42/94

SUPREME COURT OF VICTORIA

SHUARTSMAN v LEE and ANOR

Ashley J

4 May 1994

CIVIL PROCEEDINGS – ARBITRATION – PROCEEDINGS COMMENCED – IDENTITY OF OTHER PARTY SOUGHT – WHETHER DISCOVERY OF DOCUMENTS MAY BE SOUGHT OR INTERROGATORIES SERVED – WHETHER PRELIMINARY DISCOVERY AVAILABLE – APPLICATION FOR ORAL EXAMINATION REFUSED – WHETHER REFUSAL PROPER: *MAGISTRATES' COURT ACT* 1989, S102; *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, RR1.12, 2.04, 11, 12, 13, 21.

Order 21.02 of the *Magistrates' Court Civil Procedure Rules* 1989 ('Rules') provides:

> "No party may seek discovery of documents or serve interrogatories in a proceeding referred to arbitration."

S. issued proceedings against L. (car owner) for damages incurred as a result of a motor car accident. The driver of L's car was unknown to S. Before the matter came on for arbitration, S. sought discovery of documents, service of interrogatories and oral examination of L. as to the identity of the driver of L's car. The Magistrate refused the application on the ground that he had no power to make the orders sought. Upon appeal—

HELD: Appeal allowed. Remitted for further determination.
1. So long as the matter was referred to arbitration, O.21.02 of the Rules precluded S. from seeking discovery of documents or serving interrogatories. However, O.21.02 deals with proceedings which have been commenced and referred to arbitration. On the other hand, O.13.03 deals with discovery prior to the commencement of proceedings.

2. Accordingly, it would have been open to S., independently of the proceedings commenced against L., to have applied for the oral examination of L. with a view to obtaining the identity of the driver of L's vehicle and commencing proceedings against that person.

ASHLEY J: [1] Before me is an originating motion brought under Order 56 of Chapter 1 of the Rules. The plaintiff, Ms A. Shuartsman, was the plaintiff in proceedings before the Magistrates' Court at Broadmeadows. The first defendant, Leander Mearle Lee (who I shall hereafter call 'the defendant') was the defendant in those proceedings. The second defendant, the Magistrates' Court at Broadmeadows, does not appear before me, but will abide the outcome of the motion.

The proceedings arise out of orders made by a Magistrate on 14 July 1993. Those orders must be understood against the background of the complaint brought by the plaintiff in the Magistrates' Court. The complaint related to a road traffic accident alleged to have occurred on 28 January 1992 between a motor vehicle driven and apparently owned by the plaintiff and another motor vehicle.

The complaint was issued on 6 November 1992. The defendant was named as defendant to that complaint; she, that is the defendant, being described as the owner of the vehicle which collided with the plaintiff's vehicle. It appears from affidavit material that was before the learned Magistrate that at the time of the collision the driver of the vehicle which had struck the plaintiff's vehicle decamped without providing his name and address. I use the word "his" advisedly, because that is the way in which the plaintiff apparently identified the driver's sex from a time antecedent to that when the complaint was issued.

The plaintiff's solicitors had, prior to the issue of proceedings in the Magistrates' Court, ascertained that **[2]** the defendant was the registered owner of the vehicle. No other steps, it appears, had been taken prior to issue to determine whether the owner, obviously a female, could, as a consequence of some relationship between her and the driver, be responsible to the plaintiff for the damage caused to the plaintiff's vehicle. In the interim between the issue of the complaint and 14 July 1993 the plaintiff's solicitors attempted on several occasions to establish the identity of the driver and the relationship, if any, between the driver and the defendant.

The first occasion when material was sought was 9 June 1993. At that time the defendant's solicitors were threatened with an application by the plaintiff for leave to deliver interrogatories in the event that details were not provided. That was an empty threat, since interrogatories could not be delivered so long as the complaint remained subject to the rules of the Magistrates' Court pertaining to matters referred to arbitration. This was such a matter, the amount claimed being $1,141. Whether the threat was perceived to be empty or there was a misconception on the part of the plaintiff's solicitors is unknown. The defendant's solicitors responded to the letter of 9 June on 21 June 1993. There was no substantive response to the matter that had been raised but, rather, a suggestion that the proceeding should be withdrawn and the defendant's costs paid –

> "if you have taken action against the wrong defendant, which appears to be the case".

But then on 22 June the defendant's solicitors wrote **[3]** to the plaintiff's solicitors confirming that the defendant had not been the driver of the vehicle, and saying further:

> "Our client instructs that the drive (sic) of the vehicle was Dominic Palumbo, a friend of our clients (sic)".

The plaintiff's solicitors responded to the disclosure of the driver's name by letter of 25 June 1993. There was a request that the defendant provide full details of the name, address and occupation of the driver of her motor vehicle and all relevant details as to the purpose for which it was being driven and the exact nature of the relationship between the driver and the defendant. An application by the plaintiff's side was foreshadowed. It was that application which the Magistrate entertained on 14 July 1993. It was, as initially framed, an application for adjournment of the proceedings and for orders for delivery of interrogatories, discovery or otherwise so as to identify the driver of the defendant's vehicle, and for leave to add Dominic Palumbo as a defendant to the proceedings.

In the event, the application made to the Magistrate was not in all respects as it had originally been mooted. Orders sought for the delivery of interrogatories and discovery and oral application was made for an order under Rule 13.03(2)(a) for oral examination of the defendant and for an order for further and better particulars of defence. No doubt the application for oral examination relied upon the necessary inter-relationship between Rule 13.04 and Rule 13.03(2)(a) and was inexactly described as by reference only to the latter of these Rules. No doubt the Magistrate used the same shorthand in his ruling, **[4]** which apparently referred only to Rule 13.03. The Magistrate refused each aspect of the application and, in terms, the originating motion seeks to challenge each of the orders made. But Mr Flower of counsel, for the plaintiff, today abandoned any challenge to the Magistrate's orders so far as they concerned interrogatories and discovery under Order 11 of the *Magistrates' Court Civil Procedure Rules.* Further, he did not press any submission in relation to the provision of further and better particulars of defence. His submission, rather, centred upon the Magistrate's refusal to make an order for oral examination of the defendant under Order 13.

Although Mr Wartski of counsel, for the defendant, submitted that there had been no application for oral examination made to the learned Magistrate on 14 July, but rather that the matter had been dealt with incidentally both by counsel and His Worship, it appears to me that the affidavits sufficiently disclose that oral application was made and was refused.

A further issue of some uncertainty is whether the application was refused by the learned Magistrate on the basis that there was no power to make an order under Order 13 in the circumstances of the case, or, rather, whether he assumed the existence of such a power and exercised a discretion adverse to the plaintiff. Whilst in respect of this matter the affidavit evidence is somewhat unsatisfactory, it seems most likely that the Magistrate did hold that he had no power to make an order for oral examination and that no question of the exercise of discretion arose. That seems to me to be the preferable view of paragraphs 9 and 13 of the affidavit of **[5]** Anna Ziaras, sworn 3 May 1994, in support of the motion.

The question to be determined, then, as I see it, is whether the procedure available under Order 13 was available to the plaintiff and whether the Magistrate misapprehended his jurisdiction so as to deny the existence of the remedy. Under s102 of the *Magistrates' Court Act*, by sub-section

(1) the court must refer a complaint under which the amount of monetary relief sought is less than $5,000 to arbitration in accordance with the division which follows. There is provision for relief from the effect of sub-section (1), but no relief was sought on 14 July and the Magistrate rightly concluded that the matter before him was one for arbitration. The *Magistrates' Court Civil Procedure Rules*, by Order 21, provide by Rule 21.01(1):

> "This order applies to any proceeding which is referred to arbitration under s102 of the Act and in which a notice of defence is given".

Sub-paragraph (2) provides:

> "A proceeding referred to arbitration must be conducted in accordance with this Order".

Rule 21.02 provides:

> "No party may seek discovery of documents or serve interrogatories in a proceeding referred to arbitration".

There is an order which provides for interrogatories. It is Order 12. There is also an order providing for discovery of documents. It is Order 11. Order 21 is concerned to deal with proceedings which are on foot, that is, where a proceeding has been issued and referred to arbitration in accordance with s102. The Rule, **[6]** therefore, directs attention to procedures which are otherwise apposite to proceedings which have been commenced. That, plainly enough, is a reference to, at the least, interrogatories comprehended by Order 12 and discovery comprehended by Order 11.

The further question is whether the reference in Rule 21.02 to "discovery of documents" should be taken to include preliminary discovery and non-party discovery under Order 13. The learned Magistrate must, I think, have treated the discovery available under Order 13 as being precluded by the operation of Rule 21.02. Often, the discovery available under Order 13 will not be discovery undertaken after proceedings have been commenced. So, for example, Rule 13.03(1) deals with the circumstance of an applicant being unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding. Likewise, Rule 13.05 looks to prospective proceedings. On the other hand, portions of Order 13 deal with extant proceedings; thus, for example, Rules 13.04, 13.06 and 13.07.

The discovery contemplated by Order 13 often will be a discovery of documents. Rules 13.05, 13.06 and 13.07 are all concerned with discovery of documents. Rule 13.03, however, contemplates not only the discovery of documents, but also oral examination of a person who has or is likely to have knowledge of relevant facts. There is, I think, an area where Order 13 can operate despite the fact that proceedings, when issued, would, by the operation of s102 of the Act, be referred to arbitration; that is, Rule 13.03(1) and rule 13.05 do not require that proceedings be on foot at all. Indeed, the **[7]** opposite must be the situation.

In the present case nothing that I can see would prevent the plaintiff presently making application under Rule 13.03, independently of the proceedings now before the Magistrates' Court, for the oral examination of the present defendant with a view to obtaining identification of the driver of her vehicle and the commencement of proceedings against that driver. But that was not the application before the learned Magistrate on 14 July, and the question is, notwithstanding that Order 13 may in some obvious respects co-exist with Order 21, whether the Magistrate was right in concluding in the circumstances that it could not do so.

If the Magistrate was to have made any order, it must have been under Rule 13.04, interrelated in operation as it is with Rule 13.03. But Rule 13.04 contemplates oral examination, as well as discovery of relevant documents. The precise question, then, which must be answered is whether Rule 21.02 can operate to preclude application and an order under Rule 13.04. Mr Wartski drew my attention to Rule 1.12. It provides that:-

> "Unless the context or subject matter otherwise requires ... 'discovery' includes discovery and inspection of documents, and discovery by written interrogatories or oral examination."

Plainly enough, that definition itself distinguishes between discovery and inspection of

documents and discovery by way of oral examination. Rule 21.02 is pointedly directed to discovery of documents and, as I have pointed out, discovery of documents in an extant proceeding. **[8]** Whilst it is true that an element of Rule 13.04 is or may be discovery of documents, it seems to me that Rule 21.02 is directed to a different matter, that is, discovery of documents and interrogatories in a conventional sense, as comprehended by Orders 11 and 12. In so concluding, I would not wish to be taken by analogy to be determining that Rule 21.02 does not operate upon rules 13.06 and 13.07. As I have already pointed out, neither of those sub-rules contemplates oral examination.

It is one thing to say that the application which was made to and dealt with by the Magistrate on 14 July involved error on his part. It is, however, another matter whether discretionary relief ought be afforded. It is the case that no application complying with Rule 13.08 was before the learned Magistrate, and the material that was supplied, which was directed to other applications, was not pointedly made pertinent to the matters required to be investigated under Rule 13.04. But the Magistrate was entitled to waive compliance with the rules – see Rule 2.04. And it appears that that is what, in a practical sense, he did.

I should next refer to a submission made by Mr Wartski that the material before the learned Magistrate was such that the application, even had jurisdiction between assumed, must have failed in any event. That is a heavy burden to bear and whilst in my opinion there is force to the submission that the plaintiff might be said not to have made reasonable enquires before bringing the Rule 13.04 application, yet I do not think it was inevitable that a Magistrate must have so concluded.

[9] I bear in mind also that if relief is granted and the matter remitted to the learned Magistrate, then he will not be bound to act only upon the material before him on 14 July 1993. It would, I think, be prudent for the plaintiff's side to make a search of the electoral roll, at least, before the application is renewed. It would also be very desirable that an application formally complying with Rule 13.08 be made. In the event, it appears to me that the learned Magistrate did fall into error, and that relief should in my discretion be granted.

It is I think, before specifying the details of relief, desirable to mention one further and entirely practical matter. The parties, through their advisers, have so far spent portion of a day in the Magistrates' Court and a good part of a day in this court. The plaintiff's side may be said to have been cavalier in commencing proceedings against the defendant without first ascertaining the identity of the driver, or forming some reliable view that the defendant could be liable for any negligence on the part of the driver of her vehicle. As against that, it seems clear that the defendant, at least in mid-1993, knew the identity of the driver and, it might be supposed, had some information as to his whereabouts. At least there was no assertion by the solicitors for the defendant that the whereabouts of the driver were then unknown. The defendant's vehicle was, to judge from its registration number, a vehicle registered in Queensland, and I note that the defendant was apparently resident and served with proceedings in Queensland. Where the driver resided, either in 1992 or in 1993, in unknown.

But I am **[10]** certainly left with the suspicion that the defendant's side played ducks and drakes as to the whereabouts of the driver, and what that has done, even conceding that the plaintiff's side acted in cavalier fashion, has been to much add to the cost of litigation. I bear in mind in saying that, that the amount claimed by the plaintiff in the matter before the Magistrates' Court is only $1,141. It would be highly desirable, I think, even at this late stage, that commonsense enter into the conduct of the parties. What I propose to do now, gentlemen, is to indicate that the order I intend to make is that the order of the Magistrate made on 14 July 1993, by which he determined that he had no power to make an order pursuant to Rule 13.04 of the *Magistrates' Court Civil Procedure Rules* be quashed, and that the matter be remitted to the Magistrates' Court to be dealt with in accordance with law.

APPEARANCES: For the plaintiff Shuartsman: Mr AM Flower, solicitor. For the defendant Lee: Mr S Wartski, counsel. Klonis Kirby & Co, solicitors.
