54/88

SUPREME COURT OF VICTORIA

KARALL v WINCH

McGarvie J

28 June 1988

CIVIL JURISDICTION – PROCEDURE – ELEMENTS OF PLAINTIFF'S CLAIM ADMITTED – DEFENCE NOT GOOD IN LAW – WHETHER ORDER MAY BE MADE WITHOUT HEARING EVIDENCE – CLAIM INVOLVING DISPUTED QUESTIONS OF FACT – WHETHER JUDGMENT MAY BE ENTERED WITHOUT HEARING EVIDENCE: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S78.

1. Where a defendant by his pleading or his counsel admits all the necessary elements of the plaintiff's claim, the magistrate, after hearing argument, if satisfied that the defence is not good in law, would be entitled to order judgment in favour of the plaintiff.

2. Where in an action for money lent the defendant denied that the money was in fact lent or advanced or repayable by a certain date, the magistrate was in error in making an order in favour of the plaintiff without first hearing evidence.

McGARVIE J: **[1]** This is the return of an order to review the decision of a magistrate made on 6 August 1987 in an action which was one of two actions originally brought in the County Court at Ballarat but transferred by consent to the Magistrates' Court at Ballarat. I will, for convenience, refer to the proceedings as "actions", and to the initiating parties as "plaintiffs" after the transfers took place. No argument was directed to me as to the effect, if any, which the *County Court* ***[2]*** *rules* had upon the position in this case.

The action number 861119 in which this order to review has been made, was commenced by Brian Winch against Herbert Karall on 4 July 1986. I will refer to it as the action for money lent. It alleged that pursuant to a mortgage agreement made about 17 October 1985, Winch lent Karall $19,000, repayable with interest by 17 January 1986, and that Karall had, in breach of the agreement, failed to repay principal and interest amounting to $5,978.69, which was the sum Winch claimed in the action. By a defence delivered on 23 December 1986, while the action was still in the County Court, Karall denied that any monies were lent, denied that the moneys were to be repayable by the date alleged, and denied that he had breached the mortgage agreement, alleging that that agreement was purely collateral to an agreement between himself and Better House Removers Pty Ltd, which had not been fulfilled by that company.

It is common ground before me that both in this action and the other action, any reference to Better House Removers Pty Ltd is to be taken as a reference to Winch himself. In the other action No. 861384, which I shall call the action for damages, Karall claimed damages against Better House Removers Pty Ltd, which counterclaimed for damages against him. On 6 August 1987, this action was the first of the two actions to come before the Magistrate, and, by consent, the name Brian Winch was substituted for Better House Removers Pty Ltd as the defendant. **[3]** The position after that amendment was made was that Karall alleged that by an agreement made with him on about 17 October 1985, Winch agreed to sell a house, and remove and re-erect it on Karall's property for $19,000; that Winch had not re-erected the house in a proper and workman-like manner and had not completed the re-erection; and Karall claimed $7,527 damages. The essence of Winch's defence, delivered on 8 January 1987, was a denial that the house was not re-erected in accordance with the agreement, and a denial it was uncompleted. In that action for damages, Winch also counterclaimed $1,000 from Karall for plastering work done for Karall, and materials supplied at Karall's request.

In the action for damages Winch as defendant paid into court on 3 August 1987 $800 with a denial of liability, and $291.85 for costs. The notice of payment into court stated:

> "The said $800 is in satisfaction of the cause of action in respect of which the complainant claims, and after taking into account and satisfying of the abovenamed defendant's cause of action for work and labour done and materials supplied, in respect of which he counterclaims."

By notice of acceptance dated 5 August 1987, Karall as plaintiff on 6 August 1987 accepted the money which Winch had paid into court. When the action for damages came before the court, apparently the amendment substituting Brian Winch for Better House Removers Pty Ltd was made by consent. Karall's claim as plaintiff was struck out, and Winch's counterclaim was dismissed. Then the action for money lent was called on. Ms Krejus of counsel appeared for the plaintiff Winch, and Mr Forrest of counsel for the defendant Karall. **[4]** Those counsel had appeared for the same persons in the actions for damages. Ms Krejus opened the case of Winch in support of his claim for money lent. Mr Forrest then, apparently under s78(2)(a) of the *Magistrates (Summary Proceedings) Act* 1975, gave a statement of the defences to the claim. He referred to the defences in the defence which had been delivered, and then orally added two defences:

> (a) the money was withheld against another action now settled;
> (b) the moneys claimed to be due under the mortgage were never advanced as pleaded.

It was not argued before me that Mr Forrest was not entitled to add oral defences, and I reserve my opinion as to whether he was. His reference in oral defence (a) to another action now settled, was to the action for damages. Mr Forrest told the learned magistrate that that action had been settled by acceptance of moneys paid into court, and that that action arose out of the agreement set out in the statement of claim in that action, and that the action for money lent arose out of an agreement between Winch and Karall with a view to securing Karall's liability to Better Home Removers Pty Ltd. **[5]** The magistrate said that he did not think the defences of Karall were good defences to the action for money lent. Ms Krejus submitted that that was correct. She submitted that Karall in his defence tied the two matters together. Here she was referring to paragraph 4 in Karall's defence delivered in the action for money lent, which was in these terms:

> "4. HE denies that he is in Breach of any Agreement and says that as the said Mortgage document is purely collateral to the Agreement between himself and Better House Removers Pty Ltd which has not been fulfilled, by Better House Removers Pty Ltd"

Ms Krejus also submitted to the magistrate that Mr Forrest had admitted the loan and the reason for failing to pay the balance. She submitted that Karall had no defence to the action for money lent and, even if he had had one, it was extinguished by the acceptance by him of the payment into Court in the action for damages. The learned magistrate agreed with Ms Krejus's submission and ordered that judgment be entered for Winch against Karall for the amount claimed, $5,978.68, interest on judgment $841.98, and costs $1,347.00. This is the order which is the subject of the order to review. Mr Lenczner who appeared for the applicant Karall before me combined the grounds of the order to review into two main arguments:

> 1. The Magistrate had no power to enter judgment against the defendant having heard an opening and the defences without hearing any evidence in the case.
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> 2. If the Magistrate had such a power he ought not in this case to have entered the judgment he did.

Mr Lenczner in support of the first argument put it as a general principle that a magistrate in a Magistrates' Court has **[6]** no power until after hearing all the evidence the parties desire to place before the Court, to order judgment for the complainant on the basis that the defendant's defences are not good defences in law, or to order judgment for the defendant on the basis that on the evidence the complainant proposes to call the complainant has no cause of action which is good in law. Mr Lenczner relied on s78(1)(b), (d) and (2)(a) of the *Magistrates (Summary Proceedings) Act* as making it mandatory, if the defendant gives a statement of defence as is referred to in sub-section (2), to hear the complainant and the defendant and their witnesses. I do not consider that those provisions give a defendant a right to enter or rely upon or to give evidence as to a defence or points stated by the defendant but which do not provide any valid defence in law.

Mr Lenczner's submission is one which I cannot accept as an absolute proposition. While entering judgment without hearing evidence is a course which should only be adopted with care and circumspection and in a clear case, there are cases in which it is open and appropriate for a

magistrate to follow that course. I repeat what I said in *Paroukas v Katsaris* [1987] VicRp 4; [1987] VR 39 at p40. See also: *Bailey v Wallace* [1970] VicRp 15; [1970] VR 109 at p114; *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505 at p516; (1978) 3 ACLR 289; [1978] ACLC 40-381, and *Kellett v Buchanan* [1935] SASR 144 at p147. As to the inappropriateness of such a course where there are disputed questions of fact, compare: *The Queen v Commonwealth Conciliation and Arbitration Commission; ex parte Melbourne & Metropolitan Tramways Board* [1965] HCA 50; [1965] 113 CLR 228 at pp243 and 252; 39 ALJR 216; and *In re Carpenters and Joiners and Bricklayers Construction (State) and Builders Labourers Construction Site (State) Awards* (1963) AR (NSW) 279 at p283.

[7] In my opinion in the present case if the defendant by his pleading or his counsel admitted all the necessary elements of the plaintiff's claim but a defence was raised which was claimed to provide a defence despite the establishment of those elements, the Magistrate, after hearing argument, if satisfied that the defence was not good in law, would be entitled to order judgment for the plaintiff.

I go to the second main argument and ask whether the defendant Karall by his pleading or his counsel admitted all the necessary elements of the plaintiff Winch's claim for money lent. To make out that claim the plaintiff Winch had to establish that there was the agreement, that pursuant to it $19,000.00 was lent, that interest was payable at the rate of 17.5 per cent per annum, that principal and interest were repayable by 17th January, 1986, and that $5,978.69 had become due for principal and interest which the defendant had not paid. In my opinion Karall had not by his pleading or his counsel admitted all the necessary elements of the plaintiff's claim for money lent.

The defences taken by Karall did not deny the existence of the mortgage agreement alleged but it did by separate defences deny that the money was lent or advanced and that the money was repayable by 17th January, 1986. Paragraph 4 in Karall's delivered defence which I have quoted above is in my opinion to be taken as a further and separate defence to paragraphs 1 and 2 which make the denials mentioned above. It does not negate or override the earlier defences.

In my view the position remained at the end that the defendant Karall was denying that the money was lent or advanced or that the moneys were repayable by 17th January 1986. **[8]** I do not think that anything Mr Forrest said withdrew the defendant Karall from that position. I was not referred to any provisions of any Act or rules or to any authority to show the effect of Karall taking out the money paid into Court in the action for damages. I am prepared to assume that it had the same effect as an equivalent judgment for the plaintiff would have had. See *Malcolm v Hart* [1964] VicRp 29; [1964] VR 204 at p209; *Demeter v Texieria* [1967] VicRp 99; [1967] VR 783; *Blake v Public Trustee* [1973] VicRp 73; [1973] VR 749; and *Port of Melbourne Authority v Anshun Pty Ltd* [1980] VicRp 34; [1980] VR 321 at p324. However, on that assumption it gives no more than a basis for suspicion that the effect of the acceptance of the payment into Court deprives the defendant Karall of an entitlement to rely on the defence stated in paragraph 4 of the delivered defence and a suspicion that there is no real defence to the action for money lent.

I do not consider that the combined effect of what Mr Forrest said and the acceptance of the money paid into Court in the action for damages entitled the learned magistrate to give judgment for the plaintiff as he did. The order will therefore be set aside. In order to avoid any embarrassment to, the magistrate I will order that it be reheard before another magistrate. I make this order: The order of the Magistrates' Court at Ballarat made on 6th August, 1987, is set aside and the case is remitted to that Court for hearing by another Magistrate.
