15/04; [2004] VSC 59

SUPREME COURT OF VICTORIA

MARYVELL INVESTMENTS PTY LTD v COADYS & ANOR

Hansen J

6 February 2004

CIVIL PROCEEDINGS – APPLICATION BY DEFENDANT TO MAGISTRATE FOR AN ADJOURNMENT – PREVIOUS ADJOURNMENTS GRANTED TO APPLICANT – APPLICANT PRODUCED LETTERS FROM MEDICAL PRACTITIONER TO SHOW THAT DEFENDANT WAS MEDICALLY UNFIT TO PARTICIPATE IN THE PROCEEDING – RECOMMENDATION BY MEDICAL PRACTITIONER THAT PROCEEDINGS BE DELAYED UNTIL APPLICANT'S CONDITION WAS FURTHER ASSESSED – APPLICATION REFUSED BY MAGISTRATE ON GROUND THAT MATTER MIGHT NEVER BE HEARD – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION.

1. Whether an adjournment will be granted at the request of a party depends on the justice of the situation in the particular circumstances. Normally an adjournment will be granted if any prejudice to the opposite party can be cured by an award of costs or some other appropriate term; however, no party has an ongoing right to the adjournment of a proceeding.

***State of Queensland v JL Holdings* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294, applied.**

2. Where a magistrate refused an application for an adjournment on the ground that the materials were so vague that he could never have any confidence that the matter would ever be heard, the magistrate failed to give appropriate consideration to the application. It was a question of how the application was to be appropriately dealt with in light of the materials before the court, not whether it might ever be heard at all.

HANSEN J:

1. This matter has been well argued by counsel and I have reached a view as to what should happen with it. I think that it is better in the interests of the parties that I now express that view without taking time to refine the language which I may use or to bring greater elaboration to the reasons.

2. The application is for judicial review of a decision of a magistrate, sitting in the Magistrates' Court at Melbourne on 3 September 2003, to refuse to adjourn the hearing of a proceeding and accompanying counterclaim. The parties to the proceeding are a firm of solicitors, Coadys, as plaintiff, and Maryvell Investments Pty Ltd as defendant. The claim by Coadys is for legal costs in acting for Maryvell. The counterclaim by Maryvell is presumably one that is based upon an allegation of negligent performance of a retainer. I have not seen the counterclaim nor, for that matter, have I seen the claim but for present purposes that does not matter.

3. It is regrettable that the parties have become involved in such expensive and protracted litigation as the evidence indicates that the claim is for a sum of only $3,800 and the counterclaim for some $20,000. In any event, the Magistrate, having refused the application for an adjournment, proceeded to hear the claim and he made orders on the claim with interest and costs and dismissed the counterclaim with an order for costs.

4. The application for judicial review is based on a contention that in denying the application for an adjournment the Magistrate denied Maryvell procedural fairness or natural justice. The application was based on an affidavit sworn by the sole director of Maryvell, Constantine George Velissaris on 2 September 2003 which was responded to by an affidavit by David Michael Brett, a solicitor in the employ of Coadys, also sworn on 2 September 2003.

5. Mr Velissaris appeared before the Magistrate who permitted him to make submissions on behalf of the company in support of his application for an adjournment. In the course of those submissions, Mr Velissaris amplified the grounds of the application. They concerned Mr Velissaris' health.

6. There were exhibited to Mr Velissaris' affidavit a letter from a Dr Smith dated 13 August 2003. He was a general practitioner at the Brunswick Medical Centre and his brief letter referred to Mr Velissaris suffering diabetes, hypertension and cardiac disease and a stress condition exacerbated by his impending court cases. The letter further said that he was to undergo cardiac investigation at Royal Melbourne Hospital in September and the doctor recommended that his cases be delayed until his medical status is clarified.

7. Then there were two letters from Dr Cochrane, also of the Brunswick Medical Centre and each dated 22 August 2003 which further referred to and indeed elaborated somewhat upon the medical condition of Mr Velissaris. One letter from Dr Cochrane was directed to Cardiology Outpatients, Royal Melbourne Hospital, and may be seen readily to be a request to expedite review by the cardiology unit to the extent possible of Mr Velissaris and to report back to Dr Cochrane. Dr Cochrane's letter refers to investigation at the hospital in May and June as to chest pain which comes on with exertion; to angioplasty having been administered in the past; to postponement of his review to late September or early October; and to various medications that Mr Velissaris was taking.

8. The second letter of Dr Cochrane stated, in addition to that stated earlier by Dr Smith, that Mr Velissaris was having angina reasonably frequently and that this was likely to be aggravated by his impending court case; and that he was to undergo cardiac investigation at Royal Melbourne Hospital in September. He expressed the opinion that Mr Velissaris was unfit to participate in a stressful court case. Dr Cochrane recommended that the case be delayed until his condition had been further assessed and managed.

9. Finally, the exhibits to Mr Velissaris' affidavit included a note from the Royal Melbourne Hospital of an appointment on 29 October 2003 at the cardiac clinic.

10. The affidavit of Mr Brett recited a prior history of applications for adjournment. It would appear from the transcript that the complaint had been filed on 18 July 2002; that following pleadings there was a pre-hearing conference in December 2002; and that the case was first fixed for hearing on 25 March 2003. It was thereafter refixed for 13 May 2003, then for 30 June 2003 and finally for 3 September 2003 when the application for the adjournment in question was made.

11. Mr Brett's affidavit traces the matter of these adjournments through and indicates that they were brought about by requests of Mr Velissaris based upon his medical condition. These requests were acceded to, doubtless with increasing hesitation and concern, and with what I think was an increasing degree of scepticism and requests for particularity in justification. So one comes to the application on 3 September.

12. I have the benefit of a transcript of the hearing before the Magistrate. I have had the opportunity of reading it before the hearing commenced and I have been taken through it by both counsel. It brings to mind that which one commonly has as a reaction on reading such transcripts, that is, that Magistrates daily face a very difficult task; they have to deal with many cases with little time for consideration and must at times be driven almost to the point of distraction for one reason or another.

13. The application by Maryvell was, as I have said, made by Mr Velissaris himself in the first instance; it was not made by a legal practitioner engaged by the company. Mr Velissaris described to the Magistrate what his condition was. He stated in the course of the submissions that he was not in a position to run the case by any means and said he was not supposed to be at court, that doubtless referring, and it should be taken as referring, to the medical evidence. He said he could not go ahead with the case by any means. He said that his company had a good case; he requested an adjournment, having given notice, and concluded by saying that he wanted to deal with the case but it was impossible to do so and his doctor had ordered him repeatedly not to have stress.

14. There were some brief submissions by counsel for Coadys, and the Magistrate then gave a ruling upon the application. In his ruling the Magistrate referred to the chronology of events in the proceeding, so far as it was relevant to do so, to the application for adjournment having formally been made the day before, to the materials relied upon in support of it, and then concluded that

the application should be refused, saying this:

> "The reality of the world is that on the material before me it is not compelling that I adjourn the applications today and in any event it is so vague as to what may or may not happen in the future that I can never have any confidence, if I adjourned it today, that it would ever be a matter that would be able to be heard because of Mr Velissaris' health, whatever that is."

15. The Magistrate referred to Mr Velissaris suffering from diabetes, hypertension and cardiac disease and referred to the materials placed before him in this way, that they "Would never give me any confidence that any day in the future, the foreseeable future, there would be a day on which Mr Velissaris would be in a fit state, even if I thought that the evidence was compelling that he wasn't in a fit state", to prosecute the case. The application was rejected.

16. The matter did not end there as the transcript reveals that with one or two interruptions, which included Mr Velissaris leaving and then returning with a solicitor and the solicitor then leaving, and then the Magistrate commencing to hear the case, that the case proceeded to the point where the Magistrate ultimately gave judgment.

17. The solicitor who appeared, it seems to me, reading the transcript and regarding the matter overall, and in that respect it is difficult to understand exactly what happened when a particular adjournment occurred for discussions to take place between the parties, came to seek an adjournment but was rather put off from that by reason of what the Magistrate said and the fact that there were no further materials to place before the Magistrate. That seems to be the explanation, combined with the Magistrate's commitments, why he did not ask for an adjournment even for a short time, say up to a week, to be able to place some further materials before the court, with or without terms of paying costs in the meantime, which would be a not unexpected thing in such circumstances, and the solicitor left, saying, as it is recorded in the transcript, "Your Worship, the situation is that the parties have been unable to arrive at any agreement. I am unable to present any additional material to what was presented to you this morning. Therefore, I am in no position to make an application for an adjournment, sir. As indicated, I am also in no position to represent my client at the hearing. I understand what the consequences of that will no doubt be, Your Worship. That is my position." The Magistrate then said, "Well, the matter will proceed". The matter did proceed and for a part of the time Mr Velissaris was present in court but he, too, left, before there was a final adjudication.

18. It has been said time and time again, that whether an adjournment will be granted at the request of a party depends on the justice of the situation in the particular circumstances and it has been said for a long time now, and it was referred to by the High Court in *State of Queensland v JL Holdings*[1], that normally an adjournment will be granted if any prejudice to the opposite party can be cured by an award of costs or some other appropriate term. Regrettably, in this case, the Magistrate, as I read the transcript, never came appropriately to consider that proposition.

19. Here the application for an adjournment was opposed. Perhaps because the applicant for the adjournment was not represented by a lawyer, the application was not made on the basis that the applicant may have to pay the costs of the adjournment or bear some other term that might ameliorate the postponement of the case. No party has an ongoing right to the adjournment of a proceeding and this was the fourth fixture, an application for the adjournment of which might ordinarily therefore have been approached with some trepidation as to its success. For some reason, as I read the transcript, counsel appearing for Coadys did not come to the point of suggesting terms, whether costs or otherwise, as the price of an adjournment. It is not that he was under any obligation to do so. However, it might have been suggested that the matter had gone so far that an appropriate term, apart from costs, was that subject to further order or agreement of the parties Maryvell put some money aside, whether in whole or part of the claim and whether in court or otherwise. Perhaps as a result of that or the approach of Mr Velissaris, the Magistrate, so far as the transcript is concerned, did not consider whether any prejudice to Coadys might satisfactorily be catered for by an order for costs or otherwise. Having formed the view as to the unsatisfactoriness of the materials in support of the application, the matter stopped there. As to the reasons which the Magistrate expressed, I would say this further. The matters that were referred to in the medical reports indicated a serious state of affairs as to the health of Mr Velissaris. That was apparent on the face of the documents. There was an opinion of Dr Cochrane, apart from the other matters, as to Mr Velissaris undertaking a court case.

20. It is difficult in the light of the pressures operating in a busy court and without the benefit of considered submissions from an independent lawyer, to deal with such materials, but there was clearly an expressed view by Dr Cochrane and references to angioplasty and cardiac disease. The course that might have been taken in relation to such materials was to adjourn the proceeding for a short time, perhaps a week, perhaps more, perhaps something else, whatever the Magistrate thought in light of the circumstances, for the purpose of and if necessarily requiring evidence to be given to the court in order to produce an appropriate level of satisfaction in the court one way or the other. In that way, the court is not merely speculating as to the correctness or otherwise of a medical practitioner's report and opinion and is generally proceeding on far safer ground.

21. The Magistrate's statement that the materials were so vague as to what may or may not happen in the future that he could never have any confidence that it would ever be a matter that would be heard, seems to me to go quite beyond the materials. It reflected, if I may say so with respect to the Magistrate, doubtless, an element of frustration. The question was not whether the case would ever be heard. The Magistrate was not required to make a prognostication of such a type, and he was not in a position to do so. It was a question of how the application was to be appropriately dealt with in light of the materials before the Court, not whether it might ever be heard at all.

22. It seems to me, not without some hesitation and having given the matter considerable thought, that the case falls on the line that the Magistrate did fail to give appropriate consideration to the application and in a way that may properly be described as denying procedural fairness.

23. The originating motion was amended subsequent to its original filing to add some grounds. The initial ground and the ground which I uphold, is that the refusal to adjourn the proceeding deprived the plaintiff of natural justice. Three further grounds have been added. Ground 3 is not pressed as it is said by counsel for Maryvell that it stands for the same point as the initial ground 2. Ground 4 has already been dismissed by the Master. Ground 5 is not pressed. Accordingly, it is not necessary to say anything about those other grounds.

24. For the reasons that I have expressed, I make the following orders, subject to anything that counsel may say:

25. 1. The orders made by the Magistrates' Court on 3 September 2003 be set aside.

26. 2. The proceeding be remitted to the Magistrates' Court for hearing by a different Magistrate.

27. (Discussion re costs).

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[1] [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294.

APPEARANCES: For the plaintiff Maryvell Investments: Mr MA Black, counsel. Efron & Associates, solicitors. For the defendant Coadys: Mr PG Lovell, counsel. Coadys, solicitors.
