09/09; [2009] VSC 111

SUPREME COURT OF VICTORIA

SLAVESKI v ROTSTEIN & ASSOCIATES & ANOR

Smith J

16 February, 3 April 2009

BIAS - CIVIL PROCEEDING - WHEN CASE BEGAN MAGISTRATE INDICATED THAT HE WAS A PARTNER IN A LAW FIRM WHO HAD PREVIOUSLY ACTED FOR THE DEFENDANT - DEFENDANT SAID THAT HE HAD NO CONCERNS ABOUT THE MAGISTRATE DETERMINING THE CASE - CASE PROCEEDED - MAGISTRATE MADE RULING ON THE RELEVANCY OF A NUMBER OF DOCUMENTS ADVERSELY TO DEFENDANT - AN APPLICATION FOR THE MAGISTRATE TO DISQUALIFY HIMSELF WAS REJECTED - THE FOLLOWING DAY DEFENDANT INFORMED THE MAGISTRATE THAT HE HAD WRITTEN A LETTER TO THE CHIEF MAGISTRATE IN WHICH HE RAISED THE ISSUE OF BIAS - AFTER READING THE LETTER THE MAGISTRATE DISQUALIFIED HIMSELF - PROCEEDINGS REQUIRED TO BE ADJOURNED TO ANOTHER DATE - APPLICATION BY PLAINTIFF FOR COSTS THROWN AWAY - APPLICATION GRANTED - WHETHER MAGISTRATE IN ERROR.

1. There was no basis upon which the Magistrate should have disqualified himself when the matter was first raised. The link was extremely remote, he was no longer a member of the firm in question and had not been for some two years and the defendant indicated that he did not want him to disqualify himself.

2. The rulings of the Magistrate were justified and the Magistrate did not demonstrate bias in the way he had conducted himself subsequently in the proceedings.

3. In relation to the role played by the notes relating to the conversation with a Deputy Chief Magistrate, there was a connection in time, but the Magistrate acted as he did because the defendant now relied upon the connection with the solicitors, an issue which the Magistrate had raised the previous day.

4. In relation to the making of the cost orders, the Magistrate revealed neither actual bias nor provided a reasonable basis for concluding apprehended bias. In fixing the costs, he was discharging a role required of him. He did nothing more than address the obvious and did not give any biased assistance to counsel for the plaintiff solicitor or do anything that would support a conclusion of apprehended bias. Accordingly, nothing occurred that should have given any independent reasonable observer any concern about real or apprehended bias on the part of the Magistrate. There was no denial of natural justice. As events unfolded, all the relevant decisions of the Magistrate, including the costs order, were reasonably open to him.

SMITH J:

The proceedings – originating motion

1. This is an application by Originating Motion for judicial review of an order made by the Melbourne Magistrates' Court on 1 April 2008 that Mr Slaveski pay $7,115.90 in costs to Rotstein & Associates (Rotstein), the first defendant in this application.

2. On 13 May 2008, Mr Slaveski was served with a Bankruptcy Notice from Rotstein in respect of the costs order. On 30 May 2008, Mr Slaveski filed an application in the Federal Magistrates' Court relating to the bankruptcy notice and the present proceeding seeking to have the costs order dismissed.

3. The documentation in this proceeding has been criticised by counsel for Rotstein. Grounds are not specified and, of course, the nature of the proceedings imposes constraints on what may be raised by the plaintiff. Counsel for Rotstein in fact argued that what was being sought was in effect an appeal not judicial review.

4. The plaintiff, Mr Slaveski, was not represented and while he would appear to have had some experience of litigation was not well enough to be able to adequately address these issues. His wife, with the consent of the respondent, ultimately presented his argument because of his Ill-health. She too lacks legal skill and experience.

5. In all the circumstances, I do not propose to explore the various issues of a legal nature raised by counsel for Rotstein arising out of the particular nature of the application. In addition I do not propose to explore the discretionary matters relied upon by counsel for the respondent. Instead, I propose to consider the issues raised by Mr Slaveski and deal with them as they were put and on their merits.

The original proceedings

6. On 31 March and 1 April 2008 a hearing occurred at the Magistrates' Court relating to the claim by Rotstein for work and labour done plus interest and costs. The amount claimed was in excess of $76,000. As noted above an order for costs was made against Mr Slaveski on 1 April 2008.

7. In opening the case before his Honour in the Magistrates' Court, counsel for Rotstein mentioned that Mr Slaveski had previously been represented by a firm of solicitors, Ryan Carlisle and Thomas. Counsel mentioned that Mr Slaveski had been critical of that firm and other law firms that had previously acted for him. This prompted his Honour to draw to the attention of Mr Slaveski, he being unrepresented, the fact that he had been a partner in that firm and was appointed to the bench in September 2006. The transcript then records an exchange which is not easy to follow but, in the course of it, Mr Slaveski was asked if he had any concerns about his Honour determining the case and he said he did not. He thanked his Honour for bringing the matter to his attention.

8. Subsequently, shortly after lunch on the first day of the hearing, Mr Slaveski was cross-examining Mr Rotstein. In the course of the cross-examination, his Honour made rulings on the relevancy of a number of documents and statements and questions adversely to Mr Slaveski. Exchanges occurred and his Honour left the courtroom for 10 minutes to give Mr Slaveski an opportunity to compose himself. On his return, Mr Slaveski raised an allegation of bias against him, there being two aspects. One was the adverse rulings. He also complained, however, that his Honour seemed to look at him as if he was an idiot who did not know what he was talking about when the other side were playing games about documents. His Honour put to him that what had happened was that he had started making rulings on the relevance of various documents that Mr Slaveski was calling for, that Mr Slaveski did not like those rulings and that that was when he made his allegation of bias. Mr Slaveski said that his Honour's conduct showed his bias.

9. Mr Slaveski then asked his Honour to disqualify himself. This application was rejected. His Honour gave brief reasons stating that what had basically occurred was that he had made rulings with which Mr Slaveski was unhappy. Further he did not believe that Mr Slaveski should have the feeling that he was biased or prejudiced against him, or that any independent person would think that and he was not prepared to disqualify himself.

10. On the next day, the transcript records that Mr Slaveski told his Honour that he had written a letter to the Chief Magistrate in which he had raised the issue of bias. He stated that this letter was dealt with by Mr Muling, the second in charge. He alleged that Mr Muling had asked him to ask his Honour to excuse himself. He indicated that if His Honour did not do so he would make an application to the Supreme Court. His Honour responded by summarising what had occurred the previous day when he had drawn the party's attention to the fact that he had been a partner in Ryan Carlisle Thomas, that he was no longer a partner in that that firm and no longer had anything to do with it following his appointment as a Magistrate. His Honour pointed out that Mr Slaveski had said that those matters did not cause him any concern. Mr Slaveski then produced a copy of the letter he had written to the Chief Magistrate which raised the issue of bias. It did not mention the fact that the question had been canvassed, that he had been given the opportunity to object and chose not to do so. The letter contained two handwritten notes on it to the following effect "Ask Magistrate to excuse himself again" and "If he refuses to seek matter be stood down to lodge injunctionary application at Supreme Court".

11. Having read the letter, and the comments upon it, His Honour decided that it was not appropriate that he continue in the case. He referred to the fact that Mr Slaveski had raised the issue [about his connection with Ryan Carlisle Thomas] that he believes that "causes him to be biased" and said that he believed that it was "only appropriate" that he disqualify himself from hearing the case.

12. Counsel for Rotstein then sought an order for costs on the basis that the matter could have been heard before another Magistrate if Mr Slaveski had not waited until the end of the day to take the steps he had taken. Counsel put that he had every opportunity to object at 10.30am on the first day. Mr Slaveski argued that the costs should be reserved. This was opposed by counsel for Rotstein. His Honour then sought confirmation of what followed from the position of Rotstein, namely, that it wanted an order that the defendant pay its costs on the appropriate scale. He asked whether this was for the 31 May 2008 and 1 April 2008 – the two days of the hearing. Counsel confirmed that was so. There was then discussion of a stay. After some more exchanges, his Honour stated the following

> "In this matter, I will have to adjourn the matter to a date to be fixed by the coordinator. I've made an order that the defendant is to pay the plaintiff's costs on scale for the hearing on the 31st of March and the first of April with a stay of 28 days. I've made that order on the basis that the issue that ultimately led to me disqualifying myself from hearing the case was first raised early in the proceedings which was not acted upon by the defendant and therefore the plaintiff should not be prejudiced in relation to costs for the matter proceeding for the rest of yesterday and having to attend today."

13. Counsel for Rotstein then asked his Honour to fix the costs. His Honour went through relevant issues with Counsel with Mr Slaveski protesting. At the end of the exercise a figure of $7,115.90 was arrived at. His Honour then made specific orders dealing with the quantum of the order. Mr Slaveski asked that costs be reserved and complained that his Honour was being "biased again".

The Originating Motion – issues raised

14. In essence, the issues raised for the plaintiff were first that his Honour should have disqualified himself when the issue was first raised and only did so after he had a behaved in a manner that demonstrated bias or gave rise to a reasonable apprehension of bias. It was put that it was only after he had seen the notes of Mr Muling indicating the options available to the plaintiff that his Honour chose to disqualify himself. In those circumstances, it was put that there was no basis upon which his Honour could have properly ordered the plaintiff to pay the costs wasted over the two days. It was also argued, as I understood it, that in finalising the details of the orders and, so, while making them, he revealed actual bias or acted in such a way as to give rise to a reasonable apprehension of bias. It was also submitted that Mr Slaveski was denied natural justice.

15. As to the first issue, there was no basis upon which his Honour should have disqualified himself when the matter was first raised. The link was extremely remote, he was no longer a member of the firm in question and had not been for some two years and Mr Slaveski indicated that he did not want him to do so. On the second morning, Mr Slaveski asserted that he had not said that he had no concern in the initial discussion but had said "no, I said I will see how we go" - this was not so. In reaching the above conclusions, I reject the assertion made by Mr Slaveski that from the outset he had sought orders from the Magistrate that he disqualify himself.

16. As to the next aspect, that his Honour had demonstrated bias in the way he had conducted himself subsequently in the proceedings, what emerges from the transcript is that his Honour attempted to keep the hearing within relevant limits which was extremely difficult because of the way Mr Slaveski conducted his case. Mr Slaveski either did not appreciate what was relevant or did not want to confine himself to relevant issues and evidence and, in the course of discussion, often talked over his Honour. Mr Slaveski returned to the issue of bias with a changed attitude after His Honour had ruled against him on issues of relevance in particular. The rulings, however, were justified.

17. As to the role played by the notes relating to the conversation with Mr Muling, there was a connection in time, but his Honour acted as he did because Mr Slaveski now relied upon the connection with the solicitors, an issue which his Honour had raised the previous day.

18. As to the arguments that, in making the cost orders, he revealed either actual bias or provided a reasonable basis for concluding apprehended bias, that was not so. I also do not accept that he, in asking questions, guided counsel for the plaintiff solicitor. In fixing the costs, he was discharging a role required of him. He did nothing more than address the obvious and did not give any biased assistance to counsel for the plaintiff solicitor or do anything that would support

a conclusion of apprehended bias.

19. I am satisfied that nothing had occurred that should have given any independent reasonable observer any concern about real or apprehended bias on the part of his Honour. There was no denial of natural justice.

20. As events unfolded, all the relevant decisions of the learned Magistrate, including the costs order, were reasonably open to him. Mr Slaveski has been unable to demonstrate any error on the part of the learned Magistrate in this matter. The application should therefore be dismissed.

APPEARANCES: For the plaintiff Slaveski: in person. For the first defendant Rotstein & Associates: Mr H Rotstein, counsel. Rotstein Lockwood Reedy Lawyers Pty Ltd.
