15/94

SUPREME COURT OF VICTORIA

CHAMPION COMPRESSORS LTD v ANDREKO NOMINEES PTY LTD

Nathan J

18 March 1994

CIVIL PROCEEDING – VENUE – CHOSEN BY PLAINTIFF – NO OBJECTION BY DEFENDANT – MATTER SET DOWN FOR HEARING – PARTIES READY TO PROCEED – ADJOURNED BY MAGISTRATE TO ANOTHER COURT – WHETHER PROPER EXERCISE OF DISCRETION: *MAGISTRATES' COURT ACT* 1989, S3; *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, O29.

A civil proceeding initiated at Melbourne was set down for a hearing at that Court after all interlocutory steps had been completed and a pre-hearing conference conducted. The defendant at no stage objected to the plaintiff's choice of venue. When the matter came on for hearing at Melbourne, the magistrate indicated that the wrong venue had been selected and stood the matter down. When it was not reached that day, the magistrate adjourned the proceeding to a date to be fixed at another court and made an order for costs against the plaintiff. On appeal—

HELD: Appeal allowed. Orders set aside. Remitted for priority hearing at Melbourne.
(1) Notwithstanding the definition of "proper venue" in s3 of the *Magistrates' Court Act* 1989, O29.01 of the Rules opens up venue selection in civil proceedings to the initiating party. The court may transfer the proceeding to another venue if the defendant objects but subject to the convenience of the parties.

(2) In view of the history of the proceeding, particularly the previous decisions in interlocutory matters and the fact that the defendant had not objected to the plaintiff's choice of venue, when the matter came on for hearing the proper and appropriate venue had become Melbourne. Accordingly, the magistrate was in error in transferring the proceeding to another venue.

NATHAN J: [1] I am called upon to judicially review an order of a magistrate which required the plaintiff to pay the defendant's costs. The issue comes before me by way of Order 56 of the *Rules of the Supreme Court*, which is the vehicle allowing judicial review of interlocutory orders.

It is contended the magistrate's discretion miscarried and is unsustainable, given the peculiar circumstances of the case. The plaintiff readily recognises the heavy onus placed upon it to overturn the strong presumption that the exercise of a judicial discretion should be affirmed unless it is clearly and patently wrong. The *locus classicus* in this area is the *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, which was preceded by a similar High Court decision, *House v King*, (1936) 55 CLR 499 and canvassed with approval by this Court in *Urban No 1 Co-operative Society v Kilavus and Anor* [1993] VicRp 69; [1993] 2 VR 201; [1993] ANZ Conv R 397; [1992] V Conv R 54-452. One might also refer to the very strong expressions of view that "the judicial exercise of discretion should not be amenable to review unless error is clear or that the appellant would suffer substantial injustice if the order were permitted to stand, or it may be said that the order is so unreasonable that it is revealed to be plainly unjust in such a way that the appellate court could readily infer there has been a failure to properly exercise a discretion". These comments are found in *Spatt v Spatt* [1970] VicRp 14; [1970] VR 104 at 109; [1970] ALR 350.

Having confronted the plaintiff with the hurdle it must surmount, I can come now to a chronology of the facts **[2]** giving rise to the review. In May of 1992, the plaintiff issued proceedings in the Magistrates' Court demanding payment for work and labour done pursuant to a contract. It was met by a counterclaim which far exceeded the initial claim. In any event, the whole dispute was discussed at a pre-hearing conference conducted before a Deputy Registrar of the Melbourne Magistrates' Court on 8 October 1992. Solicitors for the parties attended that conference. What needs to be stated at the outset is that the plaintiff selected as its venue the Magistrates' Court at Melbourne. The choice was not disputed by the defendant, although it must be said that both parties have places of business closer to the Magistrates' Court at Frankston, and that the

agreement to do the work and labour, together with the facts giving rise to the counterclaim, all arose closer to Frankston than to Melbourne. At no time, either at the pre-hearing conference or subsequently did the defendant ever contest the venue.

On 13 January 1993, the defendant made an application for inspection and testing of materials in the plaintiff's hands. The issue was contested before a magistrate at Melbourne. *Viva voce* evidence was given and an order in favour of the defendant was made by a magistrate sitting at Melbourne. On 15 April 1993, the proceedings were adjourned by consent and a special fixture set and arranged for 2 August 1993. Again, the defendant did not contest, but must be seen to have assented to the adjournment of the hearing of the case to Melbourne on that date. The case came on for hearing that day before a magistrate at Melbourne, when he was handed **[3]** particulars of the complaint. Of course, he must have had the court file before him. He was apparently anxious to hear the case but because of its duration, a special fixture was set for 14 February 1994. Again, there was no complaint about the venue and the defendant acquiesced, at the very least, and agreed quite willingly to a further reference of the case to a magistrate at Melbourne.

On 20 October 1993, a further interlocutory hearing was conducted before a magistrate at Melbourne. This related to interrogatories and further discovery. It was a contested issue between the plaintiff and the defendant and, as I have already observed, conducted before a Melbourne magistrate. On 14 February 1994, the matter came on for hearing, as a result of the order of the magistrate of 2 August 1993, whereupon the magistrate assigned to hear the case confronted the plaintiff with a complaint that the wrong venue had been selected. The magistrate said to plaintiff's counsel that the matter should be heard at Frankston, and that he proposed not to deal with the matter but put it on the bottom of the list, thereby ensuring that it would not be reached. The case could not take advantage of the special fixture arranged for it. He invited an application from the defendant's solicitors as to costs. An application was made and after some discussion as to the costs of attending experts, preparation and conferences, an order in the sum of $3,471.00 was made against the plaintiff. It is that order which the plaintiff now seeks to review.

The arguments for both plaintiff and defendant can be shortly stated. For the plaintiff, it is, that the **[4]** Magistrates' Court processes had been pursued with the consent of the defendant on the basis that Melbourne would be the venue for hearing. Accordingly, the magistrate, in the light of the history to which I have just adverted could not have exercised his discretion in such a way as to direct the hearing to Frankston or, and additionally so, order that the plaintiff pay the defendant's costs of the day. It is conceded by plaintiff's counsel that the proper venue was Frankston. Reference was made to the *Magistrates' Court Act*, which defines "proper venue" in s3 thus:

> "in relation to a civil proceeding, means the court that is nearest to—
> (i) the place where the subject-matter of the complaint arose; or
>
> (ii) place of residence of the defendant."

The *Magistrates' Court Civil Procedure Rules*, Order 29, says this in relation to the venue of the court:

> "Rule 29.01
> (1) A civil proceeding must be issued from the proper venue of the Court.
>
> (2) Subject to paragraph (3), if—
> (a) the defendant objects that the venue from which process is issued is not the proper venue of the Court;
> and
> (b) the Court is satisfied, having regard to the convenience of the parties, that the proceeding should be transferred—
> the Court may adjourn the proceeding to another venue or court.
>
> (4) Notwithstanding that a proceeding is issued from a venue of the Court which is not the proper venue within para. (1), the Court may proceed to hear and determine the proceeding at the venue from which the proceeding was issued or at any other venue as the court thinks fit."

In my view, the rule of court opens up venue **[5]** selection to the initiating party. That choice may become the subject of objection from either the defendant or the court itself. If the Court is satisfied, having regard to the convenience of the parties, that the matter should be transferred from the proper court to another one, it may do so. One should note that the court's initiative is one which must be addressed to, or have regard to, the convenience of the parties. I immediately interpolate that no question was asked by the magistrate here as to what was the convenience of the parties, and indeed, he was confronted with both parties being prepared to argue and despatch the case then and there before him. The inference is compelling that the convenience of the parties was that the matter be despatched at Melbourne, and before the magistrate who had been selected to hear the special fixture.

I move on to a consideration of 29.01(4). Its terms permit a venue other than the proper one, as defined in the section, to be empowered to hear a case and further grants to the magistrate a discretion encapsulated in the terms "as the court thinks fit". Accordingly, it was at all times possible for the plaintiff to have selected a venue other than Frankston and to have proceeded on that basis. It did so. The defendant did not object. The magistrate did not have regard to the convenience of the parties *a fortiori* the court itself which had selected the hearing day. The magistrate apparently thought, under sub-rule (4), that the requirement to proceed at the proper venue was one which gave him discretion to direct the case to that site. If he did, he was acting administratively and not judicially. The power of the **[6]** magistrate to uplift or direct the proceedings away from the one selected by the parties (I use the term in the plural, because I am satisfied that the defendant had chosen the court at Melbourne just as much as had the plaintiff) is a power which must be governed by the circumstances of the case. It should not be exercised administratively in a Sovietesque manner. Even if the magistrate had made the order judicially the same principle applies. However in this case he acted, not to resolve a dispute between the parties but out of administrative rectitude. The magistrate seems to have assumed that he had power only to direct the matter to the proper court, under the terms of the rule; that is simply incorrect and a far too restricted meaning of the words in sub-section (4). He could have directed it anywhere.

I turn to encapsulate the case of the defendant. It says the magistrate had an unfettered discretion under the terms of the Act and the Rules, so that if the definitional section is to be given meaning, a case must proceed before the proper venue, as defined. It says that the magistrate charged with hearing the case should not be seen as constrained or in any way obliged to follow the decisions of magistrates who had preceded him in hearing various interlocutory aspects about the case.

It can be seen the two arguments cannot be reconciled. I am satisfied, however, that the exercise of the magistrate's discretion in this case miscarried and did so obviously and patently for the following reasons:

- Both parties had assented to and agreed to a venue other than the proper one.

- Both parties had conducted, in an adversarial manner **[7]** part of the case in a venue other than the proper one.

- No objection at any time was raised by the defendant as to venue; quite to the contrary. It appeared on the day specially fixed for hearing equipped with its experts and counsel entirely ready to dispose of the case. Both parties were prejudiced by the magistrate's decision to give the case no priority, thereby effectively ensuring it would not be heard on that day. Both parties then had their prepared cases adjourned and set aside to another time and date at cost and inconvenience to them, a factor not considered by the magistrate.

Justice is neither timeless nor priceless. People who administer justice must consider their discretion in the light of its public efficacy and the way it will be perceived by the people to whom justice is owed. Playing games with the administration of justice is to be deplored. I consider the magistrate exercised his discretion in this case in a game-playing way, regardless of the interests of the litigants, regardless of the interests of the public. He neither edified himself or the judicial system.

The case falls within the concept known in European law as *detournment de pouvoir*, that is,

an abuse of a position of power. The concept was alluded to in *R v Inland Revenue Commissioners; ex parte Preston* [1984] UKHL 5; [1985] AC 835; [1985] 2 All ER 327; [1984] 3 WLR 945; [1985] BTC 208. In that case, the House of Lords, hearing an appeal in respect of decisions of the Inland Revenue Commissioners decided that a decision was open to judicial review where administrative power had been abused. It said this in respect of the **[8]** decision of the taxation commissioners which could be likened to a breach of contract or a breach of representation, per Lord Templeman at 867:

> "Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power. There may be circumstances in which the court in its discretion might not grant relief by judicial review, notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power, if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."

The situation is not directly applicable, but it is, by way of analogy, helpful. In this case, the Magistrates' Court at Melbourne was seized of this matter on four occasions prior to the special fixture which came before this magistrate. The parties had argued by way of counsel and had addressed their own administrative processes to the court at that location. The court took on the conduct of the case and must have given the impression to the parties that it was prepared to conduct it to conclusion. No other conclusion is possible in view of the magisterial decision to grant the case a special fixture and a special hearing time, and allot the court calendar accordingly. The magistrate's discretion was to my view constrained by the previous conduct of his co-ordinate judicial officers. His discretion as to venue was not one which was afresh but should have been considered and exercised in the light of the prior judicial behaviour. The parties had come to rely upon previous adjudications as to location, so much so, that they appeared on the day prepared to argue the **[9]** case to decision. In my view, it amounts to an incorrect, one might almost say, perverse exercise of a discretion to send the parties away at that juncture on the ground that some three years earlier the plaintiff may not have selected what was then said to be "the proper venue". By the time the matter came before the magistrate, Melbourne had become the proper and appropriate venue.

Discretion must be exercised judicially in the context of the entire case. The antecedent history of the case must be taken into account and should not have been ignored. A highly relevant and pertinent factor was not taken into account by the magistrate here. His discretion, or exercise of it, falls clearly into the class of being exercised in innocence of a relevant and pertinent fact, in this case, the antecedent history.

Accordingly, I am now empowered, having reviewed the decision, to exercise my own discretion. I shall set aside the magistrate's order that the plaintiff pay the defendant's costs. I shall order that the matter be remitted for hearing as soon as practicable by the Magistrates' Court at Melbourne, and to be given priority in preference to other cases by virtue of the aborted special fixture. I shall direct that the matter be heard by a magistrate other than that from whom this appeal emanates. I shall hear counsel as to costs.

APPEARANCES: For the applicant Champion Compressors: Mr M McDonald, counsel. Andrew Gray & Assocaites, solitors. For the second-named respondent Andreko Nominees: Mr GW Robertson, cousel. Barker Gosling, solicitors.
