

13/88

SUPREME COURT OF VICTORIA

LISZCZAK and NICOLA v THE MAGISTRATES' COURTS at SANDRINGHAM & MOE and ADK MOTORS (A Firm)

Kaye J

27 October 1987

PRACTICE AND PROCEDURE – CIVIL PROCEEDING – TWO WITNESSES SUB-POENAED TO ATTEND AND PRODUCE DOCUMENTS – WITNESSES ATTEND ON RETURN DATE – PROCEEDINGS ADJOURNED TO A DATE TO BE FIXED – WITNESSES NOT FORMALLY NOTIFIED OF DATE OF LATER HEARING – ONE WITNESS ABSENT – OTHER WITNESS FAILS TO PRODUCE DOCUMENTS – PROCEEDINGS FURTHER ADJOURNED – BOTH WITNESSES ORDERED TO PAY COSTS OF ADJOURNMENT – EFFECT OF SUB-POENA WHERE HEARING ADJOURNED TO A DATE TO BE FIXED – WHETHER JURISDICTION TO ORDER COSTS AGAINST WITNESSES NOT PARTIES TO THE PROCEEDINGS – WHETHER WITNESS IN CONTEMPT OF COURT: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, SS79(1)(d), 97(e); MAGISTRATES' COURTS ACT 1971, S46(1).*

L. and N. were each served with a summons to attend and produce documents at the Sandringham Magistrates' Court on 8 January, in respect of a civil proceeding involving A.D.K. Motors (A Firm) v Chuck. In compliance with the sub-poena, L. appeared, however the matter did not proceed and was adjourned to a date to be fixed not exceeding one month. The matter was re-listed on 20 May, and at the request of Chuck, L. attended Sandringham Court to give evidence. L. had not been notified by A.D.K. Motors nor the Court that he was required to attend pursuant to the terms of the sub-poena earlier served on him. N. had no notice of the hearing on 20 May and did not appear. When L. was unable to produce the documents on 20 May, the magistrate adjourned the proceedings and ordered that L. and N. pay the costs of the adjournment fixed at \$1565. Upon originating motion for an order absolute for writ of *certiorari*—

HELD: Order absolute. Order for costs quashed.

(1) Section 79(1)(d) of the *Magistrates (Summary Proceedings) Act 1975*, provides that where a court adjourns proceedings to a fixed time and place, any witness subpoenaed to attend is bound to attend on the adjourned date. In the present case, as the proceedings were adjourned not to a fixed time and place but to a date to be fixed, the witnesses were no longer bound by their sub-poena and any order against them for costs was made without jurisdiction.

(2) The power to award costs on an adjournment pursuant to section 97(e) of the *Magistrates (Summary Proceedings) Act 1975* is only between parties. Accordingly, as the witnesses were not parties to the proceedings, there was no jurisdiction in the court to make an order against them for the costs of the adjournment.

(3) Where a witness fails to comply with a subpoena, the court may deal with the witness for contempt of court pursuant to Section 46(1) of the *Magistrates' Courts Act 1971*. However, the witness must first be charged and the court's power exercised only if the failure by the witness has been without sufficient cause. In the present case, L. could not have been convicted for contempt of court.

KAYE J: [1] The plaintiffs in the proceedings before the Court were each served with a subpoena *duces tecum ad testificandum* out of the Magistrates' Court at Cheltenham by which they were required to appear at the Sandringham Court on 8 January 1987 upon the hearing of a complaint for damages for breach of contract by A.D.C. Motors (a firm), being the third-named defendant in the present proceedings, against one Garry Chuck.

The first and second-named defendants in the [2] present proceedings have appeared by Mrs Lapirone, their solicitor, but there has been no appearance for the thirdnamed defendant. The following facts are deposed to in affidavits sworn by each of the plaintiffs and their instructing solicitor, and appear from the exhibit to their several affidavits. In the absence of any affidavit by the defendants or either of them, I find the facts relevant to these proceedings as follows:

On 8 January 1987, in compliance with the subpoena served upon him, the first-named plaintiff attended the Magistrates' Court at Sandringham with the identified documents. The

Magistrate ordered, *inter alia*, that the hearing of the complaint be adjourned to a date to be fixed not exceeding one month from the date of his order, reserving to the parties the right to make application within the fixed period to the co-ordinator for a chamber hearing of the complaint. Thereafter, within the time specified in the order, the plaintiffs were not given notice of either an application as reserved by the Magistrate's order or the time and place of the resumed hearing of the complaint. On 20 May 1987 the first-named plaintiff, at the request of Garry Chuck the defendant to the complaint, attended the Magistrates' Court at Sandringham to give evidence on behalf of the defendant Chuck. He did so without notification by the third-named defendant or the Court that he was required to attend pursuant to the terms of the subpoena, or that the proceedings referred to in the subpoena would be brought on for hearing on that day. Furthermore, the second-named plaintiff, who was then living and carrying [3] on business at Traralgon, it seems had no notice of the hearing on that day. It also appears that after the complaint was called on for hearing, counsel for the third-named defendant sought an adjournment on the ground that the first-named plaintiff was unable to produce the documents sought by the subpoena.

By way of reply, counsel for Chuck submitted that the first-named plaintiff should be given an opportunity to collect the documents from his home. After discussion between counsel, the Magistrate directed the first-named plaintiff to enter the witness box. It is not clear whether then he was or was not sworn as a witness. In answer to the Magistrate's question, the first-named plaintiff stated that he had kept records. When asked by the Magistrate whether he had brought those records to the Court, the first-named plaintiff replied, "No". Although he was asked why he had failed to bring the records to the Court, the first-named plaintiff was not given an opportunity to explain his omission. The Magistrate asked him whether he had received a summons to attend as a witness, to which the first-named plaintiff replied in the affirmative. Yet he was not asked whether he was notified of the date of the resumed hearing. The Magistrate then adjourned the further hearing of the complaint to the Magistrates' Court at Moe and ordered the plaintiffs to pay to the defendant to the complaint \$1,565 costs.

Within a short time thereafter, the plaintiffs consulted their solicitors in the present proceedings concerning the order made against them. By letter dated 29 May, the plaintiffs' solicitors sought of the third-named [4] defendant's solicitors, Messrs Stephenson & Co, copies of the subpoenas served upon the plaintiffs, a copy of the order of the Magistrates' Court made on 20 May, and details of conduct money provided to them. A reply to their letter was not received by the plaintiffs' solicitors until 9 July 1987 when Stephensons disclosed, *inter alia*, that they were currently taking out the order made on 20 May 1987. On 28 July 1987, the plaintiffs' solicitors prepared documents in support of an application for an order nisi to review the decision of the Magistrate made on 20 May. It would seem that on 7 August the plaintiffs' solicitors were informed by the Prothonotary's Office that the documents could not be issued because the order nisi had been sought by means of an originating motion, and not by summons as required by the Rules.

On 5 August the plaintiffs were each issued with a summons to attend on 13 August at the Magistrates' Court at Moe for oral examination in chambers by the Clerk arising out of the order for payment of \$1,560 costs made on 20 June (sic) by the Sandringham Magistrates' Court. By letter dated 16 September, Stephensons advised the plaintiffs' solicitors that the summons for oral examination had been re-listed for 7 October. By letter dated 21 September, the plaintiffs' solicitors informed Stephensons that in counsel's opinion, the orders made on 20 May were contrary to the rules of natural justice and to the provisions of the *Magistrates (Summary Proceedings) Act*, and that they had no option other than to apply to the Supreme Court for relief against the requirements of the order for costs by seeking *certiorari* and prohibition in regard to the summons for oral [5] examination.

Proceedings presently before the Court were commenced by the filing of an originating motion on 28 September 1987. The relief claimed by the plaintiff includes the following. [*His Honour then dealt with matters not relevant to this Report, and continued*] ... [12] Mrs Lapirone, the solicitor for the first- and second-named defendants, supports the plaintiffs' submission that there are special circumstances. On their behalf, Mrs Lapirone conceded that the order for costs was made without jurisdiction. She submitted that if special circumstances were not granted, the plaintiffs would remain liable under an invalid order to pay the third-named defendant \$1,560 and that that liability would continue for a period of 15 years. In making that concession, she was repeating the submission which has been made to me by Mr Hurley.

The delay by Stephenson's in taking out the order is a relevant circumstance, and the concession of grave injustice which the plaintiffs might suffer if the order for costs were not set aside is also a material circumstance; however, whether there are special circumstances justifying the extension of time sought depends upon whether I am satisfied the concession made by Mrs Lapirone is a proper one. I turn first to the claim for *certiorari* to quash the order made at the Magistrates' Court at Sandringham on 20 May. By the terms of the order made on 8 January, the hearing of the complaint was adjourned to a date to be fixed not exceeding one month from the date of the order. In my view, Mrs Lapirone's concession was correctly made for the following reason: by the *Magistrates (Summary Proceedings) Act 1975*, s79(1)(d) it is provided:

"All persons whose attendance has been required by summons in any case which have been adjourned or postponed shall attend at the time and place to which the case has been adjourned or postponed without the issue or service of any further summons, but shall nevertheless be entitled to [13] additional expenses for so attending."

No order was made in the terms of the provision to which I have referred. In other words, the adjournment was never made to a fixed time and place by which the plaintiffs would know where they were required to attend and when they were required to attend. Thus, the order made on 8 January did not adjourn the complaint in the terms of s79(1)(d). The obligation of the plaintiffs was merely to attend on 8 January. Indeed, the subpoena does not set out or warn them they have a continuing obligation to attend. In the absence of an order made in the terms of s79(1)(d), in my view, the plaintiffs were not under any continuing obligation.

Thus to have bound the plaintiffs to attend further, the Magistrate, in exercising his power under s79(1)(d), might have adjourned the hearing of the complaint to a fixed date and a fixed place. It follows that, having attended on 8 January in answer to the subpoena, and the hearing not having been adjourned to a fixed time and place, the plaintiffs were no longer bound by the subpoena. The appearance of the first-named defendant or the attendance of the first-named defendant on 20 May was not in compliance with the subpoena but voluntarily at the request of Mr Chuck.

[14] It follows the order for costs made against the plaintiffs on 20th May was made without jurisdiction. In any event, the Magistrate had no power to order a witness to pay costs. The failure of a witness, having been summonsed to attend as a witness, and who neglects to produce books required by the summons to be produced, is provided for by s46(1) of the *Magistrates' Courts Act 1971*. That section is in the form of contempt proceedings. For failure to comply with the summons to attend and to produce documents required, the person so neglecting must be charged, and he is liable to a penalty of imprisonment for not more than one month and for a fine of not more than \$100.00. Furthermore, the power must be exercised only if the failure has been without sufficient cause. Whether there was sufficient cause was never investigated. The first named plaintiff was not dealt with under that section. Indeed, if he had been, in my view he could not have been so convicted.

The power to order costs on a adjournment is provided for by s97(e) of the *Magistrates (Summary Proceedings) Act*, but that power is only to award costs as between parties. The plaintiffs were not parties to the proceedings but were merely summoned as witnesses. Accordingly, there was no jurisdiction under s97 of the *Magistrates (Summary Proceedings) Act* to order them or either of them to pay costs of the adjournment. In the result, the plaintiffs are entitled to the relief which they seek. I should add, for the reasons that I have stated, in my view the plaintiffs have established special circumstances within the terms of the rule whereby the time for commencing [15] these proceedings should be extended. It is ordered that the time for commencing these proceedings be extended to the 28th day of September, 1987, *nunc pro tunc*.

It is ordered that the order made in the Magistrates' Court at Sandringham in proceedings number S 30 of 1987, insofar as the plaintiffs were ordered to pay \$1,560 costs, be removed into this court, and be quashed forthwith. It is further ordered that the Clerk of the Magistrates' Court at Moe be prohibited, and he is hereby prohibited, from proceeding with the hearing of the summons for oral examination of the plaintiffs in proceedings number 30 of 1987. Order that the plaintiffs' costs of and incidental to these proceedings, including the costs reserved by order of Fullagar J made on 5th October 1987, be paid by the first named defendant and second named defendant.