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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

Ex parte ASHBY: Re CARLESS and ANOR

Sugerman A-CJ, Asprey and Moffitt JJA

21 October 1971

PRACTICE AND PROCEDURE – INFORMATION ISSUED AGAINST A COMPANY FOR BREACHING THE PROVISIONS OF THE *MARKETING OF PRIMARY PRODUCTS ACT* 1927 – THE CERTIFICATE OF INCORPORATION PRODUCED TO THE MAGISTRATE HAD THE WORD "THE" IN THE NAME OF THE COMPANY WHEREAS THE INFORMATION DID NOT – WHETHER A MISNOMER – WHETHER INFORMATION SHOULD HAVE BEEN AMENDED – MAGISTRATE ACCEDED TO A SUBMISSION THAT THE INFORMATION "WAS BAD" AND THAT HE HAD "NO JURISDICTION TO PROCEED" – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute.

1. On the material before the Court it was abundantly clear that there was in the present case the merest misnomer – one of a kind which might very easily have occurred in view of the common habit, both in speech and in writing, of referring to many companies with a prefixed definite article. It was abundantly clear that the reference intended, both in the information and in the summons, was to the respondent company, and that the company so understood.

2. The summons was served at an address described in the affidavit of service as "the registered office of the company" and being in fact the registered office of the respondent company. The company's solicitor appeared on the return day "for the defendant", without any suggestion that the defendant was other than the respondent company; he was also the solicitor instructing Mr Edwards. In writing to the Egg Marketing Board seeking agreement on an adjournment, he found it sufficient to refer to the prosecution and the summons as being against "Egg & I". And he wrote later to the informant's solicitor seeking particulars in a manner which clearly indicated that he sought particulars of allegations made against his client, the respondent company, without suggesting that there was any difference between it and "The Egg and I (Farm) Pty. Ltd." referred to in the heading of the letter.

3. In the result, this was not an instance of a mistake made in a matter within jurisdiction but one of a failure to exercise a jurisdiction which the Magistrate had and which the applicant sought to have exercised, or in terms of s134 of the *Justices Act* (NSW) of refusal to do an act relating to the duties of the Magistrate's office.

4. The rule nisi was therefore made absolute and the second-named respondent ordered to pay the costs of the applicant. There was no order as to the costs of the first-named respondent. In the circumstances a certificate under the *Suitor's Fund Act* was not warranted.

SUGERMAN P: In my opinion the rule nisi should be made absolute and the second-named respondent should pay the costs of the applicant. There should be no order as to the costs of the first-named respondent and, in the circumstances, a certificate under the *Suitors' Fund Act* should not be granted. I publish my reasons.

ASPREY JA: I have had the advantage of reading the judgment pronounced by the learned Acting Chief Justice in this case, and agree in it and with the order which he proposes. I publish a statement to that effect.

SUGERMAN A-CJ: Moffitt JA, who is the third member of the Bench which heard this case, is of the same opinion and on his behalf I publish his reasons. My brother Moffitt has omitted to state in his statement of the intended order that there should be no order as to the costs of the respondent Magistrate, but that, I think, is only a slip or omission from his order. That is the order of the Court, that there should be no order as to the costs of the respondent Magistrate. The order of the Court will be as I have proposed.

SUGERMAN P: This is the return of a rule nisi for a mandamus, or a rule in the nature of a mandamus pursuant to s134 of the *Justices Act* 1902-1966, commanding the first-named respondent, a Stipendiary Magistrate

> "to hear and determine the information laid by the applicant on the 12 November 1970 according to law, which information the said Respondent on the 13 May 1971 held he had no jurisdiction to hear."

The whole difficulty arises out of the singularly trifling circumstance that in the information referred to, and in the summons issued thereon, the defendant was described as The Egg and I (Farm) Pty. Ltd.", whereas the name of the second-named respondent is, according to a certificate of its incorporation "Egg & I (Farm) Pty. Limited". The applicant was the informant, acting on behalf of the Egg Marketing Board for the State of New South Wales, and the offence alleged was, briefly stated, that the defendant, being a producer of eggs, had disposed of eggs otherwise than to the Board, contrary to the provisions of the *Marketing of Primary Products Act* 1927, as amended.

On the return day of the summons the informant appeared in person and Mr Bolster, solicitor, appeared "for the defendant", stated that the information would be defended, and applied for an adjournment. By consent the information was adjourned for hearing on 13 May 1971. On that day Mr Jourdain, of counsel, appeared for the informant and Mr Edwards of counsel, also made submissions to the Court, describing himself as "amicus curiae". No appearance was announced on behalf of the defendant, but Mr Bolster, who had on the previous hearing day announced his appearance for the defendant, was in Court with Mr Edwards.

Mr Edwards informed the court that there was no company existing of the name stated on the information to instruct him, and, although there was no other evidence of the fact, it is common ground. Mr Jourdain then handed to the learned Magistrate a certified copy of the Certificate of Incorporation of the respondent company showing its name to be "Egg & I (Farm) Pty. Ltd." and asked that the information be amended accordingly pursuant to s65 of the *Justices Act.* Mr Edwards, while conceding that s65 could be applied in a case of misnomer of an individual, submitted that it was a different matter in the case of a company. The learned Magistrate said that he could only amend an information under s65 if there were a variance between the information and the evidence adduced in support thereof, whereupon Mr Jourdain asked the learned Magistrate to proceed *ex parte* and tendered the copy of the Certificate of Incorporation earlier referred to.

The learned Magistrate, after stating Mr Jourdain's contention that this was a matter which, pursuant to s65 of the *Justices Act*, might be treated as a variance, and further stating that this was not so in the present case of an information alleging an offence by a company, the name being all important where an incorporated company is joined as a defendant, concluded thus:–

> "I am of the opinion, that the certificate of incorporation tendered and marked exhibit one in this matter, discloses the company named therein to be of a different name to the company named in the information. The certificate does not show or support the proposition that the proceedings have been commenced against an existing legal entity, or against an incorporated company existing at the relevant date shown on the information and I am of the opinion that the information for that reason is BAD AND ACCORDINGLY THAT I HAVE NO JURISDICTION TO PROCEED".

On the material before us it is abundantly clear that there was here the merest misnomer – one of a kind which might very easily occur in view of the common habit, both in speech and in writing, of referring to many companies with a prefixed definite article. It is abundantly clear, that is to say, that the reference intended, both in the information and in the summons, was to the respondent company, and that the company so understood.

The summons was served at an address described in the affidavit of service as "the registered office of the company" and being in fact the registered office of the respondent company. The company's solicitor appeared on the return day "for the defendant", without any suggestion that the defendant was other than the respondent company; he was also the solicitor instructing Mr Edwards. In writing to the Egg Marketing Board seeking agreement on an adjournment, he found it sufficient to refer to the prosecution and the summons as being against "Egg & I". And he wrote later to the informant's solicitor seeking particulars in a manner which clearly indicated that he sought particulars of allegations made against his client, the respondent company, without

suggesting that there was any difference between it and "The Egg and I (Farm) Pty. Ltd." referred to in the heading of the letter.

Misnomer such as will, in an action at law, permit the amendment of the name of a party to be effected, for example after the period of limitation of actions has expired (in contra-distinction, in this respect, to the addition or substitution of a party), was thus defined by Devlin LJ, as he then was in *Davies v Elsby Brothers Ltd* (1960) 3 All ER 672 at p676; [1961] 1 WLR 170 (a definition applied in *Whittam v WJ Daniel & Co Ltd* (1962) 1 QB 271 at p277; [1961] 3 All ER 796):

> "The test must be: How would a reasonable person receiving the document take it? if, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

To the same effect, as to proceedings before justices, is *Rex v Norkett* (139 LT Jo 316 at p317, followed in *R v Lister* (1956) 72 WN 491):-

> "Held, that the justices had full power under the *Summary Jurisdiction Act* 1848 to make the amendment in the name, that the defendant had been in no way thereby deceived or misled, and that as the defendant was the person who was intended to be served with the summons in the first instance, although wrongly described, the convictions were right."

There is no such distinction as was suggested, in the application of these definitions, between misnomer of an individual and misnomer of a company; thus in *Whittam v WJ Daniel & Co Ltd* (*supra*), it was said at p282 by Donovan LJ, as he then was:-

> "By parity of reasoning, I think it follows in this case that the mere omission of the word 'Limited' is not fatal, in the sense that no person is described at all. I think one can have a case where the misdescription of a defendant corporation, whether it be by the omission of the word 'Limited' or by calling it a firm or by a combination of both, as it happened here, can be a mere misnomer."

As I have earlier said, on the facts as now known to this Court there was plainly a misnomer which could have been cured by the application of s65 of the *Justices Act* (*Rex v Norkett*, *supra*; *R v Lister*, *supra*). Whether the same observation may be applied to the matters which were before the learned Stipendiary Magistrate before he held that the information was bad, and accordingly, that he had no jurisdiction to proceed, is perhaps not so abundantly clear, but in my opinion they may – the appearance of Mr Bolster for the defendant at the first hearing without qualification of any kind and his appearance to instruct Mr Edwards at the adjourned hearing, the statement in the affidavit of service that the summons was served at "the registered office of the defendant", that is, as named in the information and the summons, coupled with the learned Magistrate's knowledge that in fact there existed no company by that name, the completely trivial nature of the difference between the two names, and the absence of prejudice to the respondent company. In any event, it must have been plain to the learned stipendiary magistrate that the informant was relying on there being a mere misnomer such as would, when the evidence was complete, lead to the conclusion that here there was a mere variance between the information and the evidence in support of it, with the result that under s65 of the *Justices Act* no objection was to be taken or allowed to the information.

As was said by Griffith LJ in *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531 at p543; 19 ALR 95:—

> "That" (section) "apparently means that if objections are taken which really do not go to the merits of the case the magistrate is not to stay his hand, but to proceed to dispose of the case on the merits".

See also the passage from Wilkinson's *Australian Magistrate* (6th edn. p502) cited in *Ex parte Palmer* [1907] NSWStRp 71; (1907) 7 SR (NSW) 544 at p549; 24 WN (NSW) 128.

Mr Papayanni's principal submission, and I think the only one which need be discussed

here in view of the discussion of others which took place during argument, is that any error which the learned Magistrate may have made was an error on a matter within his jurisdiction to determine and not on a matter going to jurisdiction. Therefore, it is said, the only remedy available to the prosecutor would be case stated, the time for which is long past; mandamus, or an order in the nature thereof, error does not lie for any such error as the Magistrate made.

The distinction is a well known one, less difficult to state than to apply to particular cases, and no purpose will be served by referring to the many cases in which it has been considered, other than what I believe to have been the most recent in this State, namely *Ex parte Hulin; Re Gillespie* (1965) 65 SR (NSW) 31; [1965] NSWR 313. As is there also pointed out, magistrates do not always use the word "jurisdiction" in its strict sense (p36; *Oates v Sieveking* [1948] NSWStRp 34; (1948) 48 SR (NSW) 445 at p448).

What, however, the learned Magistrate has done here is to conclude that the information (the foundation of his jurisdiction) was "bad", and this, in itself, it plainly was not. Then, by terminating the proceedings on the ground of want of jurisdiction (here used by him in its accurate sense) at the stage and in the manner which he did, he deprived the applicant of all effective capacity to rely, when the evidence should be in, upon s65 of the *Justices Act*, – a reliance which, if successful and if otherwise the offence charged was established, would involve no more than the substitution in the conviction of the respondent company's name for the name appearing in the information.

As was said in the passage from Wilkinson's *Australian Magistrate* earlier referred to–

> "The result of the above enactments seems to be to entirely supersede the use of the information, summons, or warrant, as substantial parts of the proceedings, beyond the fact of their being required by way of authority for the Justices' interference; but that the conviction entirely depends upon the case proved by the evidence, which neither recites or even alludes to the information, summons, or warrant, as in the repealed form given in 3rd Geo. IV. c. 23."

In the result, in my opinion, this was not an instance of a mistake made in a matter within jurisdiction but one of a failure to exercise a jurisdiction which the learned Magistrate had and which the applicant sought to have exercised, or in terms of s134 of the *Justices Act*, of refusal to do an act relating to the duties of the learned Magistrate's office. The rule nisi should therefore be made absolute and the second-named respondent should pay the costs of the applicant; no order as to the costs of the first-named respondent. In my opinion, in the circumstances a certificate under the *Suitor's Fund Act* is not warranted.

ASPREY JA: I have had the advantage of reading the judgment of Sugerman P in this case and I agree in it.

MOFFITT JA: One could hardly conceive that in this century in the law, much less in this decade, there should parade as a judicial proceeding the charade that has led to the present application. The respondent company, which bears the name Egg and I (Farm) Pty. Limited was proceeded against by summons on a charge of selling, at Tweed Heads South, eggs other than to the Egg Marketing Board. The summons was served at the Company's registered office at Pacific Highway Tweed Heads South. Unfortunately "The" was inserted in the information in front of the respondent company's name. The presence of a capital T rather than a small t suggests the "The" was part of the name rather than the definite article attached to the company's name Egg and I (Farm) Pty. Limited, as often happens when reference is made to a company the name of which is descriptive or includes a reference to a locality. The explanation possibly is that the typist made a mistake because she had read the name of the book by McDonald more accurately than the person responsible for selecting the name of the Company when it was incorporated. The company was described in the summons as of Pacific Highway South Tweed Heads.

Nobody for a moment could have any doubt that the summons referred to and only referred to the respondent, except perhaps some lawyer of a century or more ago in a layman's tale seeking to ridicule lawyers for their petty-fogging technicalities. It did not leave any doubt in the mind of Mr Bolster the company solicitor, and he should know for he was also a director of the company. He wrote off to the Board and suggested an adjournment of the hearing and asked for particulars. In his letter he referred to the Company variously as "Egg and I" and "The Egg

and I (Farm) Pty. Ltd." He was referring to the respondent. He was in Court on the return date of the summons and announced his appearance for the defendant. He had told the Board not to bring its witnesses from Sydney because the case would not be reached. By agreement a date was fixed for the hearing and it was announced that counsel would be coming from Sydney (some 500 miles distant).

On the appointed day, counsel from Sydney was present to represent the informant and presumably his witnesses from Sydney were also there. There was also present in Court Mr Edwards, a counsel from Sydney with the Solicitor for the respondent company. He did not announce his appearance for the defendant but told the Court he was *amicus curiae* and as such had to inform the Court that there was no company in existence which had the "The" in front of its name and that, therefore, there was no such company which could instruct him to appear and that he was telling this to the Court because he felt he had a duty to do so. I do not know whether we are expected to suppose he just happened to be in Court when the case was called on and, being there, was moved by benevolence to aid the Court.

The Certificate of Incorporation of the respondent company was produced and became an exhibit. It showed that the company did not have a "The" in front of its name. Beyond this the proceedings were not embarked upon. No witnesses were called. After the respondent Magistrate referred to the "The" difference in the otherwise two identical names he said:

> "I am of the opinion, that the Certificate of Incorporation tendered and marked Exhibit 1 in this matter, discloses the company named therein to be a different name to the company named in the information. The certificate does not show or support the proposition that the proceedings have been commenced against an existing legal entity or against an incorporated company existing at the relevant date shown on the information and I am of the opinion that the information for that reason is bad and accordingly that I have no jurisdiction to proceed."

After this sorry farce, presumably the witnesses, who had travelled many hundreds of miles to be present on the hearing date arranged by the solicitor and director of the respondent, went away without giving any evidence. One might be excused for supposing that counsel for the respondent received his fee for ingeniously befriending the court in the interests of his client. Lawyers representing and seeking to advance the interests of a client should not be allowed to do so under the misleading term of *amicus curiae*, but only by virtue of a regular announcement of an appearance for their client.

Counsel for the respondent before us, who was not the counsel who acted for the respondent at the hearing at Tweed Heads, did not really argue that the Magistrate was correct in what he did, except in the kind of collateral way. He submitted that the Magistrate would need evidence that no company of the name "The Egg and I (Farm) Pty. Limited" existed before he treated that name in the information as referring to the respondent company. There is no substance at all in this submission. In any event the respondent company's counsel assured the magistrate at Tweed Heads that there was no such company.

It was argued, however, that mandamus does not lie, because the decision of the Magistrate was a decision within jurisdiction and at worst was a dismissal of the information due to error of law and the only remedy was by way of stated case, which was now out of time. Reliance was placed upon *R v War Pensions Entitlement Appeal Tribunal: Ex Parte Bott* [1933] HCA 30; (1933) 50 CLR 228 at 242-3; 39 ALR 533; (1933) 7 ALJR 169. It was argued that the Magistrate came to his decision for an assigned reason, erroneous though it might be, the reason being that because the word "The" was present in the information, the proceedings were not against an existing company and that what he did was then to dismiss it on that ground.

I do not think the magistrate did embark on the exercise of his jurisdiction. The terms of his judgment indicate he did not think he was doing so. He said the information was bad, which is difficult to understand, but, thereupon, he declined to hear the evidence which his jurisdiction required him to do. On this account mandamus will be.

However even if it be said the magistrate was hearing a preliminary objection based on the tender of the Certificate of Incorporation and, in so doing, was exercising his jurisdiction and then within jurisdiction dismissed the information, and that in doing so he erred in law, possibly

badly, but with jurisdiction and, even if it can be said that in such a case mandamus will not lie although no evidence is heard, I think the argument fails in the present case.

I consider the point can be reached, beyond even a bad error of law, where the professed reason for declining to proceed further with the determination of a matter within his jurisdiction is so devoid of reason and so utterly worthless that it is no different from declining jurisdiction for no reason at all. What if the Magistrate refused to proceed to hear the case because in the information the "I" part of the "Egg and I" was a small i or did or did not have a dot over it or because, as is the fact here, the information used "Ltd." where the Certificate of Incorporation used the word "Limited" or because the respondent's name was typed in red in the information. I can see no distinction between any of these ridiculous examples and the present ridiculous case. The law disregards such trivia, and a reason based on such trivia is no reason at all (*Ex Parte Malouf; re Gee* [1943] NSWStRp 23; (1943) 43 SR (NSW) 195 at p197; 60 WN (NSW) 134; *Ex Parte Jackson; re Fletcher* [1947] NSWStRp 32; 47 SR (NSW) 447 at p449; 64 WN (NSW)).

In my view the rule should be made absolute and the respondent company should pay the costs of the application. The grant of a certificate under the *Suitors' Fund Act* is discretionary. For reasons which should be apparent from my earlier observations, in my view a certificate should not be granted.
