13/98

SUPREME COURT OF VICTORIA

SAILAH v LAKESIDE PACKAGING PTY LTD & ORS

Coldrey J

26 September, 16 October 1997

CIVIL PROCEEDINGS – APPLICATION TO SET ASIDE AND REHEAR – JUDGMENT IN DEFAULT OF DEFENCE – WHETHER JUDGMENT REGULARLY ENTERED – PLEADINGS IN MAGISTRATES' COURT – WHETHER STRICT APPLICATION OF RULES REQUIRED – COMPLAINT FAILED TO NOMINATE PARTY AS GUARANTOR – WHETHER COMPLAINT COMPLIED WITH RULES: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, R4.02(d).

1. Whilst the strictness of pleading requirements in the Magistrates' Court may well be less than that applied in the higher courts, a complaint must contain a sufficient statement of the amount, relief or remedy sought and also inform the other side of the case to be answered at trial. A complaint which discloses no cause of action at all cannot found a regular judgment.

2. Where a complaint set out the nature of the claim, particulars and the amount claimed, but failed to nominate the second defendant as a guarantor, the complaint when viewed as a whole contained sufficient information to comply with the provisions of Rule 4.02(d) of the *Magistrates' Court Civil Procedure Rules* 1989. Accordingly, it was open to a magistrate to find that the judgment in default of defence had been regularly obtained and refuse an application to set aside and rehear.

COLDREY J: *[His honour set out the facts, the magistrate's reasons and continued]* … **[2]** Mr Kincaid who appeared on behalf of the plaintiff, argued that since the Rules of Court which allow a plaintiff to enter judgment without proof of the claim, upon a failure of the defendant to observe a time limit represent, in effect a special privilege, they must be strictly complied with. (Reference was made to *Clayton v* **[3]** *Thomas C Denton & Co Pty Ltd* [1972] VicRp 5; [1972] VR 46 at 49.) Failure to comply with the Rules results in an irregular judgment which may be set aside. Whilst a defendant failing to enter an appearance or file a defence, (the situation existing in the instant case) is taken to admit all the allegations in the plaintiff's statement of claim, if a judgment in default is irregular it will be set aside irrespective of whether the defendant has a defence on the merits. In support of this proposition Mr Kincaid referred to *Chitty v Mason* [1926] VLR 419. Although the cases relate to superior courts, it was contended that the principles were also applicable to the Magistrates' Court.

As I understand it, Mr Gilligan, who appeared on behalf of the first defendant, did not seek to argue against these propositions as expressing generally applicable principles, and I have proceeded on that basis. *[His Honour referred to two cases which involved actions brought in the NSW Supreme Court and continued]* … **[4]** In the course of argument Mr Kincaid referred to three cases in the Supreme Court of Victoria relating to the interpretation of the requirements of O3 r1. These cases were *Elsun v Jameson* [1974] VicRp 65; [1974] VR 529; *Ruzeu v Massey-Ferguson (Aust) Ltd* [1983] VicRp 69; [1983] 1 VR 733 and *Buttigieg v VL Finance Pty Ltd* [1986] VicRp 39; [1986] VR 392.

O3 r1 reads:

> "The endorsement of claim shall be made on every writ of summons before it is issued, and shall contain a statement sufficient to give notice of the nature of the claim and the cause thereof and of the relief or remedy required in the action, and, in case of non-compliance with this Rule, the defendants may apply before appearance to set aside or amend the writ or for particulars."

This Order is now r5.04. It adds the phrase "with reasonable particularity" to the statement required in the old O3 r1 formulation. It is doubtful whether this adds any further requirement given the statement of Barwick CJ and McTiernan J in *Renowden v McMullin* [1970] HCA 24; 123 CLR 584 at 595; [1970] ALR 865; 44 ALJR 283. The authorities cited do not relate to an

examination of the indorsement as a pleading as such but rather where an indorsement stands in place of a statement of claim. Even so, as was stated by the Full Court in *Buttigieg* (*ibid.*) at 397:

> "All that the Rules require of an endorsement upon a writ of summons is that it shall contain a statement which is sufficient to give notice of 'the nature of the claim and the cause thereof and of the relief or remedy required in the action' ... The word 'cause' is directed at the cause of action in the technical legal sense: see *Ruzeu v Massey-Ferguson (Aust.) Ltd* [1983] VicRp 69; [1983] 1 VR 733 esp. at p737. The endorsement does not have to employ the precise legal nomenclature of a cause of action such as 'detinue' or 'breach of contract' but it must be such as to give sufficient notice of what the cause of action is."

In the case of *Ruzeu* (*ibid.*) it was said that the determination of whether an indorsement on a writ complied with O3 r1 depended upon an **[5]** examination of the indorsement and that evidence was not generally admissible to assist in that task. In particular the knowledge of the defendant as to the allegation in the indorsement was totally irrelevant to the questions of compliance. It was submitted by Mr Kincaid that this principle was applicable to the exercise to be undertaken by the Court in this instance. Such a submission is understandable since, on the basis of the affidavit material and exhibits thereto, the plaintiff in this case must be taken to be fully aware of the legal liability with which it was sought to fix him. Ultimately the question as to whether, and to what extent, these principles may be applicable to the pleading requirements (using that expression in a broad sense) in the Magistrates' Court must depend not just on whether such Court may be regarded as a Court of pleading, but even if it were so regarded, the level of precision demanded by the Rules.

The question as to whether such a Court is a Court of pleading has been considered in two judgments of this Court to which I was referred. In the first *Zambelis v Nahas* ([1991] V Conv R 54-396 a decision of Nathan J, 22 January 1991), his Honour concluded after an examination of the Rules, that "Magistrates' Courts in their civil aspect have become Courts of pleading" (p3). His Honour stated:

> "By O4.02 a complaint must not only particularise the parties but contain a concise statement of the nature of the claim, the place of it and particulars of it together with the remedy. A defence is similarly adumbrated." (p3)

The relevant portion of r4.02, for the purpose of the instant case is sub-para(d), which is as follows:–

> "4.02 A complaint must—
> (d) contain—
> **[6]** (i) a concise statement of the nature of the claim; and
> (ii) the place where and the date when the claim arose; and
> (iii) particulars of the plaintiff's claim; and
> (iv) a statement of the amount, relief or remedy sought; ..."

This provision was considered by Eames J in *Intrac (Sales) Pty Ltd v Riverside Plumbing and Gasfitting Pty Ltd* (an unreported judgment, 2 July 1997). At p10 of that judgment, under the sub-heading "Is the Magistrates' Court a Pleading Court?", his Honour stated:

> "By r4.02(d) of the *Magistrates' Court Civil Procedures Rules* 1989 a complaint must contain 'a concise statement of the nature of the claim', together with 'particulars of the plaintiff's claim' and also 'a statement of the amount, relief or remedy sought'. The learned author of Williams, *Civil Procedure of Victoria* Vol 3 par.MC 4.02.25 and 4.02.30 opines that there are no pleadings in the Magistrates' Court, and that the 'concise statement' which is to be provided in the complaint is not the equivalent of a statement of claim in the Supreme Court. A different view was taken by Nathan, J in *Zambelis v Nahas* [citation given]. Nathan J referred to O4.02 of the Rules and held that the *Magistrates' Court Civil Procedure Rules* 1989 which came into effect on 1 September 1990, and which replaced the former 1980 Rules, were 'a reflection, very largely, of the Supreme Court Rules'. Nathan J held, therefore, that it was now the fact that the Magistrates' Courts, in their civil aspect, had become Courts of pleading.
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> It is to be noted, however, that the requirements imposed on a plaintiff to particularise the claim in the Magistrates' Court by O4.02 are different in their terms to those imposed by the Supreme Court

> Rules. O13 of the latter Rules is titled 'Pleadings' and that word appears throughout the Order. O13.02 requires, inter alia, that every pleading shall 'contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved'. The Rule requires, too, that the relief claimed to be identified, and permits points of law to be pleaded. In contrast, while it is apparent that portions of O4.02 follow precisely the words of Supreme Court O13.02, the words of the rules (as quoted above) differ significantly as to the requirement imposed upon the document which states the claim in the Magistrates' Court. O4 is titled 'Process in the Court', although the documents in which the parties make and rebut claims are treated and described in Practice Note No 2 of 1995 as being 'pleadings'. (The content of the Practice Note is directed to ensuring that 'the real issues in dispute' are identified in the 'pleadings' of **[7]** the defendant, but by implication it assumes a similar obligation must fall on the plaintiff). As I have said, in the Magistrates' Court the requirement is that the plaintiff provide 'a concise statement of the nature of the claim' rather than provide 'in a summary form a statement of all the material facts on which the party relies, but not the evidence ...' Curiously, however, the defendant is required by O9.01(c) of the *Magistrates' Courts Rules* to give a notice of defence which states 'particulars of his defence which must include a summary of the material facts upon which the defendant relies'.
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> It is clear, as Nathan J observed, that the 1989 Rules departed significantly from earlier rules as to the obligations imposed upon the persons drafting the Court documents. There can be no doubt that significantly greater obligation was imposed by the Rules as to the particularity with which the claim was set out. On the other hand, the variation in the wording between the Supreme Court Rule and the Magistrates' Court Rule suggest that it was not intended that the complaint document in the Magistrates' Court should be invested with all of the features of a Supreme Court pleading. The change in format led Nathan J to conclude that the Magistrates' Court had become a Court of pleading. I do not, with respect, disagree with that conclusion insofar as the new Rules may be said to place a greater emphasis than hitherto upon the principles which lay behind the pleadings rules, namely, that they cast an obligation on a plaintiff to identify his case, and, subject to amendment, to limit the evidence in a case to that which relates to those facts pleaded as relevant in the cause of action of the claim ... However, the strictness of the pleadings requirements in the Magistrates' Court may well be less than that applied in superior courts. The wording of the Rules suggest as much, and, notwithstanding the ever increasing limit of the Magistrates' Court jurisdiction, a less strict approach would be in keeping with a jurisdiction where unrepresented parties will often appear. I respectfully agree, therefore, with the learned author of Williams, *Supreme Court Practice* Vol 3 par.MC 9.01.25, that the primary purpose of the requirement in the rule is to inform the other side of the case to be answered at trial, but that a less strict application of pleading rules would be appropriate in the Magistrates' Court given the fact that it adjudicates claims at the smaller end of the money scale, and is necessarily a less formal court than higher courts."

I am, with respect, content to adopt his Honour's reasoning. But even "a less strict application of pleading rules" could not save a complaint that disclosed no cause of action at all. Given the truncated application of pleading requirements to the Magistrates' Court and the differences in wording between the current O5 of the *Rules of the Supreme Court* and r4.02(d), the trio of Victorian Full Court decisions **[8]** to which I have referred provide the most limited assistance in the task before this Court.

Of course the basic principle remains that a complaint which disclosed no cause of action at all could not found a regular judgment. In order to determine whether the assertions made by the plaintiff that the complaint disclosed no cause of action are made out it is necessary to examine the complaint document. This is Exh.PJS1 to the affidavit of Paul James Sailah sworn 3 June 1997. Under the requirements of r4.02(d) a complaint must contain "a concise statement of the nature of the claim". Under Part B of the Complaint Form is the heading "NATURE OF CLAIM". What is recorded on the document is "Monies owing for goods sold and delivered". There can be no doubt, in my view, that this sufficiently complies with the requirements of the Rule. Opposite the notation "DATE CLAIM AROSE" is recorded "March and April 1990" and opposite the notation "PLACE CLAIM AROSE" appears "Campbellfield, Victoria". These entries also sufficiently conform to the requirements of the Rule. The next specification is that the complaint contain "particulars of the plaintiff's claim". What is set out relevantly under the heading "PARTICULARS OF CLAIM" is:

> "3. In or about the month of March and April 1996 the Plaintiff, upon the request of the Secondnamed Defendant, [the plaintiff in this action] produced printed paper goods ('the goods') on an urgent basis for the Firstnamed Defendant upon the Firstnamed Defendant's order and specifications.
>
> PARTICULARS

> (a) the request was oral and was in writing. To the extent that it was oral it consisted of conversations between the Secondnamed Defendant and Directors and employees of the Plaintiff, and to the extent that it was in writing it consisted of a promise dated the 26th day of March 1996. The request is further to be implied from the course of dealings between the Plaintiff and the Defendants including the payments made by the Secondnamed Defendant."

Para4 of the Particulars of Claim alleges the sale and delivery of the goods and the price of the goods, namely $47,511.30, is set out in para5. **[9]** Para6 is in these terms:

> "The Secondnamed Defendant has paid the sums of $10,000 on the 21st day of March 1996 and $10,000 on the 20th day of May 1996 and accordingly the balance of $27,511.30 remains outstanding, due and $ payable."

Below that paragraph appears: "AMOUNT OF CLAIM $27,511.30 together with interest and costs." There is no doubt that the complaint contains sufficient "statement of the amount, relief or remedy sought;" as also required by the Rule. In my opinion the complaint viewed as a whole contains sufficient information to comply with the Rule. It sets out that moneys are owing by the first and secondnamed defendant for goods sold and delivered by the plaintiff. It states that those goods were produced, sold and delivered to the firstnamed defendant at the request of the secondnamed defendant. The price of the goods is set out and is the allegation that the secondnamed defendant has made two payments for the goods but still owes a specified sum of money. The clear implication is that the secondnamed defendant had placed himself under a contractual obligation to pay for the goods delivered to the firstnamed defendant. It was submitted by Mr Kincaid that the precise nature of the obligation is not spelled out and that the failure to nominate the secondnamed defendant as a guarantor caused the process to be fatally flawed. However I am of the view that it was not necessary for the complaint to be so specific given the nature of the rules governing civil procedure in the Magistrates' Courts as distinct from those applicable in the Supreme Court of Victoria.

The information in the complaint was quite sufficient to alert the secondnamed defendant of the substance of the case against him and to enable him to file any appropriate defence. In a case where no appearance has been entered and no **[10]** defence filed, it is not up to the Magistrate to look to the precise basis of liability rather than dealing with the matter as an alleged breach of a contractual obligation which has not been disputed by the secondnamed defendant. Accordingly, I do not regard the Magistrate as having erred in his finding that the judgment obtained by the firstnamed defendant in this matter against the plaintiff, had been regularly obtained. Given that view it is unnecessary for me to consider any of the discretionary aspects in the granting of relief in the nature of certiorari discussed by Batt J in *Guss v Magistrates' Court of Victoria and Joseph Katz* (unreported judgment, 3 April 1997). Accordingly the relief sought by the plaintiff must be refused.

APPEARANCES: For the plaintiff: Mr A Kincaid, counsel. Coltmans Price Brent, solicitors. For the first defendant: Mr C Gilligan, counsel. Poloni & Galgano, solicitors. Second defendant: in person. Third defendant: No appearance.
