16/93

SUPREME COURT OF VICTORIA

HALLIDAY v ARNOL

Fullagar and JD Phillips JJ

6 May 1993

PROCEDURE – APPEAL TO SUPREME COURT – REFUSAL BY MAGISTRATE TO ORDER ADDITIONAL PARTICULARS AND DISCOVERY – "FINAL ORDER" – WHETHER FINAL ORDERS – WHETHER SUCH ORDERS APPEALABLE: *MAGISTRATES' COURT ACT* 1989, S92(1).

Where a magistrate hearing charges alleging breaches of the *Fair Trading Act* 1985 refused an application for additional particulars and discovery, and declined to declare that the defendant was entitled to rely on statutory defences, the orders did not finally decide the rights of the parties and were not "final orders" within the meaning of s92(l) of the *Magistrates' Court Act* 1989. Accordingly, the Supreme Court had no jurisdiction to entertain an appeal from the orders of the Magistrate.

FULLAGAR J: [1] This is an appeal from an order of Brooking J made on 15 July 1992 whereby he dismissed an appeal from an order of Master Wheeler. On 8 July 1992 the Master had dismissed an application by the appellant for an order under Rule 58.09(c) referring to a Judge his appeal from orders of a Magistrate, being Magistrate Westmore, made on 9 July 1992.

The Magistrate had refused to order that the prosecution give to the appellant additional particulars to those which had already been given to him of the three charges made against him, being in substance charges that on or about 19 August 1990 he was knowingly concerned in certain stated contraventions by a named company of provisions of the *Fair Trading Act* 1985.

The Magistrate, Mr Westmore, had also refused to order that the prosecution give to the appellant further discovery of documents. Finally, so far as relevant, the Magistrate had refused to declare or state that the appellant was unconditionally entitled to rely on statutory defences under s40(1) of that Act. He was not satisfied that proper notice had been served.

Master Wheeler dismissed the application to him by the appellant upon the ground that none of the impugned orders of the Magistrate was a "final order" within the meaning of s92(1) of the *Magistrates' Court Act* 1989, with the consequence that the Supreme Court had no jurisdiction to make the order then sought of the Master or to determine the purported appeal. The appellant then appealed from that decision of the Master to Brooking J, who on 15 July 1992 dismissed the appeal to him. The appellant says that His Honour **[2]** expressed the view that the impugned orders were plainly not final orders and the view that, if it turned out in the end that the appellant was convicted in proceedings whereby he had suffered a denial of natural justice, an appeal would then lie to the Supreme Court from that final order.

It is necessary, I think, to bear constantly in mind two matters. The first is that Magistrate Westmore is not the trial court, that the trial court is another Magistrate before whom the trial is now proceeding, and that the trial Magistrate, of course, has full power over all relevant matters. The second thing to bear constantly in mind is the necessity for the appellant to show that the final orders of Magistrate Westmore which he is seeking to challenge on appeal were "final orders" within the meaning of that expression in s92(1) of the *Magistrates' Court Act*.

The Court has had the advantage of a written outline of argument prepared by Mr Halliday, who appeared in person, and has heard extensive oral argument by Mr Halliday over some two and a half hours. He has dealt with the dichotomy of orders into final and interlocutory and has dealt with some decisions of the High Court, and some decisions (reported and unreported) of the Supreme Court of Victoria, upon that dichotomy, and has addressed us upon, *inter alia*, public policy, the balance of justice, the grave disadvantage of a person having to undergo an unfair trial and face conviction before being vindicated in his challenge to orders made in the meantime, and also to current public opinion and to a United National Treaty.

We have considered his arguments, **[3]** including the passages in the authorities which have been cited by him. The Court was invited to lay down, as clearly as may be, some legal principle making it clear for all future occasions the precise dichotomy of orders into final and interlocutory, and, indeed, to give a definition – I think, in the end, Mr Halliday conceded, perhaps, a new definition - of what a final order is. Upon full consideration, I do not think that this is a case in which this Court should attempt some definition or re-definition of "final orders".

Of the orders in the present case I would say that, in my opinion, they did not finally decide the rights of the parties within the meaning of that expression as used in the authorities. The appellant did not demonstrate to the Master that he had an arguable appeal on a point of law because he could point for jurisdiction only to s92(1) of the Act with its requirement of a final order. Upon full consideration, I have no doubt that the order of Brooking J was correct in law. It is in my opinion quite clear, as a matter of law, that the three orders of Magistrate Westmore, in the form of the three refusals to which the appellant before us confined himself, were not final orders within the meaning of s92(1) of the *Fair Trading Act*. I would, for those reasons, dismiss this appeal.

JD PHILLIPS J: I agree, and I would add only this. The appellant, who made detailed submissions in support of his appeal, invited the Court to apply, as the relevant test of what is a "final order" within the meaning of s92, the test devised by the High Court in another context, as **[4]** described in Williams' *Supreme Court Civil Procedure - Victoria* (1987) para.20.10. As described there, that test was whether the judgment or order as made finally disposes of the rights of the parties. The learned author says:

> "The test requires the Court to look at the consequences of the order itself and to ask does it finally determine the rights of the parties in a particular proceeding pending between them. It is not enough to ask simply does the order finally determine the actual application out of which it arises because, subject to the possibility of an appeal, every order does that."

The learned author then goes on to include in his comment a sentence which is capable of being misunderstood, and so I re-fashion it by reference to its source, which is in the judgment of Taylor J in *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 at p440; [1966] ALR 705; (1966) 40 ALJR 102. So re-fashioned, the comment goes on:

> "So an order made in the course of a proceeding, which order does not conclude the rights of the parties *inter se* although it may conclude the fate of the application in which it is made, is interlocutory only."

The appellant invited the Court, in applying this test, to have regard not only to the legal but also to the practical effect of the order in question. I agree with all that has fallen from the learned presiding Judge. What I would add is that, even if this Court were to apply as the relevant test under s92 the test which I have just described from Williams, it would still follow that the orders of the Magistrate here in question were not "final orders" within the meaning of s92. I agree that the appeal must be dismissed.

FULLAGAR J: **[5]** Whilst Phillips J was delivering judgment, it occurred to me that I should perhaps have mentioned a formal matter. The respondent, John Arnol, did not appear on this appeal when it was called on, but an officer of the relevant department, with proper courtesy to the Court, informed the Court that the respondent did not propose to appear. The order of the Court is: appeal dismissed.

APPEARANCE: Mr P Halliday appeared in person.
