**22/03; [2003] VSC 287**

**SUPREME COURT OF VICTORIA**

# *INTERNATIONAL PROPERTY DEVELOPMENT PTY LTD & ORS v MEVCO INTERNATIONAL PTY LTD & ANOR*

**Osborn J**

**1, 8 August 2003**

**CIVIL PROCEEDINGS – CLAIM FOR WORK AND LABOUR DONE PURSUANT TO AN AGREEMENT FOR THE OBTAINING OF FINANCE – NOTICE TO ADMIT SERVED – NOT RESPONDED TO WITHIN TIME – DEFENDANTS NOT LEGALLY REPRESENTED AT TIME OF SERVICE OF NOTICE TO ADMIT – DEFENDANTS SUBSEQUENTLY ENGAGED LEGAL PRACTITIONERS – MATTER PROCEEDED THROUGH INTERLOCUTORY STEPS – NO APPLICATION MADE BY DEFENDANTS' SOLICITOR TO WITHDRAW DEEMED ADMISSIONS – MATTER LISTED AS A CONTESTED HEARING – APPLICATION BY DEFENDANT TO WITHDRAW ADMISSIONS – APPLICATION BY DEFENDANT FOR AN ADJOURNMENT TO PURSUE DEFENCE AND COUNTERCLAIM – APPLICATION REFUSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE FAILED TO TAKE INTO ACCOUNT MATERIAL CONSIDERATIONS – WHETHER DEFENDANTS DENIED PROCEDURAL FAIRNESS: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, R14.03.**

MIP/L claimed against IPP/L an amount for work and labour done pursuant to an agreement for the obtaining of finance. IPP/L (who had not retained a solicitor at the time) filed a notice of defence and certain interlocutory steps were taken between the parties including a pre-trial conference. MIP/L served a notice to admit which was not responded to. MIP/L subsequently retained solicitors who drew up an out-of-time objection to the notice to admit and served it on IPP/L's solicitors. A cross-claim was also issued but not served. After further interlocutory steps the matter came before a magistrate for a contested hearing. Two days before the hearing IPP/L requested an adjournment of the proceeding in order to serve the cross-claim and third party notice. At the hearing, the application was refused and judgment was given on the basis that the matters asserted in the notice to admit were deemed to be admitted. Upon appeal—

**HELD: Appeal allowed. Order of magistrate set aside. Remitted for further hearing and determination.**
**1. It is fundamental to the concept of procedural fairness that a party to litigation will be accorded a fair opportunity to meet the case against it. In the present case the magistrate did not have proper regard to matters which should have been taken into account and that the decision amounted to a denial of procedural fairness. Although the Magistrate was well entitled to refuse to adjourn the case having regard to its history, he was not entitled to hold IPP/L to the strict consequence under the rules of a failure to object to a notice to admit within the specified time.**

**2. It must be remembered that the Rules of Court are a servant and not a master. The admissions were deemed admissions not express ones; they arose by default and it is clear that they were unintended. IPP/L were unrepresented at the time of receipt of the notice to admit and may not have understood the full ramifications of a failure to respond to the notice.**
***Yendall v Smith Richmond & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369; [1953] ALR 724; *Board of Education v Rice* [1911] AC 179; [1911-13] All ER 36; 80 LJKB 796; 104 LT 689; and *Southern Equities Corp Ltd (in liq) v Bond (No 7)* [2000] SASC 427, applied.**

**3. The continuation of the interlocutory steps between the parties indicated that the matter was proceeding as a fully contested matter corroborated by the fact that all witnesses had attended court on the hearing date. Also, the substance of the defendants' claim was that they had a complete defence to the claim made against them. The defendants were deprived the opportunity to effectively contest the proceeding which was an extreme consequence to visit them given the history of the matter and their appearance before the Court. Accordingly, the order made by the magistrate is set aside.**

**OSBORN J:**
1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 with respect to the judgment of the Magistrates' Court at Ringwood upon a claim for work and labour done pursuant to an agreement for the obtaining of finance.

2. Such an appeal is restricted to an appeal on a question of law. In the present case it is

contended that the decision of the Court was vitiated by such an error because the Magistrate:

> (a) refused leave to the appellants to withdraw admissions deemed to have been made pursuant to the Rules of the Magistrates' Court relating to notices to object; and
>
> (b) erred in failing to grant the appellants an adjournment to enable them (*inter alia*) to pursue their defence and counterclaim.

3. In my view the appeal stands or falls on the first ground. If the first ground cannot be sustained there is no basis on which it can be said the Magistrate was wrong in law in following the course which he did by proceeding to complete the hearing of the proceeding. Indeed even if the first ground is made out I am not persuaded the Magistrate could be regarded as required by law to adjourn the matter in order to enable the defendants to take further steps to raise new claims.

4. The sequence of events giving rise to the matters in issue can be summarised as follows. The respondents were the plaintiffs in the Magistrates' Court and the appellants the defendants and I shall refer to them as such for the purposes of this summary. The claim was served on 22 May 2002. A notice of defence was served by the defendants in person on 6 June 2002. The defendants also requested further and better particulars of the claim. On 9 July 2002 the plaintiffs served a notice to admit. On 31 July 2002 the plaintiffs supplied further and better particulars of the claim. In September the defendants retained a solicitor. On 23 September 2002 the defendants provided an affidavit of documents and on 24 September served an amended defence. On 26 September 2002 the plaintiffs requested further and better particulars of the amended defence. A pre-trial conference occurred on 14 October 2002. On 15 October 2002 an out of time objection to the notice to admit was served on the plaintiffs' solicitors by the defendants' solicitor. During October 2002 a cross-claim was drawn on behalf of the defendants by counsel and issued but not served. Likewise, a third party notice was drawn but not served. On 27 November 2002 an order was made by the Magistrates' Court that the defendants file and serve further and better particulars of amended defence. On 11 December 2002 the defendants filed and served further and better particulars of their amended defence. On 28 January 2003 the defendants requested the plaintiffs' consent to an adjournment of the proceeding in order to serve the cross-claim and third party notice. This was refused and the hearing proceeded on 30 January 2003 and judgment was given for the plaintiffs on the basis that the matters asserted in the notice to admit were deemed to be admitted.

5. It is appropriate to set out the relevant rule of the *Magistrates' Court Civil Procedure Rules* 1999 ("the Rules"):

> "**Notice for admission of facts 14.03** (1) A party may serve on another party a notice stating that unless that party, within a time to be expressed in the notice (which shall not be less than 14 days after service), disputes the facts specified in the notice, that party shall, for the purpose of the proceeding only, be taken to admit those facts.
>
> (2) If the party served with the notice does not dispute any fact specified by serving notice that the party disputes the fact within the time allowed for that purpose, the party shall, for the purpose of the proceeding only, be taken to admit that fact.
>
> (3) A party may, by leave of the Court, withdraw an admission which is taken to have been made under paragraph (2).
> (4) A notice under paragraph (1) shall be in Form 14A, and a notice under paragraph (2) shall be in Form 14B."

6. It is necessary to set out in some detail what occurred at the hearing. Counsel for the appellants first sought leave to file and serve a third party notice and second sought an adjournment to enable both the third party claim and a cross-claim involving the parties to the Magistrates' Court proceedings (together with others) to be heard together with the primary proceeding. In the course of his initial application, counsel for the appellants indicated to the Magistrate:

> (a) the appellants' position was that they did obtain finance pursuant to transactions in which the respondents were involved; but

(b) the appellants' position was that the respondents acted pursuant to an agreement between the appellants and a third party with which the respondents were associated; and

(c) it was agreed between the appellants and the third party that the third party would be entitled to a service fee of 1.25% on finances obtained by the appellants and that the respondents would be paid (and were in fact paid) 0.4% of such finances out of the primary fee of 1.25%. Hence, the claim was bound up with the third party claim.

7. Counsel for the respondents opposed the granting of leave to initiate third party proceedings and further opposed the adjournment of the matter:

(a) because of an asserted lack of merit in the defence and proposed third party proceedings based on arguments as to privity of contract;

(b) because the third party proceeding could be initiated independently of the respondents' claim;

(c) because the appellants had failed to comply with an interlocutory order for $700 costs giving rise to a likelihood they would similarly fail to comply with any order for costs of an adjournment; and

(d) because there had been a failure to serve the cross-claim issued some time previously and such claim raised separate issues from those raised in the respondents' claim.

8. Discussion then ensued as to the possible adjournment of the proceedings for six weeks. Counsel for the respondents submitted that if the matter were adjourned the appellants should be required to pay security for costs and pay the amount of the claim into court. He further submitted that if delay had occurred as a result of the appellants' solicitors then they had their rights against the solicitors. He concluded these submissions:

"... so that primarily my submission boils down to this, the plaintiffs' proceedings ought to go on, if the defendants really want to pursue this spurious issue they can call evidence of this reduction of my client's entitlement by .4% by arranging for someone from Ashe Morgan Winthrop to come and give that evidence, ... but that if the third party proceeding is to go on and there is to be an adjournment my client's claim ought to be paid into Court and the costs ought to be paid of the amount unpaid in November and the costs thrown away today which I haven't calculated yet."

9. After a short discussion between the Magistrate and his clerk of courts, counsel for the respondents then sought to add:

"One further point ... that is that a comprehensive notice to admit was served by my instructing solicitor on behalf of the plaintiffs on 9 July last year ... Your Worship will be aware that under the rules 14 days is provided for objection to a notice to admit ... No response was received between 9 July or the date of service of that notice which was within a day or two thereafter ... until 15 October so more than, just over three months later ... that being two and a half months late, a notice of objection to it was received, clearly out of time. No application has been made, as is provided for in r.14 to extend the time to in fact withdraw the implied admissions and my instructors wrote on 18 October last year which was just after receiving the notice of objection from the defendants dated 15 October saying, 'your notice of objection to notice to admit is of no effect as it is out of time'."

10. This submission was put forward as another factor which should be taken into account in the exercise of the Magistrate's discretion on the appellants' initial application for adjournment. In response counsel for the appellant indicated that at the time of the receipt of the notice to admit the appellants had no solicitors and that as soon as a solicitor was retained he made objection to the notice to admit. When the Magistrate raised with him the necessity for leave to extend time to object to the notice to admit, application was then made for such leave. In the course of submissions in support of this application counsel emphasised among other things that his clients contended that they had a complete defence to the claim.

"The defence is quite clear and that's also a substantial (point), ... the plaintiff is not entitled to anything other than the .4 which he should have got from Ashe Morgan and Winthrop. He is not entitled to the 1.5 because he didn't obtain funding, Ashe Morgan and Winthrop obtained the funding and that's how the defence reads."

Both counsel also addressed the sequence of procedural steps that had occurred.

11. Ultimately the Magistrate ruled as follows:

> "Well apart from other matters I have decided to deal with the application to withdraw an admission pursuant to the provisions of the Magistrates' Court rule 14.03 paragraph 3. A notice to admit was served on 9 July of 2002. The rule provides the party may serve on another party a notice stating that unless that party within a time to be expressed in the notice which shall not be less than 14 days after service disputes the facts specified in the notice that party shall for the purpose of the proceeding only be taken to admit those facts. Sub-paragraph 2 says, if the party served with the notice does not dispute any facts specified by serving notice that the party disputes the fact within the time allowed for that purpose, the party shall for the purposes of the proceeding only be taken to admit that fact. As I said on 9 July, 2002 a notice to admit was served in the proceedings for which the time specified as I'm advised was 14 days. No reply was received until on 15 October a notice that the facts were disputed was served upon the solicitors for the plaintiff. I am told that the reason for that is that it would seem up until about September and late September ... the defendants did not have solicitors acting for them, however on 18 October the solicitor for the plaintiff wrote to the solicitor for the defendant advising that the notice of dispute had been served out of time and was of no effect. Sub-paragraph 3 as I have already indicated permits withdrawal of an admission with the leave of the court. Albeit advised on 18 October, no application has been made until the day when this matter is set down for hearing. The parties were in court on 14 October 2002 for a chamber application ... when it seems that the matter of the notice to admit was not raised. ... There was also a matter in open court in the Applications Court it would seem on 27 November at which again the matter was not raised and it's only raised at a moment before midnight virtually on the hearing date. In my opinion leaving the matter as it is the real question arises as to whether an injustice would be perpetrated if leave was not granted. In my opinion that has not been shown to be the case in hearing the application for the adjournment. I've heard that the defendant asserts that at least part of the moneys claimed were to be paid by a third party, furthermore I have also heard that it is alleged that the defendant has a separate cause of action against the plaintiff which has been the subject of a counterclaim that has not been served. In my opinion the defendants have slept on their rights under rule 14 to such an extent that leave should not be granted. I think I should also deal with the application for adjournment at the same time but it seems to me that as a consequence of refusing leave under rule 14 that it would purposeless and senseless to now adjourn the proceeding. The application for adjournment is also refused."

12. In substance the Magistrate ruled against the appellants:

(a) because of the very late stage at which the leave application was made; and

(b) because it had not been shown an injustice would result if leave was not granted;
(i) the substance of the appellants' position (as he expressed it) was that at least part of the moneys claimed were to be paid by a third party and the appellants had a separate cause of action against the respondents; and

(ii) the appellants had slept on their rights to such an extent that leave should not be granted.

13. The appellants face significant hurdles in this Court in that:

(a) their right of appeal requires them to demonstrate an error of law; and

(b) the Magistrate's decision as to the grant of leave was discretionary.

14. In essence the appellants contend the Magistrate did not have proper regard to matters which he should have taken into account and that his decision amounted to a denial of procedural fairness in all the circumstances of the case.

15. The Magistrate's reasons must be interpreted in the light of well accepted principles. In particular a failure to expressly refer to a relevant consideration will not necessarily lead to an inference that the Court did not have regard to it. The proper test to be applied is that stated by Sholl J in *Yendall v Smith Richmond & Co Ltd*[1] adopted by Adam J in *McConkey v McConkey*[2]. The test was restated by Sholl J in *Harrison v Mansfield*[3]:

> "The true principle ... must be, not that everything relevant which a Magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to that matter not having been considered as it should have been, or if the Magistrate's observations indicate, on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have

been, the appellate tribunal may properly draw such an inference, and the Magistrate will have no cause to complain if it does so."[4]

16. Further the rules of procedural fairness must be applied in accordance with the principles stated by Mason J in *Kioa v West*[5]:

> "What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, *inter alia*, the nature of the inquiry, the subject matter and the rules under which the decision maker is acting."

17. Nevertheless it is fundamental to the concept of procedural fairness that a party to litigation will be accorded a fair opportunity to meet the case against it.[6]

18. In the present case I have come to the conclusion that the Magistrate did err in law in the exercise of his discretion. He did not give any express or I find proper consideration to the following critical matters:

(a) The admissions in issue were deemed admissions. They were not express admissions. They arose by default and it is clear that they were unintended. They are to be contrasted with admissions of the sort in issue in *Coopers Brewery Ltd v Panfida Foods Ltd*[7] where deliberate and formal admissions had first been made in a solicitor's letter and then by Mr Heydon QC (as he then was) to the Court.

(b) The appellants were unrepresented at the time of the receipt of the notice to admit. In this regard I respectfully agree with the views expressed by Chernov J in *Aslor Pty Ltd (In Liq.) & Anor v Springmount Pty Ltd & Ors*[8]:

> "It should be borne in mind that the relevant defendants are lay people, who are not represented. It is doubtful that they would have understood the full ramification of a failure to respond to the Notice, ... notwithstanding that the first page states in terms the consequences of failing to dispute the contentions in the document."

(c) The appellants made clear that they did contest the matters set out in the notice to admit by a sequence of steps:

(i) the delivery of their initial defence;
(ii) the delivery of an amended defence;
(iii) a solicitor's letter objecting to the notice to admit; and
(iv) further and better particulars of the amended defence.

(d) Despite the fact that the solicitors for the respondents advised the solicitors for the appellants (entirely properly) that they did not accept the late objection to the notice to admit, nevertheless in substance the matter proceeded through the interlocutory stages as though it were a contested matter. In particular after the appellants had obtained further and better particulars of the claimand delivered an amended defence, the respondents sought further and better particulars of the amended defence and compelled the supply of such particulars by way of an order obtained from the Court on 27 November 2002. This course of events might reasonably be thought to have indicated to the appellants that the matter was proceeding as a fully contested matter. The sequence of events makes it difficult to regard the appellants as guilty of acquiescence although it is clear that their solicitor delayed in making or even foreshadowing an application for leave to object to the notice to admit. Further I accept that in the normal course of events the appellants must be regarded as responsible for the actions of their solicitor. Nevertheless the fact that the matter was reasonably perceived as contested on the basis set out in the amended defence is corroborated by the fact the respondents had their witnesses at court (as their subsequent costs application demonstrated).

(e) The Magistrate did not accurately state the substance of the appellants' position as to the claim. This was not simply that the appellants had a third party claim and a cross-claim against the respondents but that the appellants had a complete defence to the claim made against them. It is easy to see how the question of the third party claim and the cross-claim may have obtained undue emphasis in the Magistrate's mind given the sequence of events in argument before him. Nevertheless it was not acknowledged by him that the appellants had formulated, served and particularised a defence and that their counsel had articulated such defence to the claim in the course of argument.

(f) The course adopted by the Magistrate effectively deprived the appellants of a hearing. The right to a hearing is a fundamental component of procedural fairness before a court. The appellants remained before the Court but were unable to effectively contest the case against them. The situation can be compared with cases such as that of *Selpam Pty Ltd v City of Brighton*[9] in which the objection of a party to the tender and receipt in evidence of a document stating an opinion unless the maker

of the document were called for cross-examination, was overruled by a tribunal. Although the tribunal was not bound by the rules of evidence this was held to be a denial of procedural fairness. Similarly in the present case the appellants were deprived of the opportunity to effectively contest the proceeding. This was an extreme consequence to visit upon them given the history of the matter and their appearance before the Court.

I respectfully agree with the view expressed in *Southern Equities Corp Ltd (In Liq) v Bond (No. 7*)[10] where Debelle J said with respect to a case turning on the question whether answers to a notice to admit were validly amended without leave:

"It must be remembered that the Rules of Court are a servant and not a master."

(g) The position of the appellants was rendered significantly worse than if summary judgment had been sought on the basis of the notice to admit. If this had been done the appellants would have had the opportunity to show cause against the orders sought under the Rules.

19. For the above reasons I am of the view that although the Magistrate was well entitled to refuse to adjourn the case having regard to its history, he was not entitled to hold the appellants to the strict consequence under the rules of a failure to object to a notice to admit within the specified time. I have reached this conclusion firstly, because it can be inferred from his reasons that he failed to take into account material considerations and secondly, because the consequence of the ruling was to deny the appellants procedural fairness.

20. A failure to accord parties procedural fairness with respect to a significant matter is necessarily a vitiating error of law. Accordingly the order of the Magistrates' Court must be set aside. I will further direct that leave be given to the appellants to object to the notice to admit filed and served on behalf of the respondents in the Magistrates' Court proceeding and that the matter be further heard according to law.

21. I will hear counsel as to whether the matter should be remitted to a differently constituted division of the Magistrates' Court, and as to costs.

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[1] [1953] VicLawRp 53; [1953] VLR 369 at 379; [1953] ALR 724.
[2] [1960] VR 295 at 300; [1960] VicRp 47;.
[3] [1953] VicLawRp 60; [1953] VLR 399.
[4] Ibid at 404.
[5] [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.
[6] *Board of Education v Rice* [1911] AC 179; [1911-13] All ER 36; 80 LJKB 796; 104 LT 689.
[7] (1992) 26 NSWLR 738.
[8] [1998] VSC 108, unreported decision, 15 October 1998.
[9] (1986) 4 PABR 279; [1987] VicRp 5; [1987] VR 54; (1986) 61 LGRA 167.
[10] [2000] SASC 427 unreported decision, 30 November 2000.

**APPEARANCES:** For the Appellants International Property Development Pty Ltd: Mr MSR Clarke, counsel. Gleeson & Co, solicitors. For the respondents Mevco International Pty Ltd: Mr FJ Holzer, counsel. Irlicht & Broberg, solicitors.

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