46/07; [2007] VSC 492

SUPREME COURT OF VICTORIA

TODARELLO CONSOLIDATED INVESTMENTS PTY LTD v FINCH & MAGISTRATES' COURT of VICTORIA

Lasry J

22, 30 November 2007

CIVIL PROCEEDINGS – APPLICATION FOR SECURITY FOR COSTS – ORDER MADE – SELF-EXECUTING ORDER MADE – SECURITY FOR COSTS NOT PROVIDED WITHIN THE TIME SPECIFIED IN THE ORDER – COMPLAINT DISMISSED PURSUANT TO SELF-EXECUTING ORDER – WHETHER MAGISTRATE HAD POWER TO MAKE A SELF-EXECUTING ORDER – WHETHER MAGISTRATE GAVE ADEQUATE REASONS FOR MAKING THE ORDER: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, RR31.02, 31.04.

TCI issued civil proceedings against F. F. applied to the Magistrates' Court for an order for discovery and that TCI give security for costs of the proceeding. No material was filed by TCI in relation to its financial circumstances. After hearing submissions in the matter, the magistrate made the order for security for costs together with a self-executing order. When the security for costs was not provided within the time specified, upon application, an order was made formally dismissing the complaint pursuant to the self-executing order. Upon appeal—

HELD: The self-executing part of the order quashed.
Before the magistrate could make an order dismissing the action, he was obliged to exercise the discretion required by Rule 31.04 of the *Magistrates' Court Civil Procedure Rules* 1999. This Rule provides that where a plaintiff fails to give the security required by an order, the Court may dismiss the plaintiff's claim. The use of the word "may" in the Rule means that there is a discretion to be exercised as to whether the action should be brought to an end by being dismissed. In the circumstances, the magistrate exceeded his jurisdiction by making an order under Rule 31.04 at a time when the conditions necessary to the exercise of his discretion had not yet been satisfied. Further, although the magistrate gave no reasons, the reasons for making the order were obvious from the surrounding circumstances.

LASRY J:

1. This is an application filed on 20 June 2007 for an order in the nature of *certiorari* to quash an order of the Magistrates' Court of Victoria made on 24 April 2007 that the plaintiff provide security for the defendant's costs. A number of questions arose concerning the jurisdiction of the Magistrate to make self-executing orders in connection with security for costs and the matters that should be taken into account in making such orders, whether self-executing or otherwise.

2. There were seven grounds for the relief sought, however Ground 1 was not argued before me. The remaining grounds were as follows:

Ground 2:

3. The learned Magistrate misconstrued the operation of Rules 31.02 and 31.05 of the *Magistrates' Court Civil Procedure Rules* 1999 and consequently

(a) exceeded his jurisdiction under Rule 31.02 in making an order not permitted by that Rule; and

(b) exceeded his jurisdiction by making an order under Rule 31.04 at a time when the conditions necessary to the exercise of the discretion given by Rule 31.04 had not yet been satisfied.

Ground 3:

4. Further and in the alternative, the learned Magistrate exceeded his jurisdiction by making a self-executing order not authorised by the legislation governing the Magistrates' Court and not falling within the implied powers of the Magistrates' Court.

Ground 4:

5. Further and in the alternative to Ground 3, the learned Magistrate erred in law in making

a self-executing order

(a) without indicating to the plaintiff that he was considering making such an order; and

(b) without giving the plaintiff an opportunity to be heard in respect of the form of order and thereby denied the plaintiff procedural fairness.

Ground 5:

6. Further and in the alternative to Grounds 1, 2 and 3, the errors referred to in those Grounds constituted errors on the face of the record.

Ground 6:

7. Further, the learned Magistrate failed to give reasons for his decision and order and thereby erred in law which error constitutes an error on the face of the record.

Ground 7:

8. Further and in the alternative, the learned Magistrate

(a) erred in law in that he failed to comply with his duty to keep a record of everything necessary to enable the case to be laid properly and sufficiently before an appellate court should there be an appeal;

(b) thereby committed error on the face of the record;

(c) thereby deprived the plaintiff of the opportunity to put material before this Court demonstrating error in the learned Magistrate's reasons; and

(d) thereby denied the plaintiff procedural fairness.

Background

9. On 7 December 2006 proceedings were filed in the Magistrates' Court of Victoria in which the plaintiff, Todarello Consolidated Investments Pty Ltd (who is also the plaintiff in these proceedings), sought damages from the first defendant, Mr Finch, alleging professional negligence and negligent misstatement. The cause of action is said to have arisen in respect of services that Mr Finch, a solicitor, had provided concerning an agreement between the plaintiff and a company known as Isa-Majestics Ventures Inc. The plaintiff claimed damages, which had three components: an invested amount arising from the alleged professional negligence and negligent misstatement; expenses incurred in an attempt to recover the invested amount; and legal expenses in relation to an aborted action in this Court (which were part of the historical narrative of the relationship).

10. On 23 March 2007 Mr Finch made an application to the Magistrates' Court seeking orders that the plaintiff give security for costs of the proceeding pursuant to Rule 31.02 of the *Magistrates' Court Civil Procedure Rules* 1999 in the sum of $15,000.00.

11. Rule 31.02 provides that:

> Where ... (b) the plaintiff is a corporation ... and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so; ...
>
> the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.

12. The defendant's application for security for costs was before the Magistrates' Court on two occasions. The first hearing was on 10 April 2007 and there is a transcript of that proceeding. The second hearing was on 24 April 2007 and there is no transcript for those proceedings. It was during this second hearing that the learned Magistrate pronounced the orders which are now the subject of the originating motion before me.

13. The transcript from the hearing of 10 April 2007 reveals that the Magistrate was requested to consider two applications on behalf of the defendant. First, an application for discovery and, second, the application for security for costs to which I have just referred.

14. The material before the Magistrate in relation to the application for security for costs was

an affidavit sworn on 23 March 2007 by Robert Michael McGirr, who is the solicitor on behalf of the defendant. In that affidavit, from paragraph 10 onwards, Mr McGirr outlines his request to the solicitors for the plaintiff for security for costs and describes the result of his search in relation to the plaintiff company with the Australian Securities and Investments Commission (ASIC). That search apparently disclosed that the plaintiff company had a paid up capital of $2.00. Further, it showed that the company had not filed an annual return and was, at the time, in breach of its obligations to do so. The information also suggested that the plaintiff company had no assets and the identity of any shareholders was not known. Mr McGirr also deposed to having enquired with the Department of Sustainability and Environment, revealing that the plaintiff company was not the registered proprietor of any property.

15. On 5 April 2007 Mr McGirr swore a further affidavit in support of the application outlining the likely extent of the defendant's costs, which he estimated would total $16,576.00. In that affidavit he requested the Magistrates' Court to provide security for his client's costs in the amount of $15,000.00.

16. On 10 April 2007, the plaintiff presented no affidavit material to the Magistrate to contest the assertions made by the defendant. During those proceedings counsel for the plaintiff, Mr Hancock, submitted that the burden of proof was on the party seeking security to produce the requisite credible "testament" that there is reason to believe that the corporation will be unable to pay the defence legal costs.[1] Counsel also suggested that the defendant's evidence amounted to speculation and that that was not enough for the Magistrate to make an order for security for costs. The learned Magistrate indicated that he thought an inference could be drawn from the material before him and his attention was then drawn to factors which might be relevant to the exercise of the discretion.

17. The Magistrate's attention was also drawn to whether or not there were reasonable prospects of success in the action brought by the plaintiff.

18. It was submitted that the Magistrate needed to decide whether the action brought by the plaintiff was hopeless or had a high degree of probability of failure. The learned Magistrate noted that in support of the application for security for costs, that proposition was not put forward on behalf of the defendant but rather that counsel was simply looking at the circumstances of the plaintiff and relying totally on the alleged lack of liquidity and assets in support of the application.

19. The Magistrate told counsel for the plaintiff that he should consider providing information which met the issue of the lack of financial means on the part of the plaintiff. He said that he would give the plaintiff the opportunity to assemble that material and that failure to do so might mean that the Court would draw an inference against the plaintiff. Because of the business of the Magistrates' Court, the matter was then adjourned to 17 April 2007 and it would appear ultimately adjourned again until 24 April 2007.

20. The hearing on 24 April 2007, as I have already noted, was not recorded. There is some dispute as to how that hearing proceeded, particularly toward the conclusion. Mr Hancock, who represented the plaintiff again on that occasion, informed the Magistrate that the plaintiff had chosen to file no further material in response to the application for security for costs.

21. In brief summary, the affidavit material from both parties filed in the proceedings before me indicates that at that hearing the following occurred:

- Counsel for the plaintiff informed the Magistrate that no material was to be filed concerning the plaintiff's financial circumstances;
- Submissions were made about whether an order for security for costs should be made and whether such an order would be oppressive;
- Submissions were also made about the plaintiff's prospects of success in the action and that given those prospects were strong it was not appropriate to make an order for security for costs;
- Counsel for the defendant handed up draft orders which included the self-executing order ultimately made;[2]
- Counsel for the defendant debated the issue of the strength of the plaintiff's case and pointed to a lack of documentation which supported the allegation of an investment which was at the basis of the plaintiff's case;

• There was discussion about the quantum of the defendant's costs;
• There was an enquiry from the Court as to how long the defendant would need to file and serve a request for further and better particulars, then orders were made that the notice was to be filed and served within 14 days, with compliance required within a further 14 days;
• The Magistrate then made the orders for security for costs in an amount of $10,000.00 and the date in the draft orders handed up was amended to 14 May 2007;
• Without any participation by counsel for the plaintiff, counsel for the defendant asked the Magistrate whether he intended to make the orders in paragraphs 3 and 4 of the draft which was handed up, and his Honour indicated that he did;
• The Magistrate pronounced the orders without giving any reasons. Counsel for the plaintiff asserts in his affidavit that the self-executing portion of the order was not pronounced verbally by the Magistrate and, therefore, he did not record it on his back sheet. There is an element of dispute about that.

22. Security for costs was not provided by the plaintiff by 14 May 2007. On 16 May 2007 the solicitors for the defendant filed an application for an order that the plaintiff pay the defendant's costs of the proceedings following its failure to provide security for costs and the assumed dismissal of the claim. The defendant's solicitor has contended that there were opportunities for the plaintiff's counsel to dispute or query the orders made on 24 April 2007.

23. On 20 June 2007 the formal order dismissing the complaint "pursuant to self executing order of 24/4/07" was made by the Magistrate. On that date these proceedings under Order 56 were commenced.

The Appropriate Procedure in this Court

24. An issue before me was whether judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 seeking *certiorari* was the appropriate procedure in this case, as opposed to the appeal procedure under s109 of the *Magistrates' Court Act* 1989 (Vic) ("the Act").

25. In *Craig v South Australia*,[3] the High Court outlined the "scope" of *certiorari* as follows:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.[4]

26. It is submitted by the plaintiff in this case that we are here concerned with "a question of fundamental jurisdictional error".[5] In describing what that means for the purpose of the remedy sought here, the High Court explained in *Craig*:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.[6]

27. In my opinion, the broad grounds argued before me in this case are capable of coming within the categories of jurisdictional error, lack of procedural fairness, and error of law on the face of the record. Therefore the jurisdiction to grant relief in the nature of *certiorari* is made out and the question becomes one of the exercise of discretion.

28. Of course, as the Court of Appeal noted in *Kuek v Victoria Legal Aid & Anor*, "error of law

is the very foundation of an appeal from the Magistrates' Court to this court under s109 of the *Magistrates' Court Act*".[7] Phillips JA (with whom Winneke P and Buchanan JA agreed) specifically stated:

> In my opinion, this court should now affirm that, unless there are indeed exceptional circumstances, a litigant may not raise for determination under O56 — or at all events may not raise with any real chance of success — a matter or thing which is proper for determination on an appeal where that very litigant has a right of appeal under s109. In other words, if the proper course is an appeal under s109, albeit an appeal which is subject to the limitations imposed by that section, the litigant cannot choose at his or her option to turn to O56 as an alternative. As has been said, judicial review should not be seen as a means of appealing from the decision of a magistrate ...[8]

29. In the plaintiff's submission, in *Kuek* it was significant that the proceedings under Order 56 in that case were brought as an alternative to an appeal under s109 in circumstances where a Master refused leave to appeal out of time. The plaintiff relies on the observations of Nettle J in *DPP v Verigos & Anor*,[9] where, considering whether a Magistrate had erred in assuming jurisdiction to deal summarily with a charge of aggravated burglary, his Honour said:

> It was submitted on behalf of the defendant that I ought refuse relief in the nature of *certiorari*, even if I were satisfied that the Magistrate did not have jurisdiction. The argument was that the plaintiff could have proceeded by way of appeal under s92 of the *Magistrates' Court Act* and it was submitted that the decision of the Court of Appeal in *Kuek v Victoria Legal Aid* is authority that, unless there are exceptional circumstances, a litigant ought not be permitted to raise as an alleged error of law for determination under O56 a matter or thing proper for determination under s92 of the Act.
>
> I do not accept the submission. To start with I am not persuaded that the plaintiff did have a right of appeal under s92. That section does not apply to "a committal proceeding" and while I have not reached a concluded view about the meaning of "a committal proceeding" in the context of s92, it is at least arguable that the orders of the Magistrate were made in the course of "a committal proceeding". That is to say, because the Magistrate lacked jurisdiction to proceed with a summary determination of the charges, what he purported to do was a nullity, and therefore that what started out as a committal hearing remained a committal hearing despite the Magistrate's attempt to turn it into a summary determination.
>
> In the second place, this is not a case, like *Kuek*, in which a plaintiff sought to escape the time limit for appeal by the unmeritorious device of attempting to characterise as an application for prerogative relief for jurisdictional error a question of law which should properly have been agitated by way of appeal. In this case the plaintiff chose to proceed under O56 for the very good reason that there are doubts about the application of s92.
>
> In the third place, this application is concerned with and only with a question of fundamental jurisdictional error. In that respect it stands in contrast to the sorts of case that more frequently arise, in which one or even several questions of jurisdictional error are bundled with other alleged errors of law properly the subject of appeal. Although of course I cannot know, it may be that this is the very sort of case that Phillips JA suggested in *Kuek* would be appropriate for the exercise of discretion in favour of relief by way of judicial review (even if the same result could have been achieved by way of appeal).[10]

30. I take his Honour to be doing no more than noting the differences between the facts as they were in *Kuek* and the facts that he was concerned with, including, significantly, the real doubt he thought existed over whether there was a right of appeal under s92 of the Act – being the section that provides for appeals to this Court in criminal proceedings on a question of law. In that case his Honour's discretion was exercised in favour of granting the relief sought because he concluded that the Magistrate did not have the jurisdiction to deal summarily with the charge of aggravated burglary that was before him. I do not consider that his Honour was diminishing the statement of principle in *Kuek* that Order 56 proceedings are only available in exceptional circumstances where the right of appeal under s109 of the Act is available.

31. I therefore take the view that the plaintiff cannot succeed in this case under Order 56 unless it can either be demonstrated that a right of appeal was not the appropriate and available procedure or, if it was, there are exceptional circumstances which mitigate in favour of an exercise of discretion in the plaintiff's favour, assuming the jurisdiction to grant relief under Order 56 is established.

Section 109 Appeal?

32. The appeal process under s109 is only available if the orders appealed against are final orders. As I understood the debate before me, it concerned the status of the orders of 24 April 2007. The plaintiff contends that those orders of 24 April 2007 are not final orders and represent an interlocutory decision by the learned Magistrate. That was the subject of debate on behalf of the defendant. Counsel for the defendant, Mr Guidolin, submitted that "in and of itself" the self-executing order finally disposed of the rights between the parties. That was so, he submitted because it dismissed the complaint.

33. If the orders were not final orders then they were not amenable to appeal under s109 – that much is clear. For this purpose the actual terms of the orders made on 24 April 2007 are important to consider:

> ...
> 2. On or before 14 May 2007 the plaintiff give security for the defendant [sic] costs is given [sic] the sum of $10,000.00 by way of filing and serving an irrevocable bank guarantee pursuant to Rule 31.07
>
> 3. The proceeding as against the defendant be stayed untill [sic] security for costs is given in accordance with Order 2 above.
>
> 4. If the plaintiff fails to give security for costs in accordance with Order 2 herein the proceedings stand dismissed pursuant to Rule 31.04. ...[11]

34. I have only quoted those parts of the order that deal with the application for security for costs. There were other orders made which rather tend to support the interlocutory nature of the orders. They dealt with the defendant's intention to file and serve a request for further and better particulars of the claim within 14 days, with the plaintiff being required to file and serve further and better particulars within 14 days of the date of service of that notice. There was also an order for costs. The Notice of Order Made also records that the matter was adjourned to a date to be fixed.

35. I do not see how, on any basis, those orders could be regarded as final orders. Apart from the other interlocutory steps set out in them, the orders for security for costs contemplated that if the order was not complied with by 14 May 2007, the proceedings would "stand dismissed" pursuant to Rule 31.04 of the *Magistrates' Court Civil Procedure Rules* 1999 which provides:

> Where a plaintiff fails to give the security required by an order, the Court may dismiss the plaintiff's claim.

36. The reason that I have come to the view that this cannot be a final order is inextricably connected with the reason why I consider the plaintiff must succeed in these proceedings on the basis of Grounds 2 and 3 in the originating motion. It seems to me inevitable that upon the making of the order for security for costs, the next step in the process was for the Court to wait to see whether the plaintiff complied with the order. The order expressly provided that the plaintiff's action was stayed until the order was complied with. If there was non-compliance (as in this case), then the order made by the Magistrate contemplates that the plaintiff's claim would stand dismissed, but then makes specific reference to Rule 31.04 set out above.

37. As counsel and I discussed during the hearing of this application, the use of the word "may" in Rule 31.04 surely means that there is a discretion to be exercised as a second stage of the process. There has been non-compliance and the action remains stayed. The question the Magistrate must then consider is whether the action should be brought to an end by being dismissed. Thus, in this case a self-executing order was made in circumstances where, under the Rules, the authority for making such orders does not contemplate such a process.

38. It is not absolutely clear to me when the orders of 24 April 2007 could have become final orders but my opinion is that final orders could not be made until an application was made under Rule 31.04 and the Magistrate formally dismissed the plaintiff's claim. Since that process was not followed in this case, it is sufficiently arguable that these orders never became valid final orders because the procedure contemplated by the Rules was not complied with.

39. I am therefore satisfied that since these orders of 24 April 2007 were not final orders and therefore not amenable to appeal under s109 of the Act, the proceedings under Order 56 were appropriate and are distinguishable from Phillips JA's contemplation in *Kuek*.

40. It might have been argued on behalf of the defendant, though it was not, that the orders became final orders on 20 June 2007 when the complaint was formally dismissed by the Magistrate without there being any preceding hearing. Since that submission was not made, I would not regard the possibility of appeal under s109 of the Act in respect of that order as being able to interfere with the entitlement to bring proceedings under Order 56. To the extent that there is a discretion involved I would exercise it in favour of the Order 56 proceedings and I consider to do so is consistent with *Kuek*.

Self-Executing Orders concerning Security for Costs – Grounds 2-5

41. It follows from what I have said above that in my opinion Grounds 2 and 3 are made out in this application. The learned Magistrate was required to pursue what senior counsel for the plaintiff described as a "two-stage process". That in turn required the Court to determine whether, given that the order for security for costs had not been complied with and that in the meantime the action had been stayed, the plaintiff's action should now be dismissed. In my opinion, the *Magistrates' Court Civil Procedure Rules* 1999 do not permit that step to be taken automatically.

42. On behalf of the defendant, it was submitted that a self-executing order of the kind made by the learned Magistrate was expressly permitted by reading Rule 31.04 with Rule 25.07. Rule 31.04 appears above. Rule 25.07 provides:

> (1) In this Rule, self-executing order means an order that upon the failure of a party to do any act or take any step which under these Rules the party is required to do or take or to comply with an order that the party do any such act or take any such step—
> (a) if the party is a plaintiff, that the complaint be dismissed;
> (b) if the party is a defendant, that the defence of the party, if any, be struck out.
>
> (2) A defendant whose defence is struck out upon the failure to comply with a self-executing order is, for the purpose of Rule 10.01, taken to be a defendant who does not give notice of defence.
>
> (3) The Court may set aside or vary, as the case requires—
> (a) a self-executing order;
> (b) the dismissal of a complaint upon the failure of a plaintiff to comply with a self-executing order;
> (c) the striking out of a notice of defence upon the failure of a defendant to comply with a self-executing order;
> (d) an order made under Rule 10.01 upon the failure of a defendant to comply with a self-executing order;
> (e) an order made under Rule 10.04 upon the failure of a plaintiff to comply with a self-executing order.

43. Senior counsel for the plaintiff accepted that this Rule contemplates self-executing orders, but not necessarily under Rule 31.[12] In its terms, he submitted, the Rule does not authorise the making of such orders. On the other hand, Mr Guidolin submits on behalf of the defendant that when the two Rules are read together they provided "express power" to make the self-executing order under consideration here. I do not agree. There is clearly a discretion under Rule 31.04 and it does not fall to be exercised until there is non-compliance with the order. In my opinion, whether or not a magistrate has a general power (either express or implied) to make self-executing orders, there is no such power conferred by a combined reading of Rules 27 and 31.

44. The views I have expressed on this issue also dispose of the need to deal with Grounds 4 and 5 concerning the plaintiff's complaint that a self-executing order was made without notice to the plaintiff during the application, and that the error by the Magistrate represented an error on the face of the record.

Reasons – Grounds 6 & 7

45. These grounds concern whether or not the learned Magistrate fell into error in failing to give adequate reasons for making his order for security for costs and failing to keep a record of the proceedings. Under these grounds, the whole of the Magistrate's order concerning security for costs is sought to be impugned.

46. In my opinion it is relevant to note that although the Magistrate delivered no reasons for his decision to order security for costs, these were not final orders. Indeed, as to the self-executing portion of them, it is that feature of them that enables Order 56 proceedings to be made out.

47. In resolving to make an order for security for costs, the effect of that debate and the learned Magistrate's views on it are not unknown to the parties. I was referred by senior counsel for the plaintiff to *Bloomfield v Haralabakos & Anor*,[13] where Williams J in turn identified the statement of principle from the Court of Appeal in *Hunter v Transport Accident Commission & Avalanche*.[14] Nettle J stated:

> If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law.[15]

48. In that case, the Court of Appeal had been concerned with application for leave pursuant to s93(4)(d) of the *Transport Accident Act* 1986 (Vic) to bring a proceeding for the recovery of damages in respect of an injury said to have been sustained in a transport accident on 8 March 1997. As the Court of Appeal noted, the judge hearing that application, though interlocutory, was finally determining the rights of the plaintiff which made the provision of reasons all the more important.

49. Counsel for the defendant before me submitted that the reasons for making the decision to provide security were obvious and relied on a number of factors which he submitted were clear from the proceedings on the two separate days of hearing:

> • The Magistrate was obviously satisfied that the "enlivening issue" (being the financial status of the plaintiff) was made out;
>
> • The Magistrate accepted that the plaintiff's prospects of success were relevant, but was interested in the issue of the financial circumstances of the plaintiff, offering counsel for the plaintiff time to assemble material for further debate and informing him that an adverse inference might be drawn if the material was not presented;
>
> • No additional material was presented to the Magistrate;
>
> • There was a debate on the subsequent occasion about the strength of the plaintiff's case and the deficiencies in the documents, which might have supported the claim.

50. My conclusion in relation to these submissions can be shortly stated. I agree with the defendant's submissions. I do not consider that the situation before me is comparable, for example, with that which arose in *Kerr v Colley & County Court of Victoria*.[16] Unlike that case before Bongiorno J, I do not consider that the absence of reasons here renders it impossible for this Court to examine the exercise of the Magistrate's discretion. To use the terminology that Bongiorno J used, I consider that the reasons for the making of the order were "obvious from [the] surrounding circumstances".[17]

51. Ground 7 is based on the failure of the Magistrate to comply with his duty to keep a record of everything necessary to enable the case to be laid properly and sufficiently before an appellate court. It is submitted that the Magistrate thereby committed an error on the face of the record, deprived the plaintiff of his ability to demonstrate error in this Court, and denied the plaintiff procedural fairness. In the written submissions filed on behalf of the plaintiff, it was said that this ground was not put forward as an independent ground but rather as highlighting the need for detailed reasons to enable the plaintiff to pursue its right appeal or judicial review. Senior counsel for the plaintiff refers to *Cook v Blackburn*.[18] In that case the Full Court of the Supreme Court of Victoria was concerned with an appeal from an award of damages by a jury where there

was no transcript of the proceedings and the judge's notes were the only record. The notes were "terse in the extreme".[19] The Court (per Gray J) expressed the view that a judge or magistrate has a duty "to accurately record the evidence given before him".[20]

52. In this case, the evidence that was before the Court was in affidavit form and has been exhibited in the proceedings before me. There was a transcript of the hearing on 10 April 2007. There is further affidavit material from legal practitioners involved in the case as to how the case was conducted on 24 April 2007. It is true that the Magistrate's notes were requested and none were provided.

53. I have already dealt with the issue of the absence of reasons above and I do not consider that the arguments advanced in support of Ground 7 materially add to those put on Ground 6.

54. In my opinion both Grounds 6 and 7 of the originating motion must fail.

55. However I note that it is my intention to remit this matter to the Magistrate for consideration consistent with my reasons. Depending on the view that the Magistrate takes on the question of whether or not the plaintiff's action should "stand dismissed", given that such an order might determine the plaintiff's claim and thus be a final order, reasons for that decision would be appropriate and necessary to be given.

Conclusion

56. In my opinion the Magistrate did not have jurisdiction to make the self-executing order for security for costs in the terms that were made on 24 April 2007. The jurisdictional error arises because as a pre-condition for the existence of any authority to make an order dismissing the plaintiff's action, his Honour was obliged to exercise the discretion required by Rule 31.04. The plaintiff is entitled to succeed on Grounds 2 and 3 of the originating motion. There will therefore be an order in the nature of certiorari to quash the self-executing portion of the order, being paragraph 4, and the matter will be remitted to the Magistrates' Court to be dealt with in accordance with law. I will hear submissions from counsel as to the form of orders that should be made.

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[1] Transcript of Proceedings, *Todarello Consolidated Investments Pty Ltd v Finch* (Magistrates' Court of Victoria, Magistrate Smith, 10 April 2007) at 6.
[2] See Exhibit DJH-1 attached to the affidavit of David John Hancock sworn 22 June 2007.
[3] [1995] HCA 58; (1994) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (hereinafter "*Craig*").
[4] Ibid at 175-6.
[5] Transcript of Proceedings, *Todarello Consolidated Investments Pty Ltd v Finch & Anor* (Supreme Court of Victoria, Lasry J, 22 November 2007) at 21.
[6] [1995] HCA 58; (1994) 184 CLR 163 at 177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[7] [2001] VSCA 80; (2001) 3 VR 289 at 292.
[8] Ibid at 293.
[9] [2004] VSC 97; [2004] VSC 97.
[10] Ibid at [37]-[40].
[11] See Notice of Order Made, Exhibit GK-G to the affidavit of Gabriel Kuek sworn 20 June 2007.
[12] Transcript of Proceedings, *Todarello Consolidated Investments Pty Ltd v Finch & Anor* (Supreme Court of Victoria, Lasry J, 22 November 2007) at 15.
[13] [2007] VSC 279.
[14] [2005] VSCA 1; (2005) 43 MVR 130.
[15] Ibid at [21].
[16] [2002] VSC 209.
[17] Ibid at [17].
[18] [1989] VicRp 4; [1989] VR 35.
[19] Ibid at 38
[20] Ibid.

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