20/13; [2013] VSC 151

SUPREME COURT OF VICTORIA

SEVDALIS v MARCS AUTOMOBILES PTY LTD

Judd J

12 March, 9 April 2013

PRACTICE AND PROCEDURE – APPLICATION TO HAVE A CIVIL DEFAULT JUDGMENT SET ASIDE AND THE MATTER REHEARD – ISSUE RAISED BY THE MAGISTRATE CONCERNING THE WHEREABOUTS OF A MOTOR VEHICLE – COUNSEL NOT PERMITTED TO ADVANCE SUBMISSIONS – APPLICATION REFUSED – WHETHER A CASE OF ROBUST JUDICIAL INTERVENTION OR A DENIAL OF PROCEDURAL FAIRNESS – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION.

S. applied to have a default judgment made against him set aside and the matter reheard. During the hearing of the application, the Magistrate raised the question of the whereabouts of a motor vehicle the subject of the claim. This was an issue which was obviously regarded by the Magistrate as crucial to the outcome of the application. The Magistrate refused to permit S. an adequate opportunity to respond to this question and refused the application. Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside and the application remitted to the Magistrates' Court for hearing and determination by another Magistrate.

1. It was not contended on behalf of S. that the Magistrate had prejudged an issue, or had unjustifiably entered the arena by defining and elevating an issue that was not so defined between the parties. While there may be room for debate as to the limits of judicial intervention, there are circumstances in which a judicial officer is justified in moving beyond the confines of the issues formulated by the parties. The *Civil Procedure Act* 2010 expressly authorises active judicial intervention in the course of case management. But care must be taken to ensure that if a new issue is raised by the judge, the parties are given an adequate opportunity to address it. Additional evidence might be necessary, requiring an adjournment.

2. Procedural fairness in the present case required the Magistrate to at least permit counsel for S. to advance submissions to explain his client's connection with the vehicle.

3. The Magistrate's refusal to hear from counsel for S. could not be excused on the grounds that the apparent denial of procedural fairness was immaterial. It was the Magistrate who had elevated the absence of an explanation concerning possession of the vehicle into a contentious issue that he described as a 'smoking gun'. After all, counsel for Marcs Automobiles had proceeded on the assumption that possession of the vehicle was not contested. While it was unclear whether counsel for S. had also proceeded on that basis, possession of the vehicle became an issue of great importance to the Magistrate, and determinative of the application.

4. While it was true that counsel for S. had, at the outset, been given an opportunity to remedy any deficiencies in his affidavit material, the issues changed with the intervention of the Magistrate. Procedural fairness required the Magistrate to give counsel an opportunity to respond to the issue. He ought to have permitted counsel for S. an opportunity to persuade him that possession of the vehicle by his wife, and perhaps more importantly, the absence of material directed to that topic, did not so undermine the credibility of the defence as to justify refusing S. an opportunity to advance his defence at a trial.

5. Furthermore, on becoming aware of the significance to the Magistrate of possession, S. might also have sought an opportunity to rectify the obvious deficiency in his affidavit material.

6. The decision of the Magistrate to dismiss the application for re-hearing was set aside and the application for a rehearing was remitted to the Magistrates' Court for hearing and determination by another magistrate.

JUDD J:

1. The plaintiff, Arthur Sevdalis, was an applicant before a Magistrate to have a default judgment set aside and for a re-hearing under r46.08 of the *Magistrates' Court General Civil Procedure Rules* 2010. His application was dismissed by the Magistrate. Mr Sevdalis contends that the decision involved a denial of procedural fairness. That ground is made out.

2. The Magistrate refused to permit Mr Sevdalis an adequate opportunity to respond to a question in which the Magistrate raised an issue that was obviously regarded by him as crucial to the outcome of the application. The question concerned the whereabouts of a motor vehicle. This was not merely a case of robust judicial intervention, or one in which a denial of procedural fairness may be overlooked, in the exercise of discretion, for lack of materiality.

3. Marcs Automobiles Pty Ltd (In Liquidation) is the first defendant in this proceeding, and was the plaintiff in the proceeding commenced in the Magistrates' Court at Melbourne on 25 February 2011. Mr Sevdalis was the defendant in that proceeding. Marcs Automobiles, now in liquidation, was a wholesaler of motor vehicles. It held a Motor Car Trader Licence, but was restricted to selling vehicles to traders who also held such a licence. Mr Sevdalis did not hold such a licence, but had been employed by a licence holder, Brighton Nissan, as a used car manager.

4. In its Statement of Claim, Marcs Automobiles alleged that on or about 19 December 2009 Mr Sevdalis agreed to purchase from it a 2007 Ford Territory motor vehicle for $19,500. Mr Sevdalis was employed by Brighton Nissan at the time. The alleged agreement was partly oral and partly in writing. Insofar as it was in writing it was alleged to be constituted by a tax invoice dated 19 December 2009. The invoice, on which Marcs Automobiles relied, was addressed to 'ARTHUR SECDALIS'. It was payable within seven days. Marcs Automobiles also alleged that on or about 19 December 2009 it delivered the vehicle to Mr Sevdalis, but that he had failed to pay the price within seven days or at all. Marcs Automobiles claimed the sum of $19,500, together with interest and costs.

5. Judgement in default of defence was entered against Mr Sevdalis on 2 May 2011. Marcs Automobiles sought to enforce the judgment by having the Sheriff execute a warrant to seize property. The first warrant was returned unsatisfied, but a subsequent warrant was executed by a Sheriff's officer, attending the home of Mr Sevdalis at 15 Strachan Court, Keilor Downs, on or about 18 September 2012. The application for rehearing was dated 17 October 2012, supported by an affidavit sworn by Mr Sevdalis on 17 October 2012, and a further affidavit sworn 9 November 2012.

6. An applicant seeking to set aside a default judgment and for a rehearing will ordinarily be expected to provide a credible explanation for their failure to file a defence, for any delay in making the application, and to raise a *prima facie* defence on the merits.[1] While those issues were broadly addressed by Mr Sevdalis in his affidavits, Marcs Automobiles submitted to the Magistrate that the explanations were unsatisfactory, and that Mr Sevdalis did not disclose a credible *prima facie* defence on the merits.

7. While Marcs Automobiles did not abandon its contention that the explanation given by Mr Sevdalis, for his failure to file a defence, was inadequate, the principal issue became the adequacy of the material in support of a defence on the merits. A process server had deposed to having served the Complaint personally on Mr Sevdalis at his residence at 8.00 pm on 9 March 2011. Mr Sevdalis deposed that he had 'no recollection whatsoever of being served with the Complaint'. He said that he was dining at Quaff restaurant in Toorak at the time. He deposed that had he been served with the Complaint, he would have sought legal advice and filed a Notice of Defence.

8. Mr Sevdalis deposed that on about 25 September 2012 he received a letter from the Sheriff's Office advising him that the Sheriff had been instructed to sell his home by public auction. He said that he immediately instructed his solicitors to search the court file, and subsequently, to make the application for a rehearing.

9. In his first affidavit, Mr Sevdalis claimed to have a defence on the merits, setting out the grounds in paragraphs 16 and 17 in the following terms:

> I deny each and every allegation set out in the Complaint on the following basis:
> (a) I have no recollection whatsoever of being provided with the Sevdalis Tax Invoice. In fact, I note that the Sevdalis Invoice has my name spelt incorrectly and does not have my address printed on it.
> *Agreement between the Plaintiff and Brighton Nissan*
> (b) Brighton Nissan is a motor car trader run by Melshore Pty Ltd. I was employed by Brighton Nissan from 1 July 2007 and 25 June 2010 as a used car manager.
> (c) I believe that Brighton Nissan purchased the vehicle from the plaintiff on 19 December 2009.

(d) On or about 19 December 2009, the plaintiff faxed to me (in my capacity as used car manager) a tax invoice no 1777 dated 19 December 2009 issued to Brighton Nissan for the same vehicle (Brighton Tax Invoice).
(e) Coincidentally, the Brighton Tax Invoice bears the same date, number and relates to the sale of the same vehicle as the Sevdalis Tax Invoice. In other words, there exists two separate invoices for the same transaction. Now produced and shown to me marked 'AS3' is a copy of the Brighton Tax Invoice.
(f) The Brighton Tax Invoice clearly shows that Brighton Nissan was the entity that purchased the vehicle from the plaintiff and not me.
Motor Car Trader Licence
(g) Further, I believe that the plaintiff was the holder of a Motor Car Trader Licence (MCTL) from 28 May 2008 to 26 November 2010. The plaintiff's licence number is MCT10485. Now produced and shown to me marked 'AS4' is a copy of the printout of the MCTL.
(h) I believe that, at all material times, the plaintiff was prohibited by law from selling a motor vehicle except to a person who is a holder of a MCTL. This prohibition is stated very clearly at the bottom of the printout of the plaintiff's licence referred to in subparagraph (g) above.
(i) I do not presently, and never have, held a MCTL and as such, the plaintiff could not have sold the vehicle to me in my personal capacity.
(j) Instead, the plaintiff could have only sold the vehicle to Brighton Nissan because Brighton Nissan holds a MCTL (No MCT 10170).

By reason of the above, I did not enter, nor could I have entered, into any contract with the plaintiff. In the absence of a valid contract, the plaintiff is not entitled to seek payment of any monies from me. I believe that I have a meritorious defence and, if a rehearing is granted by this Honourable Court, the plaintiff's claim would be dismissed.

10. In response to enquiries made of Marcs Automobiles, Mr Sevdalis was provided with a copy of the tax invoice addressed to ARTHUR SECDALIS. Mr Sevdalis said that he had 'no recollection whatsoever' of being provided with 'that invoice'. He noted that his name was incorrectly spelt. Mr Sevdalis claimed that the invoice was a forgery. He relied on the improbability of Marcs Automobiles breaching its licence condition by selling a vehicle to him.

11. According to Mr Sevdalis, the only valid invoice was an almost identical document, but with a different addressee and a reference to a Motor Car Trader Licence number. The tax invoice produced by Mr Sevdalis, which he described in his affidavit as the 'Brighton Tax Invoice', was addressed to:

BRIGHTON NISSAN
931 Nepean Highway
Bentleigh. Vic 3204

12. Mr Sevdalis relied on the Brighton Tax Invoice to claim that it 'clearly shows that Brighton Nissan was the entity that purchased the vehicle from the plaintiff and not me'. Marcs Automobiles contended that the Brighton Tax Invoice was a forgery prepared by Mr Sevdalis. These competing allegations formed the basis of a contention by Mr Sevdalis that there was a serious issue for trial. But the contest was not that straightforward.

13. Mr Sevdalis claimed that the Brighton Tax Invoice had been faxed to him in his capacity as used car manager for Brighton Nissan, although he retained possession of the invoice even after he ceased employment. The uncertain provenance of the invoices was compounded by the fact that the copy of the Brighton Tax Invoice, produced to the court by Mr Sevdalis, did not contain any fax header imprint.

14. Mr Sevdalis did not directly challenge the allegation in the Statement of Claim, that the motor vehicle had been delivered to him. He said nothing in his affidavits to explain the whereabouts of the vehicle or any ongoing connection with it. A fair reading of paragraphs 16 and 17 of his affidavit sworn 17 October 2012 might cause the reader to conclude that the sale transaction did not concern Mr Sevdalis otherwise than as the mere recipient of the faxed Brighton Tax Invoice, and then only in his capacity as an employee of Brighton Nissan. In other words, that he was a disinterested conduit in a transaction between Marcs Automobiles and Brighton Nissan.

15. At the commencement of the hearing, the Magistrate warned counsel for Mr Sevdalis that he would be confined to the affidavit material filed in court. He gave counsel the opportunity to supplement the material, by seeking an adjournment, if he was of the view that the material was not 'fully in order'. Counsel elected to proceed.

16. A fair reading of the transcript suggested that the Magistrate was acquainted with the affidavit material, and had reservations about its adequacy. In any event, the application proceeded with the Magistrate leading counsel for Mr Sevdalis through the first affidavit, almost linebyline. Counsel for Mr Sevdalis had already summarised his client's defence as follows:

> The plaintiff claims that it agreed to sell a Ford motor vehicle to the defendant. The defendant — in essence there's two parts to the defendant's claim. The defendant claims they got the wrong man, that the contract was between the plaintiff and Brighton Motors, not with the defendant.
> The Magistrate characterised the defence as, 'it wasn't me'.

17. As the application progressed, the Magistrate introduced new issues. He asked, 'Where is the car?'. The question was not directed to counsel for Mr Sevdalis, but to counsel for Marcs Automobiles, who responded by saying that the car was in the applicant's possession. The following exchange took place:

> HIS HONOUR: How do you know that? There's no evidence – – –
> MR STRAUCH: Certainly doesn't deny that he took receipt of the car. We put forward the car was delivered to him.
> HIS HONOUR: You assert it in the statement of claim.
> MR STRAUCH: We assert. It's not been put anywhere in the defendant's material that he did not receive this motor vehicle. That was the one issue. We say is the defence arguable if he received – – –
> HIS HONOUR: We overlooked that, haven't we? It's a pretty important point. If he's got the car – – –
> MR STRAUCH: Yes. We haven't got to that yet, your Honour. I've got to — I've just – – –
> HIS HONOUR: If he's got the car – – –
> MR STRAUCH: We say he's got the car.
> HIS HONOUR: – – – *he's holding a smoking gun.*
> MR STRAUCH: That's the plaintiff's position, is he does not deny and doesn't put anywhere any material – – –
> HIS HONOUR: No, we all know that you don't need to pull the trigger to make a gun smoke, and someone can pull the trigger and the[n] give you the gun after they've done it. *But if he's got the car it's equivalent to a smoking gun. It's pretty strong evidence.*[2]

18. There continued a discussion between counsel for Marcs Automobiles and the Magistrate concerning proof of ownership. While the Magistrate considered the question of possession as a 'smoking gun', counsel for Marcs Automobiles appeared to have assumed that possession was not in issue because it had not been denied. The significance of possession as a 'smoking gun' was an issue of the Magistrate's own making.

19. That the Magistrate should have perceived the issue as significant, in the context of the affidavit material that had been filed by the applicant, was not surprising. The context was, as I have said, one in which the affidavit material might have been viewed as designed to give a contrary impression.

20. The applicant's connection with the vehicle was not the only 'smoking gun' the Magistrate had in mind. At one point it was possession of the Brighton Tax Invoice. Following submissions by counsel for Marcs Automobiles on the provenance of the Brighton Tax Invoice, the Magistrate turned to counsel for Mr Sevdalis and asked:

> Are you holding a smoking gun, or do you disagree with that?
> …
>
> Maybe I should rephrase. Are you holding a smoking cannon, or do you disagree with that?

21. Not surprisingly, counsel for Mr Sevdalis disagreed with the Magistrate's characterisation. From later comments, it is plain that the Magistrate was concerned by the absence of evidence to explain Mr Sevdalis' continuing possession of the Brighton Tax Invoice. When summarising issues as he understood them, the Magistrate mentioned the invoice and went on to say:

> We do not know the source of that invoice insofar as where your client got it from, how your client got it, when he got it. No idea about that.

22. The Magistrate then expressed disquiet about the lack of evidence concerning the vehicle. He said:

> We don't have any evidence from you as to who currently is registered as having an interest in that vehicle, whether it bears the registered operator or some other such interest, which is something you could have and should have done.

23. Thus, when the connection between the applicant and the vehicle was raised as an issue by the Magistrate, in the absence of evidence about who had an interest in the vehicle, it became mercurial and lacked clarity. The significance of 'registration', that featured in the Magistrate's summary of issues, first emerged as an expectation by the Magistrate that it was Marcs Automobiles who would need to prove who was the 'registered operator'. Thus, the definition of the issue from possession as the 'smoking gun', to registration became blurred until the final stage of the hearing.

24. Having summarised issues, including the absence of evidence about the 'registration' of the vehicle and the Brighton Tax Invoice, the Magistrate invited counsel for Mr Sevdalis to respond. When counsel sought to rely upon the Brighton Tax Invoice, the Magistrate said:

> And it's said to me that you have not proved the source of that invoice. I repeat, you haven't got any evidence from Brighton Nissan to show that that was produced to you into your care for the purpose of this case or for any other reason, for that matter.

25. Counsel drew the Magistrate's attention to para 16(d) of the affidavit of 17 October 2012, contending that the evidence was that the Brighton Tax Invoice had been faxed to Mr Sevdalis and had been in his possession ever since, although in his capacity as used car manager. The Magistrate was plainly concerned that nothing was said in the affidavit to explain how it was that Mr Sevdalis continued in possession of the invoice after leaving the employ of Brighton Nissan.

26. Counsel for Mr Sevdalis then informed the Magistrate:

> I have instructions that aren't in the affidavit, your Honour, which I will just keep to myself, which would assist. But it will be an issue of credibility.
>
> HIS HONOUR: And telling me you have instructions doesn't help me either.
>
> MR CAILLARD: No, it doesn't. But it is submitted that the issue of forgery is a serious triable issue and does go to the heart of this matter, and one that it's submitted there is sufficient question about the authenticity of the first invoice, and one that my client should have an opportunity – – –

27. The nature of the instructions was not made clear. Perhaps the instructions were along the lines of what was said from the bar table in this proceeding. Counsel explained that his client had acquired the motor vehicle from Brighton Nissan, and paid for it in cash. If so, it is surprising that those instructions were not to be found in the affidavit before the Magistrate, or in an affidavit sworn in this proceeding. The disclosure to the Magistrate of such 'instructions' might not, of course, have assisted the applicant. The Magistrate's concern about the absence of material might only have been heightened. On the other hand, disclosure might have precipitated a request for an adjournment, to introduce additional evidence to meet the issue raised by the Magistrate. In any event, the following exchange took place:

> HIS HONOUR: You don't have to answer this question, and Mr Strauch may object to me even asking it, but let's try — first, we'll hear from him if there's an objection. Then we'll hear from you, if you care to give it an answer. *Have you got this car, or is it under your care, control, or is it in the possession of anybody associated with you?*
> MR CAILLARD: *The answer is yes*, your Honour, it is in the possession of — assume – – –
> MR STRAUCH: No objection, your Honour.
> HIS HONOUR: You (indistinct) to wait till Mr Strauch – – –
> MR CAILLARD: I'm sorry, I thought the answer helped. Yes, my apologies.
> MR STRAUCH: Your Honour, I stay seated. No objection.
> MR CAILLARD: Your Honour, it's in the possession of his wife. If I may, by way of – – –
> HIS HONOUR: You may not. Yes, thank you. The application is dismissed. I dismiss this application in one of those rare situations that I find myself in today. It's a rare situation indeed, but nonetheless it's a situation in which by reason of the material contained *or not contained* in the applicant's own affidavit, to which there are two, he has failed to persuade me that he has a credible — and I emphasise the word 'credible' — arguable case. Yes, thank you.[3]

28. The application was, as the transcript records, dismissed. There was an order for costs.

By an originating motion, filed 10 January 2013, Mr Sevdalis, as plaintiff, sought judicial review, under r56 of the *Supreme Court (General Civil Procedure) Rules* 2005, of the whole of the decision and order of the Magistrate. The amended grounds of review are as follows:

> (a) There was a denial of procedural fairness because the second defendant denied the plaintiff of any reasonable opportunity to present his case and/or properly address a key element and/or complete his response to a question asked by the second respondent. In particular, the second respondent denied the plaintiff's counsel an opportunity to address the reason why the vehicle the subject of the proceedings came to be in the possession of the plaintiff and/or his wife (which was erroneously described by the second respondent as being the 'smoking cannon' in this matter); and
>
> (b) in determining whether [the] plaintiff had a credible arguable case, the second defendant was in error in taking into account whether the vehicle was or had been in the possession of the plaintiff's wife and therefore took into account an irrelevant consideration; and
>
> (c) the decision to dismiss the application based on a finding that the plaintiff had no credible arguable case was manifestly unreasonable and/or so unreasonable that no reasonable person could have reached that decision.

29. Mr Sevdalis sought the following orders:

> (a) an order of *certiorari* that:
> (i) the decision and the orders (including the order for costs) made by his Honour Magistrate Braun in the matter of *Marcs Automobiles Pty Ltd (In Liquidation) Pty Ltd v Arthur Sevdalis* (case number B10525999) be quashed; and
>
> (ii) the application be reheard and redetermined according to law by the Magistrates' Court of Victoria constituted other than by his Honour Magistrate Braun.
>
> (b) the first defendant pay the plaintiff's costs of the appeal ...

30. Counsel for Mr Sevdalis characterised grounds (b) and (c) above as ones that 'hang off' the main contention that there had been a denial of procedural fairness. In substance, Mr Sevdalis contended that he had been denied an opportunity to present his case in response to the question framed by the Magistrate. He sought to quash the decision and have his application for a rehearing remitted to the Magistrates' Court, to be heard by a different magistrate.

31. Counsel for Marcs Automobiles contended that upon a review, in contrast to an appeal, this Court was not entitled to investigate the correctness of a decision of the Magistrate made within jurisdiction. That contention was directed to grounds (b) and (c), under which Mr Sevdalis relied on the factual matrix contained in his affidavit material to demonstrate a prima facie defence, and to contend that the question of possession of the vehicle and of the invoice were irrelevant in the determination of his application.

32. Counsel for Marcs Automobiles sought to confine the scope of the 'record' to the court documents and so much of the transcript that it might properly be characterised as reasons for judgment. He conceded, however, that in relation to the ground of procedural fairness, the Court would be entitled to review so much of the transcript of the proceeding before the Magistrate as might be necessary to properly explore that ground.

33. In *Craig v The State of South Australia*,[4] the High Court emphasised the material differences between review by way of *certiorari* and appeal. The Court said:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of

> the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.[5]

34. The High Court in *Craig* considered the scope of an inferior court's 'record' for the purposes of certiorari, as ordinarily confined to the documents initiating and defining the matter in the inferior court and the impugned order or determination.[6] The High Court recognised that while the transcript of proceedings and the reason for decision do not, of themselves, constitute a part of the 'record', they may be incorporated by reference.[7] The Court held that the determination of the precise documents which constitute the record of an inferior court for the purpose of each application for certiorari, is ultimately a matter for the court hearing the application.[8] I also note that in *Easwaralingam v DPP & Anor*,[9] the Court of Appeal said:

> By reason of s10 of the *Administrative Law Act* 1978, in Victoria the 'record' includes a court's reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under Order 56. The strictures of *Craig v South Australia* in this respect are thus avoided. The transcript of proceedings may be incorporated into the record by reference.

35. Any difference between the parties on the scope of the 'record' for the purpose of ground (a) seemed to evaporate with a concession by Marcs Automobiles that the transcript could form part of the record for the purpose of this proceeding. In my view that concession was correctly made.

36. Ground (c) invoked the principle enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[10] When approaching the question whether a decision was so unreasonable that no unreasonable tribunal, acting within jurisdiction and according to law, would have come to that conclusion, a court of review should proceed with caution to avoid exceeding its supervisory role by reviewing the decision on the merits.[11] Under grounds (b) and (c), the plaintiff invited the court to consider the weight given to various matters, contending that some should have received more weight while others should have received little or no weight. Mr Sevdalis contended that the Magistrate should have formed a different view of the credibility of his defence, and that a reasonable tribunal, acting within jurisdiction and according to law, would have done so because it would not have regarded the fact that the motor vehicle was in the possession of his wife as a significant matter reflecting adversely on the credibility of the defence. Such an enquiry is impermissible, as it tends to invite the substitution of a different view of the merits.

37. It was also contended on behalf of Marcs Automobiles that, even if Mr Sevdalis persuaded the Court that he had been denied procedural fairness in the manner alleged, the error must be material. In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*,[12] Vickery J reviewed the relevant principles and, in relation to the question of materiality, said:

> In *Re Minister for Immigration and Multicultural affairs; Ex Parte Lam*, Gleeson CJ said that procedural fairness is not an abstract concept but is instead 'essentially practical' and that 'the concern of the law is to avoid practical injustice'.
>
> To similar effect were the observations of Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* it was said that the court should not undertake the task of 'combing through the words of the decision maker with a fine appellate tooth-comb [sic], against the prospect that a verbal slip will be found warranting' the intervention of the court.
>
> As to the concept of 'materiality', this has been introduced and established as a governing consideration. McDougall J pointed out in *John Goss Projects Pty Ltd v Leighton Contractors*: 'the concept of materiality is inextricably linked to the measure of natural justice that the Act requires parties to be given in a particular case'. His Honour proceeded to explain that the principles of natural justice 'could not ... require an adjudicator to give the parties an opportunity to put submissions on matters that were not germane to his or her decision'. McDougall J later observed in *Watpac* that his approach was 'consistent with the reference by Hodgson JA in *Brodyn* to substantial denial ... of natural justice'.
>
> In concluding his analysis of the principles of natural justice as they apply to the legislation, in *Watpac*, McDougall J said in observations with which I respectfully agree:
>
> I accept, however, that the court should not be too ready to find that a denial of natural justice

> was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the point in question. But it remains the case, I think, that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point.

38. These principles are pertinent to the present case because counsel for Mr Sevdalis was given an opportunity in this court to outline the course he would have taken had he not been cut off by the Magistrate. He informed this court as follows:

> MR CAILLARD: I'm sure I would have put it much more articulately at the time and I wish I could have the flow and responded at that time, but it essentially would have been, if I may by way of explanation the location of the vehicle is not relevant as it is entirely consistent with the vehicle having been purchased from Brighton Nissan, or entirely consistent with Marcs having sold it to the LMCT holder. That for example, if you take it that he didn't buy it from Brighton Nissan, his employer could have let him drive it or whatever else — as it happens, he bought it. But the inability for Mr Sevdalis to explain or properly respond to a question that is put about a smoking canon, which shows that he was making his decision based on a smoking canon, that it denied my client natural justice; he should have an opportunity to respond. Now, this is not a hearing de novo, it is of course (indistinct).
>
> HIS HONOUR: No, it's not, but you say that given the opportunity you would have said something along the lines that the location of the vehicle is not a relevant consideration.
>
> MR CAILLARD: Not a relevant consideration and certainly not a smoking canon, which I denied previously, and not determinative of this matter. In essence we say that by cutting me dead from responding to a question that the Magistrate clearly regards as core or critical, or using his words 'a smoking canon', it denied Mr Sevdalis any reasonable opportunity to present his case, that it denied him an opportunity, a reasonable opportunity to properly address a key element, or even complete his response to a question asked by the Magistrate.

39. Putting the best complexion on the proposed response, Mr Sevdalis would have wished to disabuse the Magistrate of his view that possession of the motor vehicle was a 'smoking gun', by explaining that his possession was entirely consistent with the vehicle having been purchased from Brighton Nissan. He may have submitted that the fact of possession was an irrelevant consideration and should not of itself, or with other facts, undermine the credibility of the prima facie defence case established on the affidavit material. That explanation may not, of course, have satisfied the Magistrate, who required the evidence to be given under oath.

40. There was something arresting about the circumstances in which the Magistrate cut counsel off when he sought to explain his client's connection with the vehicle. Marcs Automobiles submitted, in substance, that from a review of the transcript it was clear that Mr Sevdalis was acquainted with the issues and had a reasonable opportunity to explain his position; and that there was nothing more of substance that could be said to enhance the credibility of his defence. After all, the Magistrate had identified the absence of what he considered to be crucial evidence.

41. Most of the relevant exchanges, until the very end, related to the significance of the applicant's possession of the Brighton Tax Invoice. Until the Magistrate formulated issues of concern to him, towards the end of the hearing, the exchanges concerning the applicant's connection with the vehicle were between the Magistrate and counsel for Marcs Automobiles. When the issue of the connection was raised with counsel for Mr Sevdalis, it was in the confused context of 'registration', and an earlier indication by the Magistrate that it was an issue for Marcs Automobiles to prove. The issue was only clarified by the Magistrate in his final question to counsel for Mr Sevdalis, who was denied any opportunity to respond.

42. With the benefit of hindsight, it might be argued that counsel for Mr Sevdalis ought to have understood from early exchanges between the Magistrate and counsel for Marcs Automobiles that the Magistrate was primarily concerned about what was not found in the affidavits concerning his client's connection with the vehicle and invoice. From relatively early in the hearing it was obvious that the Magistrate was concerned about the absence of any evidence to explain any connection between Mr Sevdalis and the vehicle, and his continuing possession of the Brighton Tax Invoice.

43. It would have been open to the Magistrate to find that the absence of such explanations raised serious questions about the credibility of the defence. A magistrate, acting reasonably,

might well have concluded that the affidavits had been carefully crafted to avoid any mention of any connection between the vehicle and Mr Sevdalis, or explanation of his possession of the Brighton Tax Invoice.

44. To avoid misleading the reader Mr Sevdalis should, at the very least, have clarified those matters. He might have explained under oath that which his counsel informed this Court from the bar table. Evidence to that effect, coupled with the contest between the invoices, may have been sufficient to persuade the Magistrate of a *prima facie* case for the purpose of the rehearing application. But it was in the absence of any such explanation that the Magistrate was obviously moved to ask his final question.

45. It was not contended on behalf of Mr Sevdalis that the Magistrate had prejudged an issue, or had unjustifiably entered the arena by defining and elevating an issue that was not so defined between the parties. While there may be room for debate as to the limits of judicial intervention, there are circumstances in which a judicial officer is justified in moving beyond the confines of the issues formulated by the parties. The *Civil Procedure Act* 2010 expressly authorises active judicial intervention in the course of case management. But care must be taken to ensure that if a new issue is raised by the judge, the parties are given an adequate opportunity to address it. Additional evidence might be necessary, requiring an adjournment. In my opinion, procedural fairness required the Magistrate to at least permit counsel for Mr Sevdalis to advance submissions to explain his client's connection with the vehicle.

46. The Magistrate's refusal to hear from counsel for Mr Sevdalis cannot be excused on the grounds that the apparent denial of procedural fairness was immaterial. It was the Magistrate who had elevated the absence of an explanation concerning possession of the vehicle into a contentious issue that he described as a 'smoking gun'. After all, counsel for Marcs Automobiles had proceeded on the assumption that possession of the vehicle was not contested. While it was unclear whether counsel for Mr Sevdalis had also proceeded on that basis, possession of the vehicle became an issue of great importance to the Magistrate, and determinative of the application.

47. While it is true that counsel for Mr Sevdalis had, at the outset, been given an opportunity to remedy any deficiencies in his affidavit material, the issues changed with the intervention of the Magistrate. Procedural fairness required the Magistrate to give counsel an opportunity to respond to the issue. He ought to have permitted counsel for Mr Sevdalis an opportunity to persuade him that possession of the vehicle by his wife, and perhaps more importantly, the absence of material directed to that topic, did not so undermine the credibility of the defence as to justify refusing Mr Sevdalis an opportunity to advance his defence at a trial. Furthermore, on becoming aware of the significance to the Magistrate of possession, Mr Sevdalis might also have sought an opportunity to rectify the obvious deficiency in his affidavit material.

48. The decision of the Magistrate to dismiss the application for re-hearing is set aside and the application for a rehearing is remitted to the Magistrates' Court for hearing and determination by another magistrate.

---

[1] *Linkenholt Pty Ltd v Quirk* [2000] VSC 166; [2000] ASC 155-040.
[2] Emphasis added.
[3] Emphasis added.
[4] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] Ibid 175–176 (citations omitted).
[6] Ibid 180.
[7] Ibid 181.
[8] Ibid 182.
[9] [2010] VSCA 353 [21]; 208 A Crim R 122 (citations omitted).
[10] [1947] EWCA Civ 1; (1948) 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[11] *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611; 162 ALR 577; 73 ALJR 746; *Minister for Aboriginal Affairs v PekoWallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 42; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109.
[12] [2010] VSC 199 [239]–[242] (citations omitted).

APPEARANCES: For the plaintiff Sevdalis: Mr P Caillard, counsel. Hambros & Cahill, solicitors. For the defendant Marcs Automobiles Pty Ltd: Mr A Strauch, counsel. B2B Lawyers.