**43/94**

**SUPREME COURT OF VICTORIA**

# *KENNETH AYRES (AUST) PTY LTD v DENNIS M GOLDENBERG & ASSOCIATES*

**McDonald J**

**9 June 1994**

**PROCEDURE – LEAVE TO APPEAL OUT OF TIME – "EXCEPTIONAL CIRCUMSTANCES" – MEANING OF – FAILURE DUE TO COMPLEXITY OF CASE AND APPEAL POINT NOT SEEN BY EXPERIENCED LEGAL PRACTITIONERS – WHETHER FAILURE DUE TO EXCEPTIONAL CIRCUMSTANCES: *MAGISTRATES' COURT ACT* 1989, S109.**

Section 109(5) of the *Magistrates' Court Act* 1989 provides:

> "The Supreme Court may grant leave under sub-section (4) and the appellant may proceed with the appeal if the Supreme Court—
>
> (a) is of the opinion that the failure to institute the appeal within the period referred to ... was due to exceptional circumstances.."

**1. When dealing with what constitutes "exceptional circumstances" a Court may adopt the definition that "exceptional" means circumstances which rarely occur and perhaps be outside reasonable anticipation or expectation. However, the facts of each case must be judged on its own merits and examined in the light of any legislative provision and the interests of the parties.**
***Owens v Stevens* [1991] ACL Rep 130 VIC 64, followed.**

**2. Where a party failed to institute an appeal within a limited time because of the complexity of the case and the fact that a point of the appeal sought to be raised was not seen by counsel prior to the hearing of the appeal, the failure to institute the appeal was not due to exceptional circumstances.**

**McDONALD J:** *[After referring to the relevant Legislative provision His Honour continued]...* **[4]** Section 109(5) of the *Magistrates' Court Act* gives rise to a discretion in the court as to whether leave should be granted. However, before such discretion may be exercised it is necessary that the court be satisfied of the two matters that I have referred to in sub-sections (a) and (b) of sub-section 5 of that section. It is first necessary that the court be of opinion that the failure to institute the appeal within the period referred to in the section was due (I emphasise the word "due") to exceptional circumstances. In *Schwerin v Equal Opportunity Board* [1994] VicRp 60; [1994] 2 VR 279; [1994] EOC 92-561 I dealt with what constituted "exceptional circumstances" under section 109(5)(a) of the *Magistrates' Court Act*. I referred to the fact that **[5]** the *Oxford English Dictionary* (second edition, volume 5), defined "exceptional" as "of the nature of or forming an exception; out of the ordinary course, unusual, special". In that case, I also followed the view of Hedigan J as expressed by him in *Owens v Stevens*, (unreported, 3 May 1991), where, after referring to the definition of the word "exceptional" as appearing in the *Oxford English Dictionary*, His Honour in his judgment said:

> "The facts must be examined in the light of the Act, the legislative intention, the interests of the prosecuting authority, the defendants and the victims. It may be that circumstances amounting to exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or expectation. Courts have been both slow and cautious before essaying definitions of phrases of this kind, leaving the content of the meaning to be filled by *ad hoc* examination of the individual cases. Each case must be judged on its own merits and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors".

In support of the application, the solicitor for the applicant, Dale Battley, has sworn an affidavit on 8 June 1994 in which he contends there are exceptional circumstances as to why the Appeal was not brought in time. In paragraph 9 of his affidavit, he deposed -

> "Further, the failure to institute the appeal within the time limited by sub-section (2)(a) of section 109 was due to exceptional circumstances. The first appeal raises some eleven grounds of appeal covering most aspects of the case at first instance which occupied five sitting days. The affidavit material relied upon is extensive, with the principal affidavit of Dennis Malcolm Goldenberg sworn 16 November 1993 extending to 156 paragraphs and exhibiting voluminous documentary material consisting of some hundreds of pages of material. The legal and factual issues raised by the first appeal are exceptionally complex for this type of case in my experience. I have been a solicitor in suburban practice in Victoria for many years and I have instructed in many hundreds of cases in the Magistrates' Court. I conduct a practice in which I am the sole legally qualified **[6]** practitioner. Never before have I been involved in a case in the Magistrates' Court which has been of this degree of complexity where the evidentiary material has been so extensive. Through the hearing of the case at first instance, I briefed Tom Keeley, an experienced counsel, who was admitted to the Victorian bar in 1981. Mr Keeley was briefed by me to prepare an affidavit in relation to the first appeal dealing with the hearing at first instance. Given the extent and complexity of the matter, the elusively simple, yet important legal points sought to be raised by the cross appeal escaped my attention, nor was the matter raised with me by Mr Keeley. Mr Vickery of counsel was briefed by me late last week. He has alerted me to the matter and I have given him instructions to take whatever steps are necessary to bring on the cross appeal".

That which is said to be the question of law that the applicant seeks to raise, if leave is granted to appeal, is whether the Magistrate erred in law in holding that a new agreement arose in respect of which Dennis M Goldenberg & Associates were entitled to an order for payment, as previously referred to, in the absence of any proceeding or pleading before the Magistrate claiming the same and in the absence of any contention by counsel for either party claiming the same before the Magistrate. That question as sought to be raised would seem to be based on an analysis of what the situation exists in respect of the pleadings, the subject of the proceedings, and what the substance of the claims were in such proceedings.

In substance, those grounds sought to be relied on by the applicant as exceptional circumstances come down to that which can be summarised as being that the point now sought to be raised was not seen by counsel or the solicitor for the applicant before the hearing of the Appeal. In my view, that sought to be relied on as **[7]** constituting exceptional circumstances and that which I have referred to, do not constitute exceptional circumstances within the meaning of the Act. Accordingly, I am satisfied that there has not been established on the material before the Court that the failure to institute the appeal was due to "exceptional circumstances". For that reason, it is not necessary for me to have regard to whether the other party to the Appeal would be materially prejudiced because of the delay, nor is it necessary for the Court to consider how it may exercise its discretion, for the discretion does not arise. Accordingly, the application will be dismissed.

**APPEARANCES:** For the plaintiff Kenneth Ayres: Mr P Vickery, counsel. Mr D Battley, solicitor. For the defendant Dennis M Goldenberg: Mr M Pearce, counsel. Madgwicks, solicitors.

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