54/83

SUPREME COURT OF VICTORIA

TUCKER v CLISBY Pty Ltd t/as ASTRA BILLIARDS and ORS

Gobbo J

9 September 1983

PROCEDURE – ADJOURNMENT OF INFORMATION – WHETHER ADJOURNMENT APPROPRIATE PENDING RESOLUTION OF "TEST CASE".

When 3 informations came on for hearing, C. P/L. applied for an adjournment on the ground that these cases raised an issue as to the onus of proof that was to be applied by the court, and that this issue was the subject of an order to review in another case which was expected to be resolved by the Supreme Court. If that challenge succeeded, then it was submitted that it would provide assistance to the court when dealing with the informations against C. P/L. The magistrate adjourned the informations to a date to be fixed being not earlier than 2 months from the initial return date. Upon order nisi to review—

HELD: Order absolute.
1. Unless there are circumstances that warrant deferring a matter for a limited period to enable particular assistance to be given and unless there are cogent grounds so far as the disposition of business in, and the convenience of the court, generally, the court should proceed to dispose of the matters before it.

R v The Public Service Board of State of Victoria **[1948] VicLawRp 53; (1948) VLR 310; [1948] 2 ALR 405, applied.**

2. As the adjournment was of an indeterminate nature, that it was not clear when the "test case" was due to be heard, that it was not clear whether the issue raised was likely to be the subject of the "test case", and that the issue raised was bound to fall for decision in the hearing of the informations, there was an element of speculation about whether resolution of the "test case" would be of any assistance, and accordingly the magistrate's discretion miscarried.

GOBBO J: *[After setting at the facts, His Honour continued]:* … **[2]** As a matter of general principle it is clear that a court, including a Magistrates' Court, has a discretion to adjourn proceedings before that court. It is also clear that that discretion must be exercised judicially. It is not necessary on this occasion to attempt to set out criteria relevant to the judicial exercise of that discretion. They will, of course, vary with the circumstances of the case before the court. It is sufficient to say that it is open to a Stipendiary Magistrate to adjourn proceedings before him where he is satisfied on material before him that a point that might be properly described as a "test case" point is about to be resolved which will obviate it having to be argued and decided before him and which may obviate a lengthy hearing before him. It may even be that in certain circumstances the Magistrate would be entitled to adjourn proceedings to await the decision of a superior court even where no lengthy hearing of the matter was involved before him. It will, as I say, depend on the circumstances of each case.

In the present case, however, I am satisfied that the discretion miscarried for the following reasons. In the first place, the adjournment that was granted was one of an indeterminate and unspecified nature in that it was adjourned to a date no earlier than two months and upon the basis, in effect, of awaiting the resolution of a case, the decision in which might take a considerable time to secure from the court. In the event, it turns out that it may be that this matter will shortly be resolved, but on the material before the learned Stipendiary Magistrate it was not by any means clear what that date was likely to be. Secondly, it was not, in my view, sufficiently clear on the material before the learned Stipendiary Magistrate that the point said to arise in the case, the point which was one of the grounds of the case on review, was bound or even very likely to be the subject of actual decision in that review, there being some eight grounds in the order nisi in that case. In those circumstances, there was an element of real speculation about whether or not there would be real assistance provided to the learned Stipendiary Magistrate if he awaited the resolution of the other case. Thirdly, it was not, **[3]** in my view, sufficiently clear that on the

material before the learned Stipendiary Magistrate that the onus point, which was one of the grounds of the order to review, was bound to fall for decision in the case before the Stipendiary Magistrate. I refer to this third ground with some hesitation, however, since it is not by any means clear on the material precisely how this matter emerged in the various submissions that were made.

A further ground of attack was made upon the decision of the learned Stipendiary Magistrate based upon the fact that he had relied upon submissions rather than cause the defendant to put material, whether by affidavit or orally, before him. In fairness to the applicant, it was not a point that was pressed before me, although I notice that in argument before the Stipendiary Magistrate some emphasis was placed upon that. It is not necessary for me to make any final decision on this matter, but I indicate that it would normally be a matter for the court to satisfy itself as to the material that it was prepared to rely upon. As a matter of ordinary and efficient disposition of business in court it is not infrequent for the court to rely upon submissions from representatives of the parties, even though those submissions are not formally verified by oral evidence or by affidavits.

It seems to me that it is a matter for the court to be satisfied in the particular circumstances of the case as to whether the nature of the material was such that it should be acted upon without formal verification. I would not be prepared at this stage to give any indication that as to this the learned Stipendiary Magistrate was in error. On the contrary, it seems to me that he gave careful consideration to this matter and heard quite lengthy submissions on behalf of the defendant. I well understand the desire of the learned Stipendiary Magistrate to secure the assistance of a ruling of the Supreme Court if that was readily available, but for the reasons that I have set down this was not an appropriate case for the **[4]** exercise of the discretion in that that discretion had not proceeded in the way it should have. That is not to say that I am supplanting the actual exercise of discretion. I am merely indicating the reasons why this court finds that that discretion had not been exercised according to the appropriate criteria.

It is not necessary to refer to any authority, although there is an illustration of the principle that courts should proceed to the disposition of the business before them and not, as it were, defer decision in the expectation of the resolution of what are said to be challenges to the legislation. In *The Queen v The Public Service Board of the State of Victoria* [1948] VicLawRp 53; (1948) VLR p310; [1948] 2 ALR 405, it was submitted at the outset that the order nisi hearing should not proceed because the legislation in question was the subject of a pending High Court appeal. O'Bryan J declined to give effect to that application on the grounds that he thought it would be wrong for the court to refuse to exercise the jurisdiction vested in it of controlling the Board's activities if error appeared. He said:

> "... this Court, in matters properly before it, should ensure that effect is given to the law of the State, including therein any Victorian statute which the State is administering on the basis that such statute has been validly enacted. Moreover, if the Board has made an error in law in this case, it may, unless corrected, repeat the error in other cases before *Wenn's Case* is decided. On the other hand, if I made an order against it can, by instituting on appeal, keep the position in this case open."

For these reasons he then proceeded with the hearing and declined the application to defer further hearing of the matter. A similar principle, in my view, applies in this case. Unless there are circumstances that warrant deferring the matter for a limited period to enable particular assistance to be given, and unless there are cogent grounds, so far as the disposition of business in the court and the convenience of the court, such as, for example, **[5]** the avoiding of a lengthy hearing, then in the ordinary course the court should proceed to dispose of the matters before it. For all these reasons, these orders nisi should be made absolute.
