01/69

SUPREME COURT OF VICTORIA

HUEBEL & HUEBEL v HOLT & HOLT

Lush J

19, 20 August, 21 October 1968 — [1969] VicRp 56; [1969] VR 462

CIVIL PROCEEDINGS – SPECIAL SUMMONS ISSUED – NO STATEMENT IN THE SUMMONS OF THE PLACE WHERE AND THE BAILIWICK IN WHICH THE CAUSE OF THE COMPLAINT AROSE - SUMMONS DISMISSED BY MAGISTRATE - WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S21(1)

HELD: Order absolute with costs.
1. The words "offence or matter" as used in the section before amendment related only to the contents of information and must be used in the same sense in the words added by the amendment. Accordingly s21(1), as amended, contained no requirement that a summons upon a complaint should state the name of the place where and the bailiwick in which the cause of the complaint (i.e. the cause of action) was alleged to have arisen.

2. Since there was no requirement that this summons should have stated the place where or the bailiwick in which the cause for action arose the magistrate was wrong in dismissing it on the ground that it did not state these matters.

LUSH J: Return of an order nisi to review a decision of the Court of Petty Sessions at Camberwell. On 12 February 1968 the applicants, who were the complainants below, caused to be issued a special summons, which was not a default summons, returnable in the Court of Petty Sessions at Camberwell on 18 March 1968. The special summons was on a printed form, and the relevant words of it were as follows:

> "Whereas a complaint has this day been laid before the undersigned, one of Her Majesty's Justices of the Peace in and for the Central Bailiwick against you in respect of a cause of action determinable summarily, the particulars whereof are endorsed hereon (or annexed hereto). These are therefore to command you" etc.

The particulars of demand were on typed sheets bound with the summons. Endorsed on the summons were printed words with typed figures as follows:

> "If you pay the amount of the claim $340.00 and costs $17.25 to the Complainant or his Solicitor or into Court pursuant to R69 of Chapter III of the *Justices Act Rules* 1963 you will avoid incurring additional costs except by order of the Court."

The summons came on for hearing on 18 March 1968, and the complainants then based their claim on certain amended particulars of demand. From these particulars, and from the original particulars, it appeared that the claim arose out of a contract in writing for the sale of a property known as 22 Kasouka Road, Camberwell. In substance, it was alleged that at the date of the contract, in which the complainants were buyers and the defendants were sellers, certain fixtures were on the premises. It was alleged that, after the making of the contract or after settlement, the defendants had wrongfully removed some of the fixtures and had converted them to their own use. Alternatively, it was said that in breach of the contract the defendants had failed to deliver the property sold by the contract, the failure referring to the same fixtures. The claim was for the return of the missing fixtures or their value or for damages for breach of contract or for damages for conversion. There was no allegation of a demand for the delivery up of the missing fixtures.

At the hearing, a number of defences were raised, none of which were relevant to the issues which now arise. The hearing continued on 18 March to the close of the complainants' case. The case for the defence was then opened and the first-named defendant was sworn and gave evidence. His evidence was not finished when the court adjourned for the day, and the case

itself was adjourned until April 1968. When the case came on that day, counsel for the defendants raised the objection that the complaint and summons did not state the name of the place where and the bailiwick in which the matter arose, and was, therefore, defective as not complying with s21(1), as amended by Act No. 7163, of the *Justices Act* 1958. The Stipendiary Magistrate held that this failure went to the jurisdiction of the court, was not a matter which the defendants were required to raise in their defences and ordered that the complaint be struck out with $81.25 costs.

An order nisi to review was granted by Master Collie upon the following grounds:

1. That the Stipendiary Magistrate was wrong in law in holding that the absence from the special summons of the name of the place where and the bailiwick in which the cause of complaint was alleged to have arisen deprived the Stipendiary Magistrate of jurisdiction to hear and determine the complaint.

2. That the Stipendiary Magistrate was wrong in law in holding that the special summons was a nullity and that he had no jurisdiction to amend it so as to give the Court of Petty Sessions jurisdiction to hear and determine the complaint.

3. That the Stipendiary Magistrate ought to have held that the absence from the special summons of the name of the place where and the bailiwick in which the cause of complaint was alleged to have arisen was an irregularity curable by amendment.

4. That the Stipendiary Magistrate was wrong in law in holding that although the special summons was a nullity he had jurisdiction to award costs against the complainants.

This last ground was abandoned before me.

Section 21(1) of the *Justices Act* 1958, as amended, is in the following terms:

"Every summons shall be signed by the justice or clerk of petty sessions issuing the same, and unless it is a summons to give evidence or to produce documents or to give evidence and to produce documents shall state shortly the offence or matter of the information or cause of complaint the name of the place where the offence or such matter is alleged to have arisen and shall name or otherwise describe the person against whom it is issued, and no summons or process shall be signed in blank."

The words "the name of the place where and the bailiwick in which the offence or such matter is alleged to have arisen" were inserted by the amending Act No. 7163.

Section 20 of the Act contemplates that summonses will be issued to answer either informations or complaints. In s3 "information" is defined as including "a complaint for any offence but not any other complaint" and "complaint" is defined as meaning "a complaint other than a complaint for an offence and includes 'application' and 'notice of set-off' and 'counterclaim'". The Act contemplates that an information for an offence or a complaint relating to a matter other than an offence may be laid or placed before a justice, who may then issue his summons upon the information or the complaint.

Mr Dwyer, who appeared for the complainants, argued that s21(1) did not require the inclusion of the name of the place where and the bailiwick in which the cause of action arose in a summons issued upon a complaint as distinct from a summons issued upon an information. His construction of s21(1) was that the words "offence or matter" both related to "information". The sub-section requires the summons to state shortly the offence or matter of the information or cause of complaint. Mr Dwyer's argument construed this as if the alternatives to be stated were either "the offence or matter of the information" or alternatively "the cause of the complaint". It followed, he argued, that the requirement that the name of the place, etc., in which "the offence or such matter is alleged to have arisen" should appear in the summons related only to summonses issued upon an information.

This construction would be more readily acceptable if the words of the section were, instead of "the offence or matter of the information or cause of complaint", "the offence or matter of the information or the cause of the complaint".

There are, however, much greater verbal difficulties in the way of the construction that

the words "offence or matter" relate both to information and complaints. If this construction is correct the relevant words must be used in the manner shown in the following analysis:–

The summons shall state:–
(a) the offence; or
(b) the matter of
    (i) the information; or
    (ii) cause of complaint.

This analysis provides various combinations of words which do not readily fit together. The first combination, the offence of the information, is awkward but understandable. The second combination, the matter of the information, is understandable. The third combination, the offence of cause of complaint is meaningless. The fourth combination, the matter of cause of complaint is understandable but tautologous.

The verbal difficulties of Mr Dwyer's construction are thus much less than the difficulties of the rival construction put upon the section by the respondent. The respondent's construction seeks to make "the information" and "cause of complaint" contrasting expressions. The preceding sections show that the proper and normal words to be used to express the contrast are simply "the information" on the one hand and "the complaint" on the other. That which contrasts in the relevant sense with the expression "cause of complaint" is some such expression as "the offence alleged in the information" or "the offence of the information".

For these reasons I think that the applicants' argument on this point is correct. The words "offence or matter" as used in the section before amendment relate only to the contents of information and must be used in the same sense in the words added by the amendment. Accordingly s21(1), as amended, contains no requirement that a summons upon a complaint should state the name of the place where and the bailiwick in which the cause of the complaint (i.e. the cause of action) is alleged to have arisen.

It was, however, argued that other amendments affected by Act No. 7163 to s89 and s102(3) indicate that it was the intention of the legislature that s21(1) in its amended form should have the meaning for which the respondent contends, namely, that every summons upon a complaint should state the facts referred to in the words added to that sub-section by Act No. 7163.

Section 89 is designed to ensure that proceedings are held at the court most easy of access both from the place of abode of the defendant and the place where the subject-matter of the proceedings arose. The amendment made by Act No. 7163 brought the first part of the section into the following form:—

"Upon the hearing before any Court of Petty Sessions of any information complaint or application which such court has power to deal with summarily—

(a) if it appears to the court from the information complaint or application; or

(b) if the defendant or person opposing the application—
    (i) objects that he is brought to the wrong court; and
    (ii) before any evidence is given in support of such information complaint or application makes it appear to the court either by the admission of the informant complainant or applicant or by the oath of a credible witness—
that there is a place at which a Court of Petty Sessions is held more easy of access than the place where such court is sitting not only from the place of abode of such defendant or person but also from the place where the subject-matter of such information complaint or application arose, ...".

Apart from introducing the paragraphing and sub-paragraphing of the passage quoted, Act No. 7163 introduced for the first time the words which appear as paragraph (a). These words contemplate that from the information complaint or application which the court is hearing facts may appear which show that there is another court easier of relevant access, and if such facts appear the court may act of its own motion in adjourning the proceedings. This, however, does not imply that the information complaint or application must state the place where and the bailiwick in which the subject-matter arose, still less that the summons issued upon the information complaint of application must do so. The information complaint or application, on the one hand,

and the summons, on the other, are separate things, even though appearing on the same piece of paper. No doubt each may incorporate essential matters by reference to the other, but there is difficulty in saying that a section which contemplates that the information complaint or application may state certain facts supports a construction which would give a different section the effect of requiring the summons issued upon the information or complaint to state those facts. In my opinion, the making of the amendment to s89 does not support the respondents' argument.

Section 102(3) provides for the making of an order on a default summons without appearance by the complainant if notice of intention to defend has not been given. The amending Act made it a condition of the making of an order in such circumstances that "the said summons or the particulars of demand annexed thereto sufficiently disclose the cause of action and the name of the place where and the bailiwick in which such cause of action is alleged to have arisen". This amendment contemplates that a statement of the matters referred to may appear in the summons but it also contemplates that the statement may not appear in the summons but in the particulars. I do not think it helps the respondents' argument. Quite independently of s21(1) it produces the result that a default order cannot be obtained unless the summons or the particulars contains the statement of the required matters.

A consideration of the amendments made to s89 and s102(3) thus leaves me free to adopt the construction of s21(1) which I have already set out. Since there was no requirement that this summons should state the place where or the bailiwick in which the cause for action arose the magistrate was wrong in dismissing it on the ground that it did not state these matters.

This decision makes it unnecessary for me to consider other matters raised by Mr Dwyer for the applicants. Mr Fagan, for the respondents, argued, however, that the summons was a nullity because it carried the endorsement which I have quoted.

The endorsement was in the form set out in r10(2)(a) of Ch III of the *Justices Act Rules* 1963. By SR No. 183 of 1965 the form of endorsement was changed so as to eliminate the reference to r69. The new form is:

> "If you pay the amount of the claim $---and costs $--- to the complainant or his solicitor not less than five days before the day on which this summons is returnable you will avoid further costs."

Both the original and the amended rule refer only to special summonses for liquidated amounts. Both rules contain as paragraph (d) the direction:

> "Except as otherwise expressly provided no other indorsement or notice except a notice to produce documents shall be made or written on or affixed to any summons."

Unless the claim for the value of the missing goods is to be classed as a claim for a liquidated amount there was no such claim in either the original or amended particulars. This claim was advanced upon the basis of a cause of action in tort, namely, detinue, and although the process of assessment is identical with that undertaken in *indebitatus assumpsit* claims for the value of goods or services (see *Alexander v Ajax Insurance Co Ltd* [1956] VicLawRp 70; [1956] VLR 436, at p442; [1956] ALR 1077, at p1083) and although the assessment of value in such a case is distinct from the assessment of damages (see the judgment of Diplock LJ in *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644; [1963] 2 All ER 314), so far as I am aware claims in tort are never classified as liquidated. The classification of claims as such depends on historical as much as on logical factors.

In the present case it makes no difference, in my opinion, whether, on the assumption that there was a liquidated claim, the endorsement was in the wrong form or, on the assumption that there was no liquidated claim, it should not have been there at all. R140 of the *Justices Act Rules* 1963 provides:

> "Non-compliance with any of the Rules, or departure from the forms, shall not render any proceedings void unless the court or a magistrate so directs, but the proceeding may be amended or otherwise dealt with in such manner and on such terms as the court or magistrate thinks fit."

On any view of the argument now under consideration, this rule is in terms applicable, and

there has not been, nor in my opinion should there have been, any direction that the suggested non-compliance or departure should render the summons void. Rule 140 is in keeping with the rule often expressed and applied in superior courts that the inference that breach of a rule produces the consequence that proceeding is null is seldom, and not lightly, to be drawn: see *Re Pritchard* [1963] Ch 502; [1963] 1 All ER 873; and the recent judgment of Newton J in *R v Danaher; Ex parte Olzer Industries Pty Ltd* [1969] VicRp 55; [1969] VR 445.

I therefore reject Mr Fagan's submission based on the endorsement. In the result, ground 1 of the order nisi is made out and the order will be made absolute with $120 costs.

Solicitor for the applicants: T Irlicht.
Solicitor for the respondents: Henderson and Ball.
