

18/02; [2002] VSC 89

SUPREME COURT OF VICTORIA

STILINOX SALES PTY LTD v WORLD CLASS PTY LTD

Mandie J

28 February 2002

CIVIL PROCEEDINGS – APPLICATION TO SET ASIDE AND REHEAR – DEFENCE ON THE MERITS – COUNTERCLAIM OR SET-OFF ARGUABLY AVAILABLE TO APPLICANT – FINDING BY MAGISTRATE THAT A COUNTERCLAIM OR SET-OFF WAS NOT CAPABLE OF BEING A DEFENCE TO THE CLAIM – WHETHER MAGISTRATE IN ERROR.

Where it was arguable on material before a magistrate in hearing an application to set aside and rehear that there was an equitable set-off available to the applicant, a magistrate was in error in concluding that a counterclaim or a set-off was not capable of being a defence to a claim.

MANDIE J: (*ex tempore*):

1. This is a proceeding brought by originating motion dated 3 December 2001 by the plaintiff, Stilinox, against the first defendant, World Class Pty Ltd. The second defendant is the Magistrates' Court. Stilinox seeks an order in the nature of *certiorari* quashing the decision of Magistrate Michael Smith made in the Magistrates' Court of Victoria on 29 October 2001, whereby the magistrate dismissed with costs an application by the plaintiff (as defendant) to set aside a default judgment entered in favour of the first defendant (as plaintiff) on 11 September 2001 in the sum of \$36,716.35, together with certain amounts for interest and costs.

2. Stilinox relies on two grounds in seeking to have the magistrate's decision quashed. It is accepted that this is the appropriate form of relief to seek, if any at all is available, but World Class contends that no relief should be granted, although this Court has the power to grant it. The two grounds relied on by Stilinox are that the magistrate acted in excess or beyond or without jurisdiction; and, secondly, that there is an error of law on the face of the record.

3. The first ground is supported by a contention that, because the magistrate overlooked or did not mention the court's power to apply the Rules of the Supreme Court in the absence of appropriate rules in the Magistrates' Court, under r.1.12 of the Magistrates' Court's rules, there was a lack of jurisdiction or an excess of jurisdiction. Rule 1.12 provides that "where the manner or form of the procedure for commencing or taking any step in a proceeding, or by which the jurisdiction, power or authority of the court is exercisable, is not prescribed by these rules or by or under any Act, the general principles of practice and the rules and forms observed and used in the Supreme Court may, at the discretion of the court, be adopted and applied to any proceeding with such modification as may be necessary". That rule was not relied on before the magistrate as something that was relevant to the exercise of his discretion to set aside the default judgment. It could have been referred to as being a matter which was relevant to the question whether there was a defence on the merits by relying upon the Supreme Court Rules as to set-offs, and therefore relevant to the question whether the default judgment should be set aside, but it was not referred to. Irrespective of that, I do not think that the failure to refer to it by the magistrate goes to his jurisdiction to hear the particular application that was before him. It might in a sense go to the jurisdiction of a court hearing the actual case, where it might be put to the court that the Rules of the Supreme Court, in particular the rules dealing with set-off – r13.14 – should be applied in the magistrate's discretion. But that was not the question before the magistrate in this matter. The question in this matter was whether the default judgment should be set aside, and, for the purposes of this proceeding, the question is whether the magistrate made an error of law in relation to whether there was an arguable defence on the merits. So I do not think there is anything in the first ground that there was no jurisdiction.

4. The second ground is that there was an error of law on the face of the record, and it is

accepted by World Class that the record for that purpose includes the reasons of the magistrate, and counsel for Stilinox points to paragraph 3(c) of an affidavit of Justin Castellan which says that the magistrate held that the claim against the plaintiff by the first defendant could be run as a separate proceeding; the magistrate held that a counter-claim was arguably available to the plaintiff, but that a counter-claim or a set-off was not capable of being a defence to the claim brought by the first defendant. It is clear that the matter argued before the magistrate, among other things, was, as emphasised by counsel appearing for the plaintiff, it being the defendant below, that what was clearly an arguable counter-claim on the evidence before the magistrate was capable of being a defence to the claim and was a set-off, which, counsel argued before the magistrate, arose out of the same matrix of facts. It seems that counsel did not use the words "equitable set-off" but simply referred to a set-off, and it seems that he did not say that the claim arose out of the same transaction, but he used words to the same effect; and, although he did not use the words "equitable set-off", it ought to have been apparent, in arguing that there was a set-off to the claim, that he was relying upon equitable principles. What else could he have been referring to? It seems to me that, given the concession before this Court that it was arguable on the material before the magistrate that there was an equitable set-off, there was an error of law by the magistrate to come to the conclusion that a set-off was not capable of being a defence to the claim in those circumstances.

I do not think the fact that the word "equitable" was not used below detracts from that conclusion. Given that there was no rule of the Magistrates' Court dealing with set-offs, and given that there was no attempt to contend that the court, if it heard the matter, might have used its discretion under the rules to apply the Supreme Court Rules, the only possible argument which could have been capable of being put was that there was an equitable set-off, and that, it seems to me, a reasonable magistrate ought to have understood when the argument was being put to him, notwithstanding perhaps, to some extent, the lack of clarity of the argument. It seems to me that the conclusion of the magistrate that a counter-claim or a set-off was not capable of being a defence to the claim is a clear error of law. Whether or not there is an equitable set-off, of course, is not a matter for this Court to decide. The question is whether the magistrate was in error in concluding that such a set-off was not arguable.

5. In those circumstances I think the appropriate order is that the magistrate's decision be quashed.

APPEARANCES: For the plaintiff Stilinox Sales Pty Ltd: Mr Jones, counsel. Tisher Liner & Co, solicitors. For the first defendant World Class Pty Ltd: Mr Ahern, counsel. Moores Legal, solicitors.
