17/02; [2001] VSC 229

SUPREME COURT OF VICTORIA

STOJANOSKI v NORTHERN MEAT & POULTRY SUPPLIES PTY LTD

Gillard J

3, 11 July 2001

CIVIL PROCEEDINGS – CLAIM FOR WORK AND LABOUR DONE – MATTER SETTLED – TERMS OF SETTLEMENT EXECUTED BY PARTIES – CLAIM TO BE PAID BY INSTALMENTS – IN DEFAULT MATTER TO BE REINSTATED AND JUDGMENT TO BE MADE FOR ORIGINAL CLAIM PLUS COSTS – PARTY IN DEFAULT – MATTER REINSTATED WITHOUT NOTICE TO PARTY IN DEFAULT AND JUDGMENT MADE – ENFORCEMENT ACTION TAKEN – APPLICATION FOR RE-HEARING MADE – APPLICATION GRANTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S110.

The parties to an action in the Magistrates' Court executed Terms of Settlement which provided for payment by instalments. In the event of default the plaintiff was entitled to have the proceeding reinstated and to obtain judgment for the original amount of the claim plus costs. When the defendant fell into arrears, the plaintiff, without notice to the defendant, obtained an order for reinstatement of the claim and an order as agreed. After steps were taken to enforce the order, the defendant applied for a rehearing of the matter. A magistrate granted the application and ordered that the order made reinstating the claim be re-litigated. Upon appeal—

HELD: Order quashed.

1. Section 110(1) of the *Magistrates' Court Act* 1989 gives power to a person to apply for an order to set aside and rehear if that person did not appear in the proceeding. In relation to the proceeding reinstating the complaint, the defendant did not appear as it was not given notice and an opportunity to be heard on the application. Accordingly, the magistrate had jurisdiction to hear the application to set aside and rehear.

2. An order made by a court in the absence of a party will only be set aside for proper cause. If the attack upon the order is that the order was obtained irregularly, as a general rule, the order will be set aside as a matter of course. In this case, the order made after reinstatement was irregularly made in that it was made without notice to the defendant. *Prima facie*, the defendant was entitled to have it set aside simply on that ground.

3. However, whether an irregular order should be set aside is a discretionary matter. The defendant did not complain that the making of the order was unfair and could not have contested the application to reinstate and make an order to which it had consented. It follows that it was necessary for the defendant to show that it had a defence on the merits. On the application to set aside there was no evidence which revealed a defence on the merits to the reinstatement order nor was there any dispute as to the existence of the grounds which gave the plaintiff the right to enter judgment in accordance with the Terms of Settlement. Accordingly, there was no basis for the magistrate to set aside the reinstatement order.

GILLARD J:

1. Before the court is a summons in a proceeding, instituted by originating motion, seeking judicial review of an order made by a Magistrate, setting aside an order and granting a re-hearing of the proceeding.

Parties

2. The plaintiffs, Saso, Ivan, Vaska and Silvana Stojanoski, who trade as Creative Visual Images, performed work for the first defendant, Northern Meat and Poultry Supplies Pty Ltd ("the defendant"), during the period between 19 March 1999 and 14 April 1999.

3. The defendant refused to pay for the services rendered, and on 3 September 1999, the plaintiffs issued a complaint in the Magistrates' Court at Melbourne, seeking the sum of $6,716 for work and labour done.

4. The defendant filed a defence through one of its directors, and asserted that the charge made was excessive, and that it had never received an itemised or detailed quotation for the work.

5. The second defendant, the Magistrates' Court of Victoria, is joined as a necessary party pursuant to Rule 56.01(3) of the Rules of Court. In accordance with the normal practice, the Court did not participate in the judicial review and has informed this Court that it will abide the decision.

Compromise and Order

6. The defendant subsequently engaged a solicitor, Anthony Zita, who commenced negotiations with the solicitors acting for the plaintiffs, in order to explore settlement of the proceeding. On 10 April 2000, the parties executed Terms of Settlement. The solicitors acting for the plaintiffs and Mr Zita, acting for the defendant, signed the Terms of Settlement. They recorded that the plaintiffs agreed to accept the sum of $6,500 in "full satisfaction of the claim, interest and costs." Paragraph 3 of the Terms provided for payment by instalments. Paragraph 4 provided that if any instalment was not paid on the date specified, the plaintiffs were entitled to have the proceeding reinstated and to obtain judgment for the original amount of the claim, namely $6,716, together with costs agreed at $2,056.80, plus costs reinstating the proceeding and obtaining judgment. It was agreed that the claim be struck out with a right of reinstatement.

7. The parties agreed to a method facilitating proof necessary to obtain judgment under the Terms if there was default. Paragraph 5 of the Terms provided:

> "5. For the purpose of obtaining a judgment pursuant to the provisions of the proceeding paragraph, the Defendant hereby agrees that: —
> (a) these terms may be produced to the Court as the Defendant's consent to such a judgment; and
>
> (b) that an affidavit by a Solicitor acting for the Plaintiffs will be sufficient evidence of;
> (i) a failure to receive all or any of the payments provided for by paragraph 3 hereof in accordance with the provisions set out in that paragraph
> (ii) and amounts which might have been received in respect of the reduced sum and any amounts which remain outstanding in respect of the full sum."

8. The claim was struck out. The first payment of $1,300, due by 30 April 2000, was paid. However, the payment due on 30 May was not paid.

9. On 6 July 2000, the plaintiffs, through their solicitors, made application for an order in default of compliance. The application was supported by an affidavit of Robert Bernard White, the solicitor acting on behalf of the plaintiffs, sworn on 20 June 2000. He requested that the Magistrates' Court reinstate the proceeding and make an order pursuant to paragraph 2 of the Terms of Settlement.

10. The application and affidavit were not served on the defendant or its solicitors.

11. Despite the fact that service was not effected upon the defendant, a Magistrate, on 10 July 2000, considered the application and made an order that the defendant pay the sum of $5,416, plus interest of $671.95 and costs fixed at $2,239.80.

12. The order made was in accordance with paragraph 4 of the Terms of Settlement.

The Dispute

13. In order to enforce the order, the plaintiffs' solicitors issued a summons requiring a director of the defendant to attend oral examination as to the defendant's financial position. The hearing was fixed for 12 December 2000.

14. On 6 December 2000, Maria Tsioukis, a secretary employed the defendant, contacted the solicitors for the plaintiff and had discussions with a law clerk, Lisa Madex. She informed Ms Madex that she was unhappy with her solicitor and proposed to negotiate directly in relation to the outstanding judgment debt. There is some dispute as to what was agreed, but it transpired that Mr Zita, the solicitor, came back into the picture, and he ultimately advised Ms Madex that his client was prepared to pay the sum of $5,850 in full settlement of the balance of the judgment debt, interest and costs. Ms Madex stated that she would seek instructions. According to Ms Tsioukis, Mr Zita informed her that he had contacted the plaintiffs' solicitors and if the sum of $5,850 was paid, it would settle the matter in full. Ms Tsioukis, who had already drawn a cheque in the sum

of $2,000 in accordance with discussions she had had with Ms Madex, then drew another cheque for $3,850 and forwarded both to the solicitors for the plaintiffs with a note stating, "I enclose the two (2) cheques. Please confirm that this matter is now finalised."

15. Ms Madex ascertained from her clients that they were not prepared to accept the sum of $5,850 in full settlement. The cheques were banked into the plaintiffs' solicitors' trust account.

16. On the following day, 12 December 2000, a letter was forwarded by the plaintiffs' solicitors to both Mr Zita and Ms Maria Tsioukis, indicating that the plaintiffs were not prepared to accept the amount in full settlement.

17. It is a contention of the defendant that the dispute between the parties had been compromised by the payment of the two cheques totalling $5,850, and accordingly, there was an accord and satisfaction.

Re-hearing

18. On 14 March 2001, the defendant, through a different lawyer, filed an application for re-hearing in the Magistrates' Court. In support of the application, the defendant filed two affidavits, by Maria Tsioukis and George Tsioukis, both sworn on 14 March 2001.

19. In response, the plaintiffs' solicitors filed 2 affidavits, one by Lisa Madex, sworn on 30 March 2001, and the other by Robert Bernard White, sworn on 5 April 2001.

20. The application for re-hearing was made pursuant to s110 of the *Magistrates' Court Act* 1989 ("the Act").

21. The application came on for hearing before the same Magistrate, who had made the order in favour of the plaintiffs on 10 July 2000. He considered the affidavit material and heard submissions from the legal representatives of the parties. He then ordered that the order of 10 July 2000 be set aside and adjourned the matter to a date to be fixed.

22. The effect of setting aside the order made on 10 July 2000, was that the application to make an order pursuant to the Terms of Settlement would be re-litigated.

23. It is pertinent to observe that there was no suggestion made on the application before the Magistrate, that the order had been made irregularly, or that the order had been procured by bad faith or fraud. There was no suggestion that the Terms of Settlement were unenforceable, were not binding in some way or ought to be set aside.

24. It appears that the basis for setting aside the order was, that there was an arguable case that in December 2000, the parties had entered into a new agreement pursuant to which the obligation to pay under the order dated 10 July 2000 was varied, so that the defendant was entitled to pay a lesser sum in full satisfaction of the Court order.

Judicial Review

25. The plaintiffs filed an originating motion on 10 May 2001, seeking, *inter alia*, a declaration that the order made setting aside the earlier order was invalid and should be quashed by an order in the nature of *certiorari*.

26. As the order setting aside the original order is an interlocutory order and not a final order, it was not open to the plaintiffs to appeal the order made pursuant to s109 of the Act. The order made was not a final order. See s109(1). Hence, the only avenue open to the plaintiffs was by way of judicial review.

27. Rule 56.01(4) requires the plaintiffs to state the grounds upon which the relief is sought. The grounds stated in the originating motion are —

> "1. The determination and order disclose an error of law, namely, the learned Magistrate's finding that the judgment entered on 10 July 2000 by consent should be set aside on the application by the first defendant and that the proceedings be reheard when the first defendant had produced no evidence that the plaintiffs were not entitled to enter judgment pursuant to terms of settlement or that the said judgment was not by consent or that the said judgment was irregular.

> 2. The learned Magistrate was wrong in law in granting the application by the first defendant for re-hearing, in setting aside the judgement entered by the Court on 10 July 2000 and ordering that the matter be re-heard.
>
> 3. The order of the learned Magistrate granting the first defendants' application for rehearing of the consent judgment entered 10 July 2000 was ultra vires".

28. Mr Osborne of Counsel, who appeared for the plaintiffs, identified two broad grounds of complaint, namely –

> (a) That the Magistrate was wrong in concluding that a pre-condition to the exercise of jurisdiction under s110 was proven, and accordingly, lacked jurisdiction to hear the application.
>
> (b) That in exercising the jurisdiction, the Magistrate made a jurisdictional error of law.

29. The common law jurisdiction of this Court to review decisions of inferior courts is subject to the procedure set out in Order 56 of the Rules of Court.

30. The jurisdiction of the Court to review decisions of inferior courts and tribunals is limited.

31. The jurisdiction is supervisory and does not entitle this Court to canvass matters that it would on an appeal. In a judicial review, the Court is exercising its common law jurisdiction. The jurisdiction is different to an appeal.

32. The judicial review procedure is concerned with the legality of what was done by the Court or Tribunal, and is not concerned with the merits of the decision under review. This is to be contrasted with an appeal, where the question usually is whether the decision is right or wrong, whereas the question on a judicial review is whether the decision is in accordance with the law.

33. Judicial review is not concerned with whether the decision was fair or correct.

34. Order 56 is concerned with procedure. It abolishes the remedies in the nature of the old prerogative writs, but nevertheless preserves the jurisdiction of the Court to make prerogative writ-type orders. It is clear that the Rules do not affect the common law jurisdiction of the Court, and it is equally clear that this Court has jurisdiction to make an order in the form similar to the old prerogative writ of *certiorari*, namely, quashing the decision under review.

35. The scope of the jurisdiction was recently discussed by the High Court in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175-76; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. In a joint judgment, 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 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 an 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, or 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." (Emphasis added).

36. In *Chief Constable of North Wales Police v Evans* [1982] UKHL 10; [1982] 3 All ER 141; (1982) 147 JP 6; (1982) 1 WLR 1155, Lord Brightman at WLR p1173 said –

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

37. In *R v District Court; ex parte White* [1966] HCA 69; (1966) 116 CLR 644; [1967] ALR 161; (1966) 40 ALJR 337 Windeyer J said at CLR p655 –

> "We do not sit in this court to weigh the evidence and decide whether or not the applicant should be exempt from military service. That decision has been committed by Parliament to a magistrate, with an appeal to a court of review constituted by a District Court or Supreme Court Judge. The court of review has given its decision. Parliament has said that its decision is 'final and conclusive'. It is not for us to say whether it was right or wrong. Nevertheless the applicant is seeking to bring the case before us, alleging an error of law which it is claimed entitles him to an order either for *certiorari* or prohibition ... I am not disposed to a narrow view of the scope of either *certiorari* or prohibition or of the power of this court to use these writs and also mandamus to ensure that administrative tribunals exercising functions under Commonwealth law proceed according to law and keep within the law. But we must not use these writs to give an appeal on the facts." (Emphasis added).

38. The High Court in *Craig's* case, *supra*, at p176, identified the most important established grounds, namely, jurisdictional error, failing to observe some applicable requirement of procedural fairness, fraud and error of law on the face of the record.

39. This Court is not concerned to examine whether in fact the Magistrate made the right decision, or whether he misapplied some principle of law, but is concerned to ensure that he acted within jurisdiction and that in performing his decision making process, he complied with the law.

40. The limited nature of the jurisdiction was stated by the High Court in *Craig's* case, supra, at pp176 *et seq*, where the Court drew a distinction between administrative tribunals and inferior courts. After giving examples of jurisdictional error in an administrative tribunal, the Court said at pp179-180 –

> "In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available, and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely on determining such a question will not ordinarily involve jurisdictional error." (Emphases added).

41. It is to be observed that the High Court was guarded in stating the principles as general propositions. However, the observations are indeed compelling in a motion such as the present. The rationale for the supervisory jurisdiction is that inferior courts must, in exercising their decision-making process, act within jurisdiction and in accordance with the law and principles of procedural fairness. But the supervisory jurisdiction is not an appeal.

42. Sometimes, there is controversy about what constitutes the record. The Rules do require, as did the common law, the production of the record. The record was produced.

43. The record is comprised by the actual extract from the Court's register disclosing the order made, but it also includes the pleadings and the reasons for the decision, the latter by reason of s10 of the *Administrative Law Act* 1974 – see *Thompson v Judge Byrne* (1998) 2 VR 274 at 280; (1997) 93 A Crim R 69, and *RSL v Liquor Licensing Commission* [1999] VSCA 37; [1999] 2 VR 203 at 209; 15 VAR 96.

44. Nevertheless, the record may be expanded to include the transcript of the proceedings, if in fact it is incorporated into the record by reference. See *Craig's* case, *supra*, at pp181-82.

45. If an attack is made on the basis that there is an error of law on the face of the record, this Court is in fact restricted to that record, and the decision will only be quashed if it is affected by an error of law which is disclosed by that record.

46. Where the attack is made on grounds other than an error on the face of the record, then the court can take into account any relevant material placed before it, subject, of course, to rules of procedure and evidence.

47. As the statement by the High Court set out above clearly demonstrates, where the allegation is that there has been a jurisdictional error, in a case where in fact the Court had jurisdiction and was exercising it, it is a difficult task to establish that there was jurisdictional error, even though an error is established in the course of the Court exercising the jurisdiction.

48. Ordinarily, an inferior court has jurisdiction to decide questions of law as well as questions of fact, and if it makes an error in the course of exercising the jurisdiction, it has made an error in matters which it has jurisdiction to determine. It is only where it makes an error with respect to that jurisdiction, that the Court can intervene.

49. The point was emphasised in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194; (2000) 174 ALR 585; (2000) 74 ALJR 1348; (2000) 21 Leg Rep 14; (2000) 99 IR 309, by Gleeson CJ, Gaudron and Hayne JJ who said at ALJR p1356 –

> "To misconceive the role of the Commission under s170MW of the Act ... does not constitute jurisdictional error on the part of the Full Bench. There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; (1947) 64 WN (NSW) 107; 16 LGR (NSW) 82, it 'misunderstood the nature of its jurisdiction'... or 'misconceived its duty' or 'failed to apply itself to the question which the section of the Act prescribes' ... or 'misunderstood the nature of the opinion which it was to form'. The Full Bench did none of those things." (Emphases added).

50. In *RSL v Liquor Licensing Commission*, *supra*, Phillips JA, at pp210-211, discussed the nature of jurisdictional error and, after noting that most inferior courts are entrusted by Parliament to decide questions of law, said –

> "And so in deciding, even if it goes wrong, it does not stray outside its jurisdiction. If erroneous, its decision may well be open to appeal, but it will not be subject to prerogative relief for want or excess of jurisdiction (even if amenable to such relief if error of law is disclosed on the face of a record)." (Emphasis added).

51. His Honour, at p215, summarised the approach when he said –

> "Accordingly, in a case like the present the essential search must be for the task which is confided to the body whose decisions are under attack; for only if that body strays beyond that task will there be a want or excess of jurisdiction."

52. In *Craig's* case, *supra*, at p177, the High Court defined some examples of jurisdictional error when it said –

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or a disregard of the nature or limits of jurisdiction. Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers. ... Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. ... Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that the particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives

> the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern."

53. The evidence concerning the hearing before the Magistrate, on the application for a re-hearing, is terse. The evidence reveals that after hearing submissions, the Magistrate –

> "gave his ruling and ordered that the judgment of 19 July 2000 be set aside and the matter be re-listed for hearing. The learned trial Magistrate commented that a hearing should be conducted so that both parties could adduce evidence as to whether there was an agreement between the parties to settle the debt by part-paying the balance of the judgment."

Re-hearing Jurisdiction

54. There is no doubt that under s110 of the Act, the Magistrates' Court does have jurisdiction in a civil proceeding to hear an application for an order that, an order of the Court be set aside and the proceeding be re-heard. If a Court has to be satisfied of a fact, as a precondition of the existence of its jurisdiction, before it may exercise the jurisdiction, and it makes an error in determining that precondition, then the Court is proceeding to exercise jurisdiction in circumstances where it does not have jurisdiction, and accordingly, is guilty of jurisdictional error.

55. It was submitted on behalf of the plaintiffs that the Magistrate did make an error in determining whether or not s110(1) of the Act applied.

56. Section 110(1) provides –

> "(1) If a final order is made by the Court in a civil proceeding against a person who did not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that an order be set aside and that the proceeding be re-heard." (Emphasis added).

57. It was submitted that the Magistrate made an error in concluding that the defendant did not appear in the proceeding in which the order was made, on 10 July 2000. The contention was that the defendant did appear in the proceeding and accordingly, the Court did not have any jurisdiction to set aside the order made. It was said that the defendant had appeared in the proceeding up to the stage when the Terms were executed, that the proceeding was being reinstated and that the wording of the Terms made it clear the defendant consented to the order being made.

58. The facts are, that the Terms of Settlement were signed by the solicitors acting for both parties, that the agreement was partially executed in that one instalment was paid by the defendant, that according to the terms of the agreement, the production of the Terms to a Court was evidence of the defendant's consent to a judgment being entered in the sum specified, that application was made without notice to enter such judgment, and that the Magistrate made an order without requiring notice of the application being given to the defendant. The application for the order was supported by an affidavit by a solicitor, and the defendant had agreed in the Terms that that would be sufficient evidence as to failure to pay any amounts outstanding.

59. It was said, on behalf of the plaintiffs, that in those circumstances, the defendant did appear in the proceeding.

60. The "proceeding" was in fact the application to reinstate the complaint and to make an order, by reason of the default of payment under the Terms of Settlement. The defendant did not actually appear in that proceeding. Indeed, the defendant did not have notice of that proceeding.

61. In my opinion, the defendant did not appear in the proceeding merely by agreeing, in the Terms of Settlement, that the Terms could be produced to the Court as the defendant's consent to an order. Notice should have been given to the defendant, and the Magistrate should not have proceeded until notice was given.

62. Notice was required because an order was to be made affecting the interests of the defendant, and by reason of the rules of natural justice, it was entitled to have notice of the application. Whilst it was unlikely that the defendant could raise any objection to the order being made, the fact was that it was entitled to have notice and be given an opportunity to be heard on the application. It

was denied this opportunity.

63. In my opinion, the Magistrate did have jurisdiction to hear the application for an order that the order be set aside. The fact was that the defendant did not appear in the proceeding reinstating the complaint.

Jurisdictional Error

64. Jurisdictional error may occur during the exercise of jurisdiction.

65. It is important, at the outset, to identify the issue before the Magistrate on the application to set aside the order made in July 2000. The application was not based upon the fact that the order was made without any notice to the defendant. No mention was made of the failure to give notice. It was made on the basis that subsequent to the order being made, the parties had compromised their dispute and the obligation to pay the amount of the order was satisfied by an agreement made in December 2000. The alleged agreement was made some five months after the order. An amount of money was paid, allegedly pursuant to the agreement. It is contended that there had been an accord and satisfaction and hence, the plaintiffs were not entitled to the full amount of the order.

66. The subject matter of the accord was the alleged agreement that a lesser sum could be paid in full satisfaction of the order. It was submitted that the alleged later agreement was a basis for setting aside an order that apparently was regularly made.

67. If a Court misconceives its role, that can amount to jurisdictional error. See *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*, *supra*, at p1356. A Court misconceives its role if it misunderstands the nature of its jurisdiction, misconceives its duty or fails to apply itself to the particular question in issue.

68. An order made by a Court, in the absence of a party, will only be set aside for proper cause. The Courts, over the years, have developed principles which guide a Court on an application to set aside an order.

69. An application under s110 of the Act is similar to an application to set aside a default judgment in this Court, and substantially the same principles apply. See *Seventeenth Febtor Pty Ltd v Household Financial Services Ltd* [1996] VicRp 88; [1996] 2 VR 577 at 578; [1996] ASC 56-342, and *Guss v Magistrates' Court of Victoria and Katz* [1998] 2 VR 113.

70. The approach of the Courts to the issue depends upon the nature of the attack upon the ex parte order or judgment. If the attack is that the order or judgment was obtained irregularly, as a general rule, the order or judgment is set aside as a matter of course.

"There is a great difference between judgments which are regularly obtained in good faith and judgments which are irregularly obtained or obtained in bad faith. The first class are not in general set aside save upon an affidavit of merits. The second class are set aside *ex debito justitiae*; irrespective of the merits of the party applying." — *Chitty v Mason* [1926] VicLawRp 60; [1926] VLR 419 at 423, per Dixon AJ.

These rules are general rules and are not inflexible. Hence, the order made after reinstatement was irregularly made, in that it was made without notice to the defendant. Prima facie, the defendant is entitled to have it set aside simply on that ground. However, application was not made on that ground to the Magistrate. In my opinion, it would be unjust to uphold the Magistrates' order on that ground. In the end, whether an irregular order should be set aside is a discretionary matter. The point was not taken before the Magistrate. Secondly, no complaint was made by the defendant that the making of the order was unfair. Thirdly, the Magistrate proceeded *ex parte* and was no doubt satisfied that it was not unfair in the circumstances. Fourthly, the defendant could not have contested the application to reinstate and enter what was described as "judgment" for a specified sum. To this day, it has not attacked the Terms which clearly bound it and provided evidence of its consent to the judgment. Despite lack of notice, the defendant was not prejudiced by what occurred. It has not suggested it was.

71. It follows that it was necessary for the defendant to show that it had a defence on the merits. See *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689, and *Kostokanellis v Allen Ltd* [1974] VicRp 71; (1974) VR 596.

72. The primary question for the Magistrate was whether the defendant had a defence on the merits to the order made on 10 July 2000.

73. On the evidence before the Magistrate, on the application to set aside the order, there was no evidence which revealed a defence on the merits to the order made on 10 July 2000. Indeed, there was no dispute as to the existence of the grounds which gave the plaintiffs the right to enter judgment in accordance with the Terms of Settlement.

74. What was put before the Magistrate was that subsequent events demonstrated an arguable accord and satisfaction in respect of the obligations that arose out of the order. These events did not, in any way, affect the validity of the order made some five months previously. The order was valid. What was arguably put in question was the extent of the right of execution. The order, when made, gave rights to the plaintiffs, which could be enforced by a form of execution. A number were available to the plaintiffs. If there was an accord and satisfaction reached between the parties, it affected the rights of execution and not the order.

75. In my opinion, there was no basis to set aside the order made on 10 July 2000.

76. If an accord and satisfaction was reached between the parties in respect of the obligation under that order, the proper course for the defendant to take was to raise the issue on the oral examination, contending that there was no debt owing, or alternatively, issuing a complaint and seeking an injunction to restrain the plaintiffs from breaching the alleged accord and satisfaction.

77. It follows that in my opinion, the Magistrate misconceived his jurisdiction and in so doing, made an order which, on the evidence before him, should never have been made. He failed to apply himself to the real question in issue, in that he failed to consider the question whether the defendant had a defence on the merits.

Conclusion

78. In my opinion, the Magistrate did make an error of law which went to his jurisdiction and accordingly, the order made by him on 11 April 2001 should be quashed.

79. Subject to submissions of Counsel, I propose to make the following orders —

(i) that the order made by the Melbourne Magistrates' Court on 11 April 2001, setting aside the order made on 10 July 2000 in a proceeding in which the present plaintiffs were plaintiff and the present defendants were defendants, be set aside.

(ii) that the defendant pay the plaintiffs' costs of the proceeding in this Court.

APPEARANCES: For the plaintiffs Stojanoski: Mr M Osborne, counsel. White Cleland Pty, solicitors. For the first defendant: Mr S Palmer, counsel. J Kotsifas & Associates, solicitors.
