8/99; [1999] VSC 67

SUPREME COURT OF VICTORIA

MUSASHI PTY LTD v FOODY

Hedigan J

22, 26 February 1999

CIVIL PROCEEDINGS – REHEARING OF CLAIM – MATTER SET DOWN FOR HEARING – DEFENDANT REQUESTED ADJOURNMENT – PLAINTIFF AGREED TO ADJOURNMENT ON CONDITION THAT FAILURE TO ATTEND SUBSEQUENT HEARING WOULD ENTITLE THE PLAINTIFF TO JUDGMENT BY DEFAULT – DEFENDANT NOT IN ATTENDANCE AT SUBSEQUENT HEARING – DEFENDANT REPRESENTED BY LEGAL PRACTITIONER – AGREEMENT FOR ENTRY OF JUDGMENT IN DEFAULT – AMBIT OF STATUTORY PROVISIONS FOR APPLICATIONS TO SET ASIDE AND REHEAR - WHETHER DEFENDANT "APPEARED IN THE PROCEEDING" – FINDING THAT ORIGINAL ORDER OBTAINED IN BAD FAITH – BASIS FOR SETTING ASIDE JUDGMENT ON GROUND OF FRAUD – WHETHER MAGISTRATE IN ERROR IN FINDING FRAUD – WHETHER MAGISTRATE IN ERROR IN GRANTING APPLICATION AND SETTING ASIDE ORIGINAL ORDER: *MAGISTRATES' COURT ACT* 1989 S110.

Section 110(1) of the *Magistrates' Court Act* 1989 ('Act') provides:

> "If a final order is made by the Court in a civil proceeding against a person who does not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and the proceeding be reheard."

When a civil proceeding was fixed for a pre-hearing conference, the defendant F. requested an adjournment on the ground that he would be out of Australia when the conference was scheduled for hearing. The solicitors for the plaintiff M P/L consented to the adjournment on the written agreement that if F. did not appear on the date subsequently fixed for hearing judgment in default would be entered. On the return date, F. did not appear personally but he was represented by a legal practitioner who sought an adjournment of the matter. When this application was refused, F's legal practitioner agreed to an order being made against F. by consent.

Subsequently, F. applied to have the order set aside and reheard. On the hearing of the application the magistrate concluded that the consent order had been obtained in bad faith and set the order aside. Upon appeal—

HELD: Appeal allowed. Decision to set aside quashed.

1. The discretion to set aside an order and rehear is regulated by s110 of the Act. It was never intended that orders made by consent against a party represented by a legal practitioner could be set aside. The section does not speak of appearing "on a hearing"; it addresses appearance "in the proceeding". F. was bound by the order because he instructed or accepted the advice of his then legal practitioners to agree to its making. There was no mistake or misapprehension as to the meaning and consequences of the arrangement made. In those circumstances there was no basis for the magistrate to set aside the order.

2. It may be that there is some residual discretion beyond s110 of the Act to quash an order on the grounds of bad faith. However, the basis of setting aside a judgment on the ground of fraud is relatively limited. The evidence before the magistrate fell short of the criteria which must be established before a judgment could be set aside due to fraud. Accordingly, the magistrate was in error in setting aside the original order on the ground that it had been obtained in bad faith.
***Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, applied.**

HEDIGAN J:

1. This is an application pursuant to Order 56 of the *Supreme Court Rules* for an order in the nature of *certiorari* quashing the order of the Magistrates' Court of Victoria of 19 November 1998 setting aside an earlier order of the court of 1 September 1992.

2. This matter was referred to me out of the Practice Court a few days ago. It was, unbeknown to me, a matter for final hearing. As a consequence, I had to embark upon it without preparation and I have been engaged in other matters since then.

3. The plaintiff company was represented by counsel, Mr Herskope, on the hearing. The first defendant, Mr Foody (hereinafter called the defendant) appeared in person. As is the usual practice, the Magistrates' Court did not appear. See *R v Australian Broadcasting Tribunal ex p. Hardiman* [1980] HCA 13; (1980) 144 CLR 13; 29 ALR 289; (1980) 54 ALJR 314.

4. The evidence before me was wholly on affidavit and submissions concluded within a day. I do not, in view of my commitments on circuit, intend to reserve my decision beyond today and, as is self-evident, I am delivering oral reasons this morning instead of the customary practice in matters of this kind, reserved reasons.

5. The history of the dispute that underlines this application is both extensive and complex.

6. In May 1991 the plaintiff company Musashi sued the defendant, who holds both U.S. and Australian citizenship, in the Magistrates' Court at Melbourne on a money claim arising out of the alleged use of a business Visa card for personal expenses.

7. The defendant had worked for the plaintiff and had become a director of it. There developed disputes between the defendant and the company and the other directors, characterised by claims of fraud on either side.

8. Both parties in the proceeding before me have filed extensive material, with ample exhibits, detailing virtually all of the litigation history, and much of the correspondence connected with it. Much of this material is irrelevant to the disposition of this application which is concerned only with a recent order of the Magistrates' Court of 19 November 1998, reinstating the proceeding concerning the Visa card expenses which had been disposed of by an order of that court in 1992. Notwithstanding that, I indicate that I have read all of the material. The principal affidavits are those firstly of the solicitor for the plaintiff, Mr Benjamin Wyatt, and secondly of the defendant, Mr Foody. Mr Wyatt's affidavit of 3 February 1998 exhibits nine exhibits. These include the magistrate's reasons for decision which constitute the true record for the present purpose. See *Craig v South Australia* (1995) 185 CLR 542 and section 10 of the *Administrative Law Act*. There is also exhibited to Mr Wyatt's affidavit, and I think in some part Mr Foody's, there being some duplication of exhibits, records of the court concerning the original Magistrates' Court order, that being the magistrate, Mr Robert Tuppen, made on 1 September 1992, the recent orders of the magistrate, Mr Coburn, who set aside Mr Tuppen's order, copies of affidavits previously sworn both by Mr Wyatt of 13 November 1998 and Mr Foody of 19 November 1998, and an affidavit of Mr Foody's solicitor, at the Magistrates' Court in September 1992, a copy letter from the plaintiff company to the Department of Immigration and Ethnic Affairs of 12 October 1990.

9. The defendant, Foody, filed a recent affidavit of 18 February 1999 with its exhibits which include extracts from proceedings before Jenkinson J of the Federal Court of Australia in 1996 when His Honour heard the plaintiff's petition for bankruptcy of the defendant allegedly arising from non-payment of the judgment debt obtained in the 1992 Magistrates' Court proceedings, and in respect of which in effect judgment was entered on 1 September 1992. From that material and some other material deposed to, it appears to me that Jenkinson J, who dismissed the petition for bankruptcy, took the view there was no debt and perhaps even that there had been no consent to the entry of judgment at that time, although that matter is not quite as clear. I emphasise, however, that whilst the Federal Court may have reached those conclusions, and acted on them for the purposes of determining the matter within its jurisdiction committed to it for decision, which was no more than the question of the petition for bankruptcy arising, it had no power and has no power or authority in respect of the 1992 order of the Magistrates' Court nor did it purport to exercise any such power, whatever view it took of the events arising from the evidence at that time. I am, however, directly concerned with the Magistrates' Court order because it is that order which the magistrate, Mr Coburn, set aside last year and granted a rehearing in respect of the proceeding. Moreover, the matter comes before me on a quite narrow basis, namely whether the Magistrates' Court in 1998 had power to make any order setting aside the 1992 order because of the provisions of the *Magistrates' Court Act* 1989.

10. I briefly summarise the mainstream facts. Mr Foody, then with Musashi, frequently went to the United States. After the fall-out the company sued him, I think initially for some $14,000-odd, later reduced to $11,000, and by complaint of 5 September 1991, he retained solicitors, Gadens

Ridgeway, (hereinafter called Gadens) and a defence was filed. Those solicitors continued to act for him throughout that proceeding.

11. There was first, under the *Magistrates' Court Civil Procedure Rules* at that time to be a pre-hearing conference fixed for 26 June 1992.

12. It appears from the material that there had been some earlier and insignificant adjournments connected with discovery and similar matters. They do not appear to be relevant to any of the matters which I have to decide.

13. Through his solicitors, the defendant Foody asked for a consent adjournment of the June hearings to enable him to travel to the United States.

14. The plaintiff's solicitors, Slater & Gordon, on 17 June 1992 requested some details of the defendant's travel plans prior to responding to that request. Those indications appeared to be of the then intended departure on 25 June. On 23 June, Slater & Gordon in effect consented in writing to the adjournment, but on the condition that Foody provide documentary proof that he had a return visa to Australia by 31 July. On 25 June, Gadens wrote a letter to Slater & Gordon, the meaning of which was debated to some extent before me. The plaintiff contends that it meant and that both sides knew that it meant that if the proceeding was adjourned to a later date and Mr Foody did not return and appear on the adjourned date, Gadens' letter could be produced as a consent to the entry of judgment against him in the claimed amount and with costs. See in respect of these matters, in particular Exhibit AEF8 to Mr Foody's affidavit of 28 October 1998, which is part of Exhibit 3 to the affidavit of Wyatt of 3 February 1999. On this basis Mr Foody went to the United States. In argument before me, Mr Foody (who was unrepresented, but with some assistance from me, it must be said, put his case with clarity and some skill) agreed that whatever the language of that letter, he believed that the position was that if he did not come back for the hearing, for whatever reason, there would be a consent or default judgment entered against him as a consequence of the correspondence. However, he stated that his solicitors had told him, that is Gadens, that he would be able to apply to have any such order set aside and the matter reheard when he returned. It is quite clear from a letter of 6 August 1992 by Gadens to the client Foody, that he was made aware that the plaintiff would get a judgment against him by default if he did not appear.

15. Mr Foody did not come back to Australia until 1 September 1992, apparently because he did not get a visa. I assume from that, I hope correctly, that he was not at this point of time an Australian citizen. There is other material (and it was referred to by the magistrate, Mr Coburn) that indicated that the plaintiff in 1990 was opposing, to the Department of Immigration, the return of the defendant by proposing opposition to his right to obtain a visa. I have read the material on this aspect which includes the letter to the Department of Immigration on the date to which I have earlier referred. It does indicate that the plaintiff's directors opposed the readmission of Foody in 1990. It is not possible, however, even on the material before me, which I think may be more ample than that before the magistrate, to conclude that their opposition was driven by a desire to keep Mr Foody out because of this case, that is the thwarting meeting the September date for hearing. After all, the proceeding was not even commenced until 1991, nor is it possible in my judgment to conclude that the refusal of the visa at that time was materially influenced by their stance. The decision about that was that of the Department of Immigration and the basis of it was unknown to the Magistrates' Court and is unknown to me. Speculation about that is not a substitute for evidence.

16. Mr Foody said to me that he had initiated some Freedom of Information application for Department records, but, for whatever reason, that has not been productive, and I think, as I said at the hearing, there might be considerable difficulties perhaps in obtaining them. The matter came on before the magistrate, Mr Tuppen, on 1 September 1992. Mr Foody's solicitor, Mr Smith, from Gadens appeared for him. He sought an adjournment. This was opposed. The magistrate may have been influenced in his refusal of the adjournment by his knowledge of the fact having emerged, presumably on the application for adjournment, that Foody had not been out of Australia on 26 June 1992, the previous but adjourned date, and did not leave until July. The explanation for this now put forward by Mr Foody, who it must be remembered was not present on 2 September 1992, seems innocent enough, but none of that was put, if true, before Mr Tuppen, who refused

the adjournment application and proceeded with the matter, Mr Smith of Gadens still appearing for Mr Foody. The order that was made was either by consent or at least not opposed. The court record does not denote it as being by consent, but I have no doubt that the Magistrates' Court would have construed the letters between the solicitors as amounting to an agreement to a consent order, to be obtained, as the Gadens' letter stated, by producing their letter to the court. One might rhetorically ask, what else could this mean save as evidence of consent to judgment?

17. The fact that Mr Foody believed, from what he had been told, that he could have it set aside afterwards appears to confirm that his expectation must have been that there be would be a default judgment against him; otherwise, there was no need to either seek or to have relied on the belief that he could get it set aside.

18. When Mr Foody returned in November 1993, he retained fresh solicitors. Some of the material before me contained in the documents I have sighted includes pointed correspondence from Mr Foody addressed to his former solicitors, to Gadens, who were seeking to recover fees due to them, that certainly articulated his considerable dissatisfaction with the services which they had rendered. He retained on his return, the solicitors, Smith and Emmerton, apparently to apply to take the necessary steps to have the judgment, entered on 1 September 1992, set aside. According to Mr Foody, he was advised by that firm that it could not be set aside. Nothing was done. About a year later the bankruptcy proceedings were commenced against him, that petition being dismissed by Jenkinson J on 16 May 1996.

19. On 25 October 1998, the defendant applied to have the order of 1 September 1992 set aside and a rehearing granted. The magistrate granted that application and that has led to this Order 56 application. It should be said this procedure was necessarily adopted because the grant of a rehearing does not constitute a final order justifying an appeal to this court which is a different matter to a proceeding under Order 56.

20. The magistrate's reasons set out some of the history of the matter, including the reference to the letter of Horewood of the plaintiff to the Department of Immigration, which he says was written not only before the hearing but prior to the company's request that Foody refund the Visa card expenses debt allegation as being personal, not business. The magistrate summarised the history, mostly derived from Foody's material. Significantly, for my purposes, the magistrate stated, on page 7, lines 5 to 6, with respect to the Tuppen order of 1 September 1992, "The parties before me have agreed that that order was made by consent". Thus it appears that Mr Foody acknowledged to the magistrate himself in October of 1998 that that order had been obtained by consent.

21. This consent can only have come from Gadens, the defendant's solicitors, either by the letter to which I have referred or through Mr Smith's presence, he being present at the court on 1 September 1992, or possibly from both.

22. The magistrate, Mr Coburn, did not specifically address the provisions of the *Magistrates' Court Act* 1989, in particular section 110 of the Act, which in relevant respects is in the following terms in sub-section (1):

> "If a final order is made by the Court", that being the Magistrates' Court, "in a civil proceedings against a person who does not appear in the proceeding, that person may, subject to and in accordance with the Rules apply to the Court for an order that the order be set aside and the proceeding be reheard".

23. There are later provisions concerning the discretionary nature of a setting aside exercise in respect of the terms upon which setting aside may be given - matters about stay, matters about payment of money, payment of re-applications.

24. The magistrate concluded that the order made in 1992 had been obtained in bad faith because the plaintiff had made representations (presumably the letter of October 1990) and perhaps some other matters referred to, to oppose the defendant's return and had done so before "it obtained the consent letter from the defendant". Those last words are the specific words from the magistrate's reasons. He dismissed as irrelevant questions of delay and prejudice to the defendant, and the question as to whether there was any defence on the merits, although it would appear for another purpose, namely the substance of section 110, although he did not identify it, the

magistrate was prepared to pray in aid reference to a defence on the merits. He concluded that it was open to be decided by him as a fact that the defendant was not allowed back into Australia because of the plaintiff's representations, as the defendant would contend, misrepresentations. I have already commented on this considerable leap to embrace the inference and conclusion of "bad faith", which in my view was not open on the evidence. It may have been borrowed from some of the language of Jenkinson J The real evidence of the Department of Immigration reasons lies in the Department files. Moreover, the magistrate's finding is a finding made virtually of fraud, without the persons against whom it was made, being heard or even seen by the magistrate on that issue. The magistrate heard the application wholly on the affidavits of Wyatt, Foody and Smith, and transcripts of what took place before Jenkinson J I add that the burden of proof of the relevant facts to attract the exercise of the assumed discretion lay on the applying defendant.

25. But in my view the magistrate's discretion to order the setting aside of the 1992 order and to order a rehearing is regulated by section 110. All the evidence points to a consent order having been made. The magistrate proceeded on that basis, that is the magistrate, Mr Coburn, proceeded on that basis, and he was correct in so doing, in my view. The order made in 1992 was a final order in a civil proceeding and it seems to me the defendant did appear, by his solicitor, and, as was admitted before the magistrate, Mr Coburn, the order was a consent order.

26. I do not find it necessary to develop any of the policy considerations that self-evidently drive section 110. It was never intended that orders made by consent, against a party represented by a legal practitioner, actually at the court, could be set aside under the Act by another magistrate.

27. The magistrate, Mr Coburn, said that the defendant did not appear at any hearing because there was no hearing, only an order entered by default. He said that there was no hearing on the merits.

28. However, the section does not speak of appearing "on a hearing"; it addresses appearance "in the proceeding". There is no reference to a hearing "on the merits". The magistrate accepted that it was a consent order; he had to, because both plaintiff and defendant agreed, before him, that it was. It needs no elaboration from me to point out that there is almost never a hearing on the merits or otherwise in the case of a consent order. That is the purpose of consent orders. The authorities establish that even if counsel took no part in the proceeding after announcing his appearance (see *Kotrlik v Eisner* [1958] VicRp 11; [1958] VR 55; [1958] ALR 317), or that counsel – that includes a solicitor, of course – merely applied for an adjournment (*Bullmore v Zurich Australian Life Assurance* unreported, Fullagar J of this court, 24 January 1991), the party has appeared for the purposes of section 110.

29. Thus there was no basis for the exercise of the jurisdiction to set aside under the Act and make an order that the proceeding be reheard. See also *Hannan v Binns* (unreported, Gobbo J, 15 November 1993).

30. I do not find it necessary to decide whether or not there is a power in a Magistrates' Court, which is entirely a creation of statute and whose powers are defined and established by the Act, to quash another Magistrates' Court order on the ground of "bad faith", whatever that may mean in this context, because I take the view that the conclusion was not open on the evidence. It may be that there is some residual discretion beyond section 110 but it must be firmly anchored in the facts. See *Kinex Exploration Pty Ltd v Tasco Pty Ltd & Anor* [1995] VicRp 58; [1995] 2 VR 318 at 322 and my own reasons in *Murphy v Lamond* (unreported, 16 July 1992). The basis of setting aside a judgment, even of a superior court, on the ground of fraud is relatively limited. That aspect was revisited by the Court of Appeal in New South Wales in the case of *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534, primarily in the judgment of President Kirby, as he then was. In a lengthy judgment, he expressed ultimately the principle in this way, that a party who seeks to establish that judgment ought to be set aside due to fraud –

> "must establish that the case is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the case will succeed; that they go beyond mere allegations of perjury on the part of witnesses at the trial; and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such party should take the benefit of the judgment".

31. In my view the application of that principle to the evidence in this case exposes the fallacies. The evidence of connection between the representations of the company and the decision of the Department of Immigration to refuse a visa is slender, if not dubious, and falls short of satisfying those criteria, particularly on the basis, as I say, of the issue of whether the contact with the Department of Immigration was causative of the refusal of the visa. See also generally with respect to the issue of setting aside judgment, *Tresize v National Australia Bank Pty Ltd* (1994) 22 ALR 185.

32. I take the view that the conclusion reached by the magistrate was not open on the evidence before him. The defendant is bound by the order because he instructed or accepted the advice of his then lawyers to agree to it, in the circumstances. There was no mistake or misapprehension as to the meaning and consequences of the arrangement made. See *Harvey v Phillips* [1956] HCA 27; (1956) 95 CLR 235; 30 ALJR 140. It is not necessary for me to consider whether there are or might have been other remedies possibly open to the defendant at an earlier time, even an application under Order 56 (although the delay would have to be considered on the discretion side), or of course proceedings against his former solicitors. This proceeding was re-activated by the defendant because of his belief that the whole issue of the debt was dead, and because of the dismissal of the plaintiff's bankruptcy petition. This belief was rudely shattered apparently when the plaintiff, according to the defendant, in effect harassed his friends by seeking to have them called on a proceeding directed to his means.

33. That the plaintiffs are entitled to pursue the debt by lawful means, notwithstanding the dismissal of the bankruptcy petition, cannot be denied, although one can only really express some amazement at that in view of the findings of Jenkinson J which were hardly flattering of the plaintiff's directors.

34. However, my task is a judicial one, to be exercised in respect of the matters raised by this proceeding. I do not sit to pronounce generally on the past rights or wrongs of these parties, nor even on their other litigation.

35. In my view, the magistrate was in error perceivable on his reasons and in addition on looking at the other material. He seems to have acted on the basis of Jenkinson J's comments, and possibly just the decision itself. Notwithstanding that I have a discretion with respect to orders in the nature of *certiorari*, it would be an improper exercise of my discretion to refuse to correct a perceived error of law on the ground that my overall impression is that Mr Foody has been something of a victim. One can sympathise with the defendant Mr Foody whose position is that he has always denied the debt, wanted to defend the case, had agreed to go along with an arrangement that led to a consent order to the contrary of his own case, because, according to him, his solicitor told him that he could get it overturned and start again. He successfully opposed the consequent petition for his bankruptcy, the Federal Court concluding on the oral evidence that it heard from the witnesses that there was no debt. The matter did not then die because the plaintiff did not accept those findings and started a fresh pursuit, but subpoenaed instead Foody's friends, all leading him to endeavour, doubtless to his own great inconvenience, to have the matter reactivated, to knock out the order of September 1992. He is perhaps a victim, although I emphasise that his former lawyers have not been heard. I say "victim" perhaps of poor advice, subject to that caveat, and also perhaps some events beyond his control and of the existence of different jurisdiction - distinct courts in a federation. As I said to the defendant in the course of the hearing, courts strive to make the application of the law and the attainment of a fair and just result coincide. This is not always possible in the administration of the law.

36. Accordingly, the application is granted. I order that the decision of the Magistrates' Court at Melbourne, Mr Coburn, of the 19th day of November 1998 be quashed, and that the order of the Magistrates' Court of 1 September 1992 be restored.

APPEARANCES: For the plaintiff Musashi Pty Ltd: Mr A Herskope, counsel. Rigby Cooke, solicitors. The defendant Foody appeared in person.
