7/95

SUPREME COURT OF VICTORIA

KINEX EXPLORATION PTY LTD v TASCO PTY LTD and ANOR

Batt J

3 August 1994 — [1995] VicRp 58; [1995] 2 VR 318

CIVIL PROCEEDINGS – ORDER MADE AFTER HEARING ON MERITS – DEFENDANT DID NOT APPEAR – WHETHER FINAL ORDER – APPLICATION FOR REHEARING REFUSED – WHETHER FINAL ORDER – "DID NOT APPEAR IN THE PROCEEDING" – MEANING OF: *MAGISTRATES' COURT ACT* 1989, SS109, 110*; MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, R30.

On 16 December, 1993 an order was made against KE P/L in a civil proceeding. At the hearing, a director of KE P/L was refused the right to appear on behalf of the corporation, whereupon the hearing proceeded without the director taking any further part in the proceeding. On 10 March, 1994, KE P/L's application to set aside the order and rehear was refused. KE P/L appealed to the Supreme Court pursuant to s109 of the *Magistrates' Court Act* 1989 ('Act).

HELD: Appeal dismissed as incompetent.
1. The test for determining whether an order is final or not is whether the order finally determines the rights of the parties. The order made on 16 December was a final order. The refusal of the rehearing application was not a final order. Accordingly, it was not open to KE P/L to appeal to the Supreme Court under s109 of the Act.
***Carr v Finance Corporation of Australia (No. 1)* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397;**
***Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423; [1966] ALR 705; (1966) 40 ALJR 102, applied.**

2. The words "did not appear in the proceeding" in s110 of the Act apply to both kinds of final orders, that is,
(a) orders made in default of defence; and

(b) orders made after a hearing on the merits where a party did not appear at the hearing.

BATT J: *[After setting out the orders made, the question of law raised on the appeal and relevant statutory provisions, His Honour continued]*...**[4]** Certainly the order of 16 December 1993 was a final order within the meaning of s110(1) of the Act. On the objection to competency, however, the question is whether the order of 10 March 1994 is a final order within s109(1). For reasons which follow, I consider that it was not and that the objection to competency should be upheld and the appeal dismissed. The expression "final order" is not defined in the Act, but it is clear both from the context and on the authority of decisions of Fullagar J, Gobbo J and Beach J, to which I shall refer later, that it is used as the antonym of the expression "interlocutory order". It is clear law that an order of a Supreme Court or a County Court refusing to set aside a judgment obtained upon default of the defendant in filing an appearance **[5]** or delivering a defence is not a final order tor the purposes of sections such as the former s35 of the *Judiciary Act* 1903 (Cth) and s13(4)(b) of the *Supreme Court Act* 1986 (though the latter actually refers to the antonym "interlocutory judgment"): *Licul v Corney* [1976] HCA 6; (1976) 180 CLR 213; (1976) 8 ALR 437; (1976) 50 ALJR 439 and *Carr v Finance Corporation or Australia Ltd [No 1]* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397.

The rationale of those decisions is that the test applicable in Australia for determining whether a judgment is final or not is "whether the judgment or order appealed from, as made, finally determines the rights of the parties" and that an "order refusing to set aside a default judgment does not as a matter of law finally dispose of the rights of the parties, for it is open to the disappointed defendant to apply again to have the judgment set aside: *Hall v Nominal Defendant* [[1966] HCA 36; (1966) 117 CLR 423 at 440; [1966] ALR 705; (1966) 40 ALJR 102]", notwithstanding that in many cases in practice a second application "would be doomed to failure because the

issues of substance which it raised would have been decided adversely to the defendant in the first application": *Carr* at 248 per Gibbs CJ. Notwithstanding that the right to make a further application may be purely theoretical, the two most recent High Court decisions I have mentioned make it clear that the test requires regard to be had to the legal rather than the practical effect of the judgment. The test was re-affirmed by the High Court in *Sanofi v Parke Davis Pty Ltd [No 1]* [1982] HCA 9; (1982) 149 CLR 147; (1982) 39 ALR 405; 56 ALJR 259. In the High Court and in the Full Court of this court the rigour of the rule may be mitigated by the favourable exercise of the Court's power to grant special leave to appeal or leave to **[6]** appeal, as the case may be. That mitigating power does not exist in respect of appeals from interlocutory orders of the Magistrates' Court of Victoria, but the rigour of the rule can be circumvented by the obtaining in an appropriate case of judicial review under O.56 of the Rules.

Mason J in *Carr* at 254-256 considered, and in my view upheld, the submission that there was a generally accepted principle that the refusal of an application to set aside a default judgment is not a bar to the making of a fresh application. His Honour stated that two cases appeared to support the proposition. They were *Atwood v Chichester* (1878) 3 QBD 722, which did so inferentially, and *Hewitt v Mirror Newspapers Ltd* (1977) 17 ACTR 1, which did so expressly. (To these cases may be added *Seymour v Holm* [1961] QdR 214.) His Honour's references to *Hall v Nominal Defendant* show, in my opinion, that Barwick CJ (in respect of the particular type of application to which I am referring) and Taylor and Owen JJ considered that more than one application to set aside could be made. Mason J at 256 of *Carr* expressed his conclusion to the same effect by saying:

> "I can see no justification for arbitrarily imposing upon that discretion a rigid rule that the refusal of an application is a complete bar. The Court should preserve the generality of its discretion so as to protect its capacity to see that justice is done in a wide variety of cases."

The question is whether these authorities apply to an order dismissing an application for rehearing under s110 of the Act, and in particular to the order made on 10 March 1994 in this case. All of the **[7]** authorities to which I have referred concerned default judgments or orders; that is, judgments or orders obtained without a hearing on the merits. Here, however, the order of 16 December 1993 (assuming for present purposes it was made without the appellant appearing) was made after a hearing on the merits. On the same assumption, the hearing on 16 December 1993 was equivalent to the trial of a proceeding in the Supreme Court under R.49.02(1)(b) where the defendant does not appear when the proceeding is called on. In my opinion, s110, although using or, perhaps, in using the words "did not appear in the proceeding" is apt to apply to both kinds of final orders; that is, orders made (under O.10) without a hearing on the merits on default in filing notice of defence and orders after a hearing on the merits where the party did not "appear" at the hearing. Certainly this view is reflected in R.30.02(1) and Form 30A in the *Magistrates' Court Civil Procedure Rules* 1989, which have retrospective statutory approval under s16(5) of the Act and may accordingly the more confidently be referred to in the construction of s110. (I do not find it necessary to consider whether subordinate legislation can otherwise be used to construe an Act.)

It would be strange if the one section, s110, permitted (assuming that it would otherwise do so, a question I come to below) a plurality of applications for rehearing of default orders but only one application for rehearing of an order made where a defendant had given notice of defence but failed to appear on the hearing date. I can see no reason why the rationale of **[8]** the High Court cases mentioned should not be applicable to the latter type of order, assuming always that the section itself does not exclude that.

The question, then, is whether s110 is different from the various rules of court considered in the cases cited above and expressly or impliedly excludes a right to make a second or subsequent application for a rehearing, thereby making the decision on the hypothesised sole application for a rehearing that can be made a final order. Before I consider decisions on whether an order dismissing an application for rehearing under s110 is a final order within s109, I shall consider for myself the interpretation of s110 and in particular whether it renders inapplicable the rationale of the High Court cases. Clearly, in my view, s110 does not expressly state that a second application may not be made except as contemplated by subs(5). After anxious consideration, I have reached the conclusion that it does not do so by implication. In my view, although the Magistrates' Court

of Victoria is a creature of statute, its jurisdiction to entertain an application to rehear should be determined, in the absence of any necessary intendment of an implication to the contrary, by the same approach to its discretion as Mason J enunciated in relation to the discretion of the Supreme Court of New South Wales in *Carr* at 256.

The only provision in s110 that it could be suggested impliedly restricts an applicant to one application is subs(5). In my opinion, however, that subsection does not purport to specify the only case in which an applicant may make a further application and does not **[9]** work at qualification upon the discretionary power conferred by subs(1). It might do that if it provided to the effect that an applicant under the section who failed to appear at the time fixed for the hearing of the application might re-apply if the application was struck out, but must first obtain the leave of the court. But the subsection is not so structured. In my view, it simply imposes a restriction (by the requirement to obtain leave) upon the right of re-applying in the particular case specified, namely, the somewhat egregious case of an applicant failing to appear on his or her own application for rehearing of a proceeding heard previously when he or she failed to appear. The Act must, I think, be taken to have been passed against the background of the case law to which I have referred. Had the Parliament wished to restrict a non-appearing party to one application it could easily have made that clear. It may well be that the view which I have just expressed can be supported by s40 of the *Interpretation of Legislation Act* 1984, but I do not find it necessary to decide whether s110(1) "confers a power" within the meaning of s40 upon the non-appearing litigant or whether, on the other hand, it is to be confined to the conferment of powers in the domain of public law.

I turn now to decisions of this court on the question, indicating at the outset that none appears to have concerned an order dismissing an application for rehearing of a proceeding that had been heard on the merits, albeit in the absence of an appearance by the applicant. In *Murphy v Lamond and Ors*, (unreported, **[10]** 16 July 1992) Hedigan J expressly declined to express a view on the very question before me since the plaintiff there had chosen to seek judicial review under O.56. I note, however, from the recitation of facts that at least two applications for rehearing had been made and that the making of the second of those applications did not appear to excite any criticism by counsel for the defendant or by His Honour. I say "at least" two applications because there was also "an abortive application", which "went awry". It may be that this means that it was not served or was withdrawn or discontinued without a hearing on its merits and therefore I have not counted it. The second of the two applications that I have counted was one for leave to re-apply for a rehearing but why leave, possibly under s110(5), was necessary is not, I think, apparent from the facts recited. I was informed today by counsel for the appellant that in *Guss v The Magistrates' Court of Victoria and Anor* (unreported, 16 June 1994) Hayne J recited, without adverse comment, the fact of a re-application for the rehearing of a proceeding under s110. That case was one where judicial review by this court was sought and not one of an appeal to this court I should say that the recitation by Hedigan J and by Hayne J of the fact of a further application for rehearing in the cases before them cannot be taken, and I do not take it, to be a decision that a second or subsequent application is authorised by or permissible under s110.

In *Bullmore and Bullmore v Zurich Australian Life Insurance Ltd* (unreported, 24 January 1991) **[11]** Fullagar J did consider both the meaning of the expression "final order" in s109 and the interpretation of the expression "did not appear in the proceeding" in s110(1), but His Honour's consideration of the former was in relation to an order refusing an adjournment and not the order later made refusing an application for rehearing. Gobbo J in *Kennedy v Victorian Rigging Pty Ltd* (unreported, 10 August 1992) had before him an appeal from the refusal of a Master of an application for an order under R.58.09 of the Rules of this court. By reason of R.77.05(3) the appeal was, as His Honour indicated using the convenient language of former times, an ex parte application on which there was, of course, no material in rebuttal at that stage. After dealing with the question of law which the appellant said was raised by the appeal and accepting that it was arguable, His Honour turned to consider the reason for the Master's refusal to grant relief in the form of an order under R.58.09. This was that the order declining to grant a rehearing was not a final order. Gobbo J said:

> "I am satisfied, at any rate, for what I might call threshold purposes of granting this application at this stage that an order denying a rehearing where there is a final judgment in place is in my view a final order. It would be otherwise, of course, if a rehearing had been granted and then the other party had sought to challenge that because that would be obviously by its nature an interlocutory

> order. But, in this case the order was by its very nature final even though purported to take the shape of a grant of a rehearing upon conditions. If, substantively, the order granted was in effect a confirmation of the judgment and effectively a denial of a rehearing, then it is at least arguable that it amounted **[12]** to a final order. The matter may have to be pursued further, but at this preliminary stage I am sufficiently satisfied that there ought to be relief upon the grounds that I have indicated ..."

It is to be observed that His Honour's views were expressed tentatively, solely for the threshold stage and with the anticipation that the question might have to be pursued further (that is, as I understand it, on an *inter partes* hearing of the appeal), without contrary submissions and, most importantly, apparently without citation to him of any cases, and in particular the decisions of the High Court referred to above.

Finally, and most recently, the question was considered by Beach J in *Guss v Johnstone* (unreported, 23 March 1994). In that case, although the appellant (as I shall for convenience call the plaintiff in that case), the defendant below, contended that he had filed a notice of defence to the respondent's claim, no such notice had ever been received by the Magistrates' Court and a default judgment had been entered against the appellant. An application for rehearing under s110(1) was refused. The appellant appealed to this court, but because he was out of time the appeal was deemed to be an application for leave to appeal and was accordingly, by reason of R.58.16, brought by originating motion in Form 5C. The Master dismissed the motion on the ground that the order appealed against was not a final order, following the decision of the High Court in *Carr*. His Honour on appeal considered that no distinction was to be drawn between a final judgment within s35 of the *Judiciary Act* 1903 and a final order within s109 of the Act. Accordingly, applying *Carr*, he considered that the **[13]** Master was quite correct and dismissed the appeal. He pointed out that the appellant, if he had any legitimate complaint about the refusal of the application for rehearing, should have followed the procedure prescribed by O.56. His Honour was apparently not referred to the decision of Gobbo J. Nevertheless, the decision of Beach J accords with my view of the law, and unless the particular circumstances of the order of 10 March 1994 in this case, to which I shall come, make it distinguishable, I propose to follow that decision. I should add that the appellant appealed from the decision of Beach J to the Full Court and on 22 July 1994 Crockett and Nathan JJ in *Guss v The Magistrates' Court of Victoria and Johnstone* (unreported) and a similar matter with the same appellant both refused the appellant an adjournment and ordered security for costs of the appeal, leaving for the Full Court hearing the appeal the application of Johnstone for the appeal to be declared incompetent on the ground that it was interlocutory in nature and required leave.

Counsel for the present appellant naturally accepted the authority of *Carr* and the other decisions of the High Court but sought to distinguish them on two grounds. The first was that in cases under the Rules of the Supreme Court or the County Court, applications to set aside judgments are made on affidavit, whereas, it was submitted, an application under s110, although made by written application, is heard orally, it being submitted that O.20 of the *Magistrates' Court Civil Procedure Rules* 1989, relating to applications, did not apply because O.30 made, within the meaning **[14]** of R20.01, other provision. It was said that this was the general practice of the Magistrates' Court of Victoria, although that was not necessarily conceded by counsel for the respondent, at least in relation to the Melbourne Court complex. The consequence of the asserted distinction was said to be that, whereas with affidavits it could be seen on a second application whether the evidence on the first application for rehearing was incomplete or did not show merits or did not deal with the question of delay, there was a quite different question when the magistrate on the first application for rehearing was asked to find facts, especially in view of the absence of transcription of evidence in the Magistrates' Court of Victoria ordinarily. In other words, it was submitted that in the first case one knew what was before the court on the first application, whilst in the other case one did not.

In my opinion, even if O.20, and in particular that part of it which provides for affidavits to be filed in support of applications, be wholly inapplicable to applications under s110 (which I doubt), there is nothing in this ground. Whilst it may be conceded that there are and were difficulties in the recording of evidence given in the Magistrates' Court of Victoria (and its predecessors), this court has grappled with those difficulties for over a century in orders to review and (now) appeals on questions of law, as well as in other proceedings. For instance, detailed handwritten notes can be made by lawyers or litigants and used as the basis for later oral or affidavit **[15]** evidence. Furthermore, even when in the County Court or this court affidavits are used, there could be oral

evidence in cross-examination or, with any necessary leave, oral evidence-in-chief whether by deponents of affidavits or by other witnesses. In my further view, the asserted distinction does not support the particular further conclusion advanced, namely that the only re-application that can be made (being by leave) is where there has been no appearance by the applicant on the hearing of the first application, the implied rationale being that there would have been in such a case no oral evidence on the first hearing.

The second ground put forward by the appellant for distinguishing the High Court authorities was that in this case the magistrate on 10 March 1994 had dismissed the application on the ground that it was not a case where the appellant "did not appear in the proceeding" at the time of the hearing on 16 December 1993. This, in my view, is a much more substantial point. *[After considering the evidence concerning the Magistrate's decision, His Honour continued]...***[18]** The magistrate, therefore, when he expressed himself in terms of discretion, could not, whether rightly or wrongly, have meant to find or hold, and should not be taken to have found or held, that the appellant had appeared on 16 December 1993. It might have been different had the magistrate said **[19]** and there is no suggestion that he did say this or that he should have said this - that he found that the present appellant had not appeared on the former occasion, but that even if he were wrong in that he would have dismissed the application on discretionary grounds, which is in fact the approach that Fullagar J took in the case to which I have already referred, *Bullmore's* case. I cannot confess to finding the ascertainment of the ground or grounds of the magistrate's decision easy. Different views can possibly be taken of the material or at any rate of parts of the material, and counsel for the respective parties have usefully and eloquently highlighted the parts that favour their respective parties and the inferences to be drawn from those parts.

It seems to me that the balance of the material points in favour of the conclusion which I have expressed and that this conclusion is confirmed when the principle, still applicable now that review is by way of appeal on a question of law, is applied that where there is a dispute between appellant and respondent as to what occurred below the affidavit or affidavits on behalf of the respondent will, in the absence of factors suggesting independently that that material is incorrect or incomplete, be adopted at any rate so far as the respondent's version supports the order below.

Accordingly the second ground of distinction, quite specific to the order of 10 March 1994, is not in my opinion made out. **[20]** I would add, for completeness, that although it does not appear to have arisen in any case, the same question as that which I have just been considering would arise if a magistrate hearing a application for rehearing were to dismiss it or were to be said to have dismissed it on the ground that the order sought to be set aside was not a final order. For the reasons I have given, I uphold the objection to competency. It is therefore inappropriate for me to discuss the merits of the appeal further than I have already had to do in order to consider the last discussed ground of distinction. Nor is it appropriate to say anything about the mode of exercise of discretion by the magistrate on 10 March 1994, which is not a question raised by the appeal. Where a proceeding in this court is dismissed as incompetent, that is, where the court has no jurisdiction, this court nevertheless has jurisdiction under s24 of the *Supreme Court Act* 1986 and R.63.03(1) to award costs: *In re Crittendon; ex parte Law Institute of Victoria* [1958] VicRp 19; [1958] VR 101; [1958] ALR 496. As that case shows, apart from statute, a superior court has power to award costs in a proceeding which it does not have jurisdiction to hear. For the foregoing reasons there will be orders in accordance with the following minutes:

1. Oral objection to competency or appeal upheld.

2. Appeal dismissed as incompetent.

3. Appellant pay the first respondent's costs of the appeal.

Solicitors for the appellant: Hyetts. Solicitors for the first respondent: Fijalski and Associates.
