. The occasion for the exercise of a discretion such as the magistrate was as to exercise in this case can readily arise where Magistrates' Courts have a jurisdiction which is often concurrent with the jurisdiction of the court of another State. Section 68 of the *Magistrates' Courts Act* 1971 provides:

> "68. A Magistrates' Court may hear and determine every complaint for a cause of action in respect of which jurisdiction is conferred upon it by this or any other Act including any complaint as aforesaid:-
> (a) where part of the cause of action arose outside Victoria but a material part thereof arose in Victoria; or
>
> (b) where the whole cause of action arose outside Victoria but the defendant resided within Victoria at the time of the service of the summons upon him."

In practice, situations do occasionally arise where in the interests of justice it may be desirable that the hearing of a claim before a Magistrates' Court be adjourned to enable the claim or some issue in it to be decided by another court. This may occur where the claim or issue is to be decided by a higher court. Eg *Patey v Patey* [1923] VicLawRp 64; (1923) VLR 521; *Ex parte Jospe; Re Radovsky* (1957) 74 WN (NSW) 156. It may occur where the claim or issue to be **[17]** decided by the court of another State or of a Territory or a federal court, of equal or higher status. It would be absurd if the Magistrates' Court at Wodonga could not adjourn indefinitely a complaint before it, when it was satisfied that the rights of the parties upon the claim were nearing determination after an extensive hearing before the Local Court across the border at Albury.

There have been cases in other States in which the decision has been that a magistrate with jurisdiction was bound to hear a matter before him although there was another court within the State which would have been more convenient. They do not affect the question now being considered. In *Ex parte Mylecharane* (1898) 19 NSWR 7 it was said that a magistrate with jurisdiction must exercise it just as the Supreme Court, in any matter which comes before it, if it has jurisdiction must exercise it (p8). The Supreme Court may exercise a discretion to stay or adjourn a matter before it on the grounds that there is a more convenient forum. In *Ex parte Punch* (1915) 32 WN (NSW) 72 the magistrate had purported to adjourn the matter beyond the area of his jurisdiction so the statement that a magistrate who has a case properly before him which he has jurisdiction to hear must proceed to deal with it and give a decision (p72), went beyond what was essential to the decision. The decision in *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 turned on the fact that the special magistrate had ordered a stay of proceedings upon charges and it was held that there was no power in a court of summary jurisdiction to make such an order. The opinion expressed by Bray CJ that he thought that the court of summary jurisdiction at the end of the day could only convict or dismiss or adjourn to a fixed day (p231) was not essential to his decision.

[18] In my opinion, in this case the magistrate had power to exercise upon the proper principles the power to adjourn the hearing of the complaint to a date to be fixed. I consider that the power of a Magistrates' Court to adjourn without appointing any time is to be construed in the context of modern times. *[His Honour then considered whether the Magistrate's discretion had been validly exercised and continued]:* ... **[21]** Because of the informal way in which the preliminary application was presented to the magistrate, I face a similar difficulty in deciding this ground to that which confronted Pape J in **[22]** *Knight v Henderson* [1958] VicRp 26; (1958) VR 134; [1958] ALR 504. I have a discretion whether to make absolute under s96(2) of the *Magistrates' Courts Act* 1971 the order to show cause. In the circumstances of this case I think it would be appropriate to exercise a discretion not to make the order absolute except upon an error by the magistrate on an issue which was contested before him. This is consistent with the approach of Pape J in *Knight v Henderson* [1958] VicRp 26; (1958) VR 134 at p137; [1958] ALR 504.

Broadly speaking, though not entirely, the argument before me was confined to issues which were contested before the magistrate. Thus, while some of the propositions of law, uncontradicted

before the magistrate, may well be open to argument, they were not argued before me and I express no opinion on them. Two propositions which fall in this category are the proposition that the *Misrepresentation Act* of South Australia would only apply if the claim were heard in South Australia, (a proposition which was expressly not pursued by counsel for the defendant before me), and the proposition that in making orders for expenses magistrates allow less than the actual reasonable expenses of a party or witness.

I mention one point raised before me but not before the magistrate. Mr O'Bryan referred to the disadvantage to the complainants if it turned out that the Court at Coober Pedy did not have jurisdiction to hear and determine the complaint. It was not submitted that it did lack jurisdiction and I was not referred to the legislation which deals with its jurisdiction. It was put that this lack of jurisdiction would not be determined until the case was determined. It was not put before the magistrate or before me that the defendant should have been required as a condition of exercising the discretion in his favour to undertake or enter an agreement to submit to the jurisdiction of the Court at Coober Pedy. **[23]** It would not necessarily follow that the defendant would need to await final determination of a question of jurisdiction in the South Australian Court. The Shepparton Court has not made an order that it will not hear the complaint. It has adjourned it to a date to be fixed so that proceedings can be brought in South Australia. If it appeared that the defendant was challenging the jurisdiction of the South Australian Court it would be open to the complainants to apply to the Court at Shepparton to fix a date and proceed with the hearing. Compare: *Castanho v Brown & Root (UK) Ltd* (1981) AC 557 at 570; [1981] 1 All ER 143; [1981] 1 Lloyds Rep 113; [1980] 3 WLR 991.

Each counsel advanced before me, as they had before the magistrate, the considerations for and against the magistrate exercising his discretion as he did. It was not argued that the magistrate had not applied the correct standard in deciding to adjourn the complaint. While the words the magistrate used raise a doubt whether he did not apply the standard of the mere balance of convenience instead of that of a real injustice, I am not satisfied that he did. I am not satisfied that the magistrate reached a result which, if the correct principle were applied, was plainly wrong. Accordingly I am not satisfied that he erred in the exercise of his discretion.

Effect of Announcement of Decision by the Magistrate

One of the grounds of the order to show cause is that the magistrate was in error in considering that he could not effectively change the order once he had announced his decision to adjourn to a date to be fixed, even though he later thought the decision to be incorrect. In the circumstances of this case I consider that it was open to the magistrate to make a different order at the stage when he decided the order he had announced appeared to be incorrect. **[24]** In my opinion until the order of the Court was entered into its records it was capable of alteration or reversal. I regard the general principle applied to a Court of General Sessions by the Full Court in *Carroll v Price* [1960] VicRp 101; (1960) VR 651 as applying to a Magistrates' Court. See also: *R v Billington* [1980] VicRp 58; [1980] VR 625.

There is an exhibit before me which is an extract of the register of orders made in the civil jurisdiction of the Magistrates' Court at Shepparton certified by the clerk of that Court. Under the heading "Orders" there appears "Adjourned to a date to be fixed. Costs Reserved" and below that the signature of the Magistrate and the date, 30 August 1985, appear in the places provided. I regard the order as entered into the court records when the magistrate signed his signature below the order in the register. That conclusion receives confirmation from the relevant legislation. Section 24(1) of the *Magistrates' Courts Act* 1971 requires the clerk of a court to keep a register of the minutes or memoranda of all convictions and orders of such court. Section 24(4) provides that the entries relating to each minute, memorandum or proceeding shall be signed by the justice or one of the justices constituting the court by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had. That it is the signature of the minute or memorandum of an order which gives it operative effect is indicated by s76 of the *Magistrates (Summary Proceedings) Act* 1975 which is set out above. Section 76(2) provides that in a case where another court is the proper court "the Court shall by memorandum signed by one or more of the justices adjourn the information complaint or application to the proper Court".

The views I express are limited to civil proceedings in a Magistrates' Court. It may be that in a criminal case the position is **[25]** different when a court announces that it is, or is not,

satisfied beyond reasonable doubt that the evidence establishes that the offence charged was committed. Both counsel desired that I should ascertain from the magistrate when the entry was made. His information was that while he has no independent recollection of this occasion it is his usual practice in civil proceedings to make entries of the orders at the conclusion of the day's business. That information, when considered with the evidence as to the course of proceedings on the day, satisfies me that the entry of the order in the court register had not been made at the time when the magistrate indicated that he regarded himself as having no power to alter the order he had earlier orally announced. While it was open to the magistrate to change the order at that stage it does not affect the outcome of this application because the later submission which seemed correct to the magistrate, I have held to be incorrect.

Result

For these reasons I have decided that I should dismiss the application for an order absolute and discharge the order to show cause.
