**72/1980**

**SUPREME COURT OF VICTORIA**

# *HOUSING COMMISSION OF VICTORIA v PIERSON*

**Southwell J**

**22 September 1980**

**CIVIL PROCEEDINGS - ORDER MADE BY DEFAULT IN CIVIL CLAIM AT MELBOURNE MAGISTRATES' COURT - MATTER TRANSFERRED TO TRARALGON MAGISTRATES' COURT - APPLICATION FOR REHEARING LODGED WITH TRARALGON COURT - ORDER SET ASIDE AND MATTER TO BE REHEARD AT TRARALGON - WHETHER MAGISTRATE IN ERROR: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS144, 152; *MAGISTRATES' COURT RULES* 1976, R142.**

**Section 152 of the *Magistrates (Summary Proceedings) Act* 1975 in clear terms refers to an application for rehearing being made to the court which made the original order. The expression "court" is not the subject of specific definition in the Act, but the section does not give a person the right to apply to "a" court or "any" court but to "the" court. There is not a Magistrates' Court in Victoria; there are many, each of them a creature of statute and each having such powers as are granted to it by statute. A complainant may choose his venue, but if he chooses wrongly a defendant may obtain a change of venue pursuant to s76 of the Act. The rule must be read as referring only to proceedings instituted by the party who obtained the original order in his favour. Accordingly, where a matter had been transferred to the Traralgon Magistrates' Court that court had no jurisdiction to set aside the order made at the Melbourne Magistrates' Court and order that the matter be reheard.**

**SOUTHWELL J:** This is the return of an order nisi to review a decision of the Traralgon Magistrates' Court. The history of the matter is as follows:

24th January 1979, complaint and summons for a debt of $170.45 issued by the applicant as complainant out of the Magistrates' Court at Melbourne;
21st March 1979, an order by default for the payment of that sum and $34.80;
29th June 1979, a certificate of registration issued, pursuant to a transfer of the order made under s144 of the *Magistrates (Summary Proceedings) Act* of 1975, the receiving court being the Traralgon Magistrates' Court;
24th September 1979, application to the Traralgon Court by the respondent/defendant to set aside the order of the Melbourne Magistrates' Court and to seek a re-hearing;
29th October 1979, an order was made by the Traralgon Magistrates' Court setting aside the order of the Melbourne Magistrates' Court and ordering a re-hearing of the matter at the Traralgon Magistrates' Court on 26th November 1979;
23rd November 1979, application was made to the Master of this Court for an order nisi for review;
14th February 1980, the order nisi was granted. The grounds of the order nisi were:

> (1) That the Stipendiary Magistrate was wrong in holding that the Magistrates' Court at Traralgon had jurisdiction to entertain the application for the said order;
> (2) That the only Magistrates' Court having power to make the said order was and is the Magistrates' Court at Melbourne;
> (3) That the said order —
> (a) was made without jurisdiction
> (b) should not have been made
> (c) was contrary to and bad in law
> (d) was a nullity.

If I might interpolate the comment, however, it does not seem to me that ground (3) can in any way advance the cause of the applicant having regard to the forms of grounds (1) and (2).

I have said that the order originally made by the Melbourne Magistrates' Court was registered at the Traralgon Magistrates' Court pursuant to s144 of the *Magistrates (Summary Proceedings) Act* 1975. That section reads:

> "144(1) When an order has been made by a Magistrates' Court for the recovery or payment of money with or without costs or for costs on a conviction or for costs alone including costs ordered to be paid by an informant, the Clerk of the Court upon application in the prescribed form by or on behalf of the person in whose favour the order was made shall, if satisfied that a warrant of distress has been returned unsatisfied in whole or in part, deliver to the person making the application a certificate of the order for facilitating the transfer of the order to a court specified in the application and shall make a minute of the delivery of the certificate in the register of the Magistrates' Court."

Sub-section (3) reads:

> "Any proceedings for the enforcement of the order in relation thereto by the other Magistrates' Court made in respect of the sum mentioned in the certificate to be unpaid ... be taken in the same manner as if the order were an order for the sum and fees made by that other Magistrates' Court."

I pause to note that the purpose of the section is perhaps best summarised by the phrase in s144(1) where it reads, "... for facilitating the transfer of the order," and in sub-s(3) which refers to "proceedings for the enforcement of the order."

The application for re-hearing was made pursuant to s152 of the Act which reads:

> "Where a conviction or order is made by a Magistrates' Court or by a Justice or Justices not sitting as a Magistrates' Court when one party does not appear the party who does not appear may, subject to and in accordance with the provisions of this part, apply to the court or in the case of a conviction or order by a Justice or Justices not sitting as a Magistrates' Court, the court in which the conviction or order is recorded, that order for the conviction or order be set aside and that the information or complaint on which it was made be reheard."

Mr Henshaw, who appeared for the applicant, submitted firstly that each Magistrates' Court is one entity separate from all others and, secondly, that the Magistrates' Court is a creature of statute. I did not understand Mr Nikakis to dispute those two propositions which, in my view, are clearly correct.

Mr Henshaw's third submission was that one court is not empowered, as he put it, to interfere with the orders of another court. It is with that proposition, as I understand it, that Mr Nikakis takes issue and submits that upon a proper reading of the relevant sections and rules, the proper court for the application to have been made was indeed the Traralgon Magistrates' Court.

Section 4 of the Act gives the Governor-in-Council power to make rules not inconsistent with any of the provisions of the Act. A rule relevant to this application is Rule 142 of the *Magistrates' Court Rules* 1976, embodied in Statutory Rule number 99 of that year.

Rule 142, after dealing with the minute which must be made by the clerk of the court receiving the registration certificate and specifying the actions he should take, provides in sub-rule (3):

> "Where a certificate has been granted as aforesaid no further proceedings in respect of the order shall be taken in the court in which the order was made unless the party who obtained the order first files with the clerk an affidavit",

and then details are given of the nature of the affidavit and the rule further requires that notice in writing of intention to take further proceedings is duly given in circumstances to which I need not now make reference. Mr Nikakis submits that that rule should be given its ordinary natural meaning and that it applies to the proceedings taken by the respondent for an order setting aside the original order, and he submits, as indeed is necessarily involved with the first submission, that had the respondent applied to the Melbourne Magistrates' Court for a re-hearing that would have been a "further proceeding" within the meaning of rule 142 sub-rule (3) and the respondent would have been defeated by the operation of that rule.

That submission is contested by Mr Henshaw, who submits, *inter alia*, that that rule can relate only to proceedings instigated by he who first obtains the original order and that to read it as contended for by the respondent would be to bring it into conflict with s152 of the Act. It appears that there is no authority on the point to assist me. It is a short point of interpretation

of the combined effect of s144, s152 and the following sections. I am not able to say whether, the point is of practical importance. One would have thought that had this been a matter of doubt and importance some cases would by now have been decided. Be that as it may, it seems to me to be of some assistance, although not of compelling persuasion, to look at the form of the application to set aside an order and re-hear a complaint. That is a form admittedly not headed under the present rules but it bears the heading of the predecessors of the present rules. It is a printed form under s69 of the *Justices Act* 1958, form 53B, and it is headed "In the Magistrates' Court at ...." and then the court to which application is made is filled in. Then after referring to the details of the complainant/defendant, the date of complaint, the nature of the complaint, it is addressed to the Clerk of the Magistrates' Court in these terms: "Whereas I did not appear at the hearing of the above-mentioned complaint and the above-mentioned court on the 21st day of March 1979, in my absence ...." *et cetera*. For this application the words "above-mentioned" where they secondly appear had to be struck out and the Melbourne Magistrates' Court inserted. That form in my view suggests that the draftsman contemplated that the court to which application was made for re-hearing was the same court which made the order in respect of which a re-hearing is sought. Even if reference to that form be not regarded as a helpful guide, the ordinary reading of the section in my view leads to the conclusion that the submissions made on behalf of the applicant are correct.

In my opinion s152 in clear terms refers to application being made to the court which made the original order. The expression "court" is not the subject of specific definition in the Act, but it is to be noted that the section does not give a person the right to apply to "a" court or "any" court but to "the" court. There is not a Magistrates' Court in Victoria; there are many, each of them a creature of statute and each having such powers as are granted to it by statute. A complainant may choose his venue, but if he chooses wrongly a defendant may obtain a change of venue pursuant to s76 of the Act. In my opinion to give to rule 142 the interpretation urged by the respondent would involve conflict with s152, and if an interpretation can be placed upon rule which 142 does not create that conflict, that interpretation should be placed upon it.

In my view the rule must be read as referring only to proceedings instituted by the party who obtained the original order in his favour. For those reasons I am of opinion that the Magistrates' Court at Traralgon had no jurisdiction to make the order here under attack and the order nisi must be made absolute with $200 costs.

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