48/87

SUPREME COURT OF VICTORIA

BROWN v CSAR; BROWN v GRBAC

Crockett J

23 September 1987

PRACTICE AND PROCEDURE – SPECIAL SUMMONS – NOTICE OF DEFENCE AND PARTICULARS FILED TWO DAYS OUT OF TIME – INDICATION GIVEN BY DEFENDANT OF INTENTION TO CONTEST PROCEEDINGS – ORDER MADE *EX PARTE* IN CHAMBERS AGAINST DEFENDANT – WHETHER SUCH ORDER SHOULD HAVE BEEN MADE: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS9A, 9C, 9D, 9E.

A motor vehicle (with trailer attached), owned by C. and driven by G. collided with a motor vehicle driven by B., thereby causing damage. Two motor cycles on the trailer, one owned by G., the other by one Jordan, were also damaged. Subsequently, Jordan sued B. and G. to recover the cost of repairing his damaged motor cycle. All necessary procedural steps were taken and the matter was listed for hearing on 21 March. C. and G. also took out proceedings against B. In the case of C. v B., B. caused to be issued and served on G. a Third Party notice. In each case, B. filed a notice of defence; however, the filing date was two days beyond 21 days after service of the summonses. The Clerk of Courts retained the notices of defence on the relevant file and notified B. that the notices were given out of time and that B. could not prosecute his defence unless leave were granted by the Court. In the meantime, B. had been granted leave to interrogate C. and G., and a copy of the interrogatories were filed with the Court. Further, correspondence was on the file indicating that an agreement had been reached on 6 March to have all matters (including the matter involving Jordan) heard on 21 March. Notwithstanding the indications given that B. wished to contest the proceedings, orders were made by magistrates in chambers on 17 March and 14 March respectively in favour of C. and G. Upon orders nisi to review—

HELD: Orders absolute. Orders of 17 March and 14 March quashed. Requests for order dismissed.
(1) In civil proceedings, where a magistrate considers a request to make an order *ex parte*, the order should not be made if the magistrate is satisfied that the defendant wishes to contest the proceedings and intends to rely upon a genuine defence.

(2) If there is some doubt as to whether it was intended that a defence be put forward, the magistrate should adjourn the matter into open court in order to obtain further information.

(3) In view of the documentary material on each file, the magistrates should have concluded that there was never other than an intention on the defendant's part to contest the proceedings and accordingly, should have refused the request for the order.

CROCKETT J: *[After setting out the facts, His Honour continued:* ... **[3]** Each of the summonses were special summonses and, in respect of each, the applicant Brown, by his solicitors, caused to be filed and served on the 12 February 1986 a notice of defence. By s9A(4) of the *Magistrates (Summary Proceedings) Act* 1975 that notice is required to be in writing and to contain a statement of the defendant's intention to defend the matter of the complaint referred to in the summons and to contain particulars of his defence. The notices that were given complied with those requirements. They did not, however, comply with the apparent requirement that it be served within 21 days of the service on the applicant of the special summons.

The relevant provisions in the legislation contain no specific provision that, if a defendant wishes to defend either a default or a special summons, he must give a notice of defence within 21 days. It is clear, however, by somewhat oblique references contained in various provisions to a 21 day period that such a time constraint is imposed upon a defendant wishing to defend the proceedings. Section 9C(1) of the Act provides that:

> "If in the case of a special summons the defendant or his solicitor does not give notice of defence within 21 days after service of the summons upon him and—
> (a) the summons or the particulars of demand annexed thereto are sufficient to disclose the cause of action and the name of the place where the cause of action is alleged to have arisen: and
> (b) the complainant files an affidavit verifying his cause of action and the nature and extent of the injury loss or damage suffered by him—
> the complainant need not attend either personally or otherwise, or prove his claim."

Subsection (2) provides that:

> **[4]** (2) "Where a complainant is not required as provided in this section to attend or prove his claim he may make and file with the Clerk of the Court a request that an order be made in his favour and upon proof of service of the special summons, an order in the complainant's favour may be made by a magistrate in chambers, notwithstanding the absence of the complainant, at any time within twelve months after the issue of the special summons."

Section 9E(1) stipulates that:

> "If the defendant does not give notice of defence within the time required he shall not be allowed whether by the Magistrates' Court on the hearing of the complaint to make any defence to the claim unless by permission of the Court and then only on such terms as to costs as the Court determines."

As I say, despite the absence of an express stipulation that, if a defence is to be prosecuted, notice of it must be filed within a defined period of time, it is plain, I think, from the provisions to which I have just referred that such a requirement as to time in fact must operate in respect of any defendant wishing to defend proceedings taken against him. The use of the expression "give notice of defence", rather than 'to serve' or 'to file' or 'to serve and file', is a little unusual and it is somewhat uncertain, I think, as to just what the particular requirement is that must be met by the "giving" of a notice of defence. I should, however, have thought that, at least, it must be given to the Magistrates' Court because s9D(2) provides that:

> "If the defendant or his solicitor gives notice of defence under subsection (1) within 21 days after the service of the summons the Clerk of the Magistrates' Court shall cause a notice in the form prescribed by the Rules to be sent to the complainant or his solicitor and to the defendant or his solicitor fixing a day for the hearing of the matter of the complaint."

It is in that way that the complainant and/or his solicitor comes to learn of the giving of notice of a defence within **[5]** the prescribed time. It would seem that there is, therefore, no requirement to serve the complainant with a copy of the notice. Now, the final provision, I think, to which I should refer is subsection (3) of s9C. That subsection provides that:

> "If in the course of considering any such complaint the Magistrate in chambers requires further information or considers it desirable in the interests of justice having regard to all the circumstances of the case that the matter of the complaint should be heard in open court he may adjourn the matter for hearing in open court and shall cause notice to be given to the complainant or his solicitor and to the defendant or his solicitor of the time and place for hearing of the matter in open court."

Now, the filing of the notice of defence in both cases on 12 February 1986 was a giving of the notice some two days beyond the stipulated 21 days provided for in the provisions to which I have referred. The complainants' solicitors (who were the same in all three sets of proceedings) learned of this time default and, in consequence, sought to employ the benefit of the provisions contained in s9C, particularly subsections (1) and (2). The complainant in each case was able to rely upon the particulars of demand annexed to the summons, as being sufficient to disclose the cause of action and the name of the place where the cause of action was alleged to have arisen and each complainant filed affidavits purporting to verify his cause of action and the extent of the loss or damage suffered by him. That having been done, the solicitor for the complainants made a request of the Magistrates' Court that an order be made in favour of each of the complainants and that request having been made, on 17 **[6]** March in the case of Csar and, in the case of Grbac, on 14 March 1986, Magistrates made the order as requested. It is that order which, in each of the present proceedings, is sought to be reviewed.

The Clerk of the Magistrates' Court, on a date which preceded the 14 February and was probably a day or two before that date, in each case sent a notice to the solicitor for the defendants, pointing out that the notice of defence, which had been given to the Court, was in fact filed beyond the 21-day period prescribed by the legislation. The object of that was to alert the solicitors to the fact that it was not possible for the defence to be prosecuted unless certain remedial action were taken to permit that to occur, as well, of course, as to alert the solicitor to the fact that the notice had been given out of time. The Clerk of Court retained the notices of defence on file. They were, of course, as already indicated, correctly drawn and the only defect was the failure to give them within the stipulated period.

This course seems to me to be both the correct and sensible course for the Clerk of Court to have followed and the fact is that the solicitor for the defendant did take steps in order to clear the way for the defences in each case to be set up and be relied upon. On 18 March 1986, the defendants each issued out of the court an application to set aside the orders made on 17 March 1986 and 14 March 1986, respectively pursuant to s152 of the *Magistrates (Summary Proceedings) Act* 1975. That section makes provision for the setting aside of *ex parte* orders. And, on 19 March 1986, the defendants' solicitors issued a chamber summons, seeking permission in each case **[7]** pursuant to s9E(1) to "make" a defence in each of the claims. The return day for each of those applications was made the 21 March 1986. The reason for selecting that date was that it was the date on which Jordan's action against Brown and Grbac was due to be heard and, as all of the concerned parties or their legal representatives would in consequence be present at that time, it no doubt seemed, as a matter of convenience to be the appropriate date on which to make returnable the two interlocutory processes to which I have referred.

On 21 March, however, the legal representative of the respondents in the present proceedings took the point that one or other or both of the interlocutory processes was short-served and apparently insisted on full service, with the result that those matters were adjourned to a date to be fixed. As far as Jordan's complaint was concerned, counsel for the defendant Brown asked the Magistrate to disqualify himself on the ground that he had already made his order of 17 March in favour of the co-defendant Grbac. The Magistrate acceded to this request and that matter was adjourned to 9 May, when it was finally determined. The Magistrate who tried those proceedings found that the whole of the fault for the accident lay with the present applicant, with the result that an order was made in Jordan's favour against the defendant Brown for the amount of damages sought to be recovered in respect of damage to the motor cycle owned by the complainant Jordan.

In the meantime, on 6 May, the order nisi in each of the present matters was made by a Master and it is the **[8]** return of each of those orders nisi, with which I now have to deal. There is a number of grounds set out in each of the orders nisi. It is unnecessary, I think, for me to refer to them in full. The fourth ground, which relies upon an alleged waiver, appears to me to have little to commend it. It was not pressed in argument and it may be therefore concluded that it has not been sustained.

The effect of the remaining grounds, taken together, can, I think, compendiously be expressed in this way: that the Magistrates' orders were each made without the Magistrate having given any consideration to the appropriate matters or, alternatively, insofar as he did give consideration to relevant factors, he failed to give any or any proper weight to those factors. It was, in effect, contended that the weight of the relevant material was such that the only conclusion to which the Magistrate could have properly come was that in all of the circumstances he ought not make the order that he was requested to make.

It was further said that, in any event, there were irregularities or gaps in the necessary proofs which should be held to vitiate the order made by each Magistrate. In particular, it was said that Rules of Court concerning the times for filing of affidavits were breached and that the requirement for verification by affidavit of each of the complainants' causes of action had not been complied with. In the event, I find it unnecessary to resolve the questions raised by these latter arguments. The contention concerning the failure properly to verify the cause of action involved a consideration of what was encompassed by the expression 'verifying' and also the **[9]** construction to be given to certain expressions in subsections (1) and (2) of s9C.

The argument was an interesting one. In the end, I have come, I think, to a reasonably firm view about that which I consider to be correct but it is quite unnecessary for me to determine the outcome of these proceedings by ruling on that matter and, accordingly, I think it preferable that I abstain from doing so. It is quite clear to me that there was only one decision to which the Magistrate in each case could reasonably have come when considering the request that an order be made in the complainant's favour. The procedure laid down in the sections to which I have already referred clearly is designed to minimise cost and to expedite the determination of matters where the Court is satisfied that no, or no genuine, defence is intended to be given or relied upon. In the event that the Magistrate should conclude that the defendant does intend to rely upon a genuine defence, it would be quite wrong to make an *ex parte* order in such a circumstance. In

the event that the Magistrate were in some doubt as whether or not it was intended that there be a defence put forward, the appropriate course is for him to adjourn the matter into open court, in order to obtain further information and to give notice to the parties or their advisers of his intention to do so.

In the present case, it is perfectly plain from the material put before him, that there was never other than an intention on the part of the applicant to contest the proceedings instituted against him by each of the respondents. Of course, for present purposes, what is relevant is the information which was available to the **[10]** Magistrate. That information is to be seen in the Court file. I have got no doubt that it is not a proper course, for a Magistrate considering a request such as was made of this Stipendiary Magistrate, to deal with it in a mechanical way or to simply make an order by rote, as it were.

The expression "may" in subsection (2) is not merely facultative but is intended clearly to confer a real discretion. To exercise a discretion, it is necessary for the Magistrate to have regard to all relevant factors and, of course, to disregard those which are irrelevant. Plainly, that involves a necessity of examining the Court file in order to determine whether or not it would appear probable from what has occurred in the past that the defendant intended to defend the proceedings.

In the present case, at the time that the orders now impugned were made, on the file, in addition, of course, to the summonses, there were the applicant's notices of defence and particulars of defence, to which I have already referred and which were retained on the file, notwithstanding their having been "given" two days beyond the stipulated period. That, of itself, should have alerted the Magistrate to the probability that there was a genuine defence, so as to refuse the order or, at least, to have given the defendant an opportunity in open court to have produced material and argument to support the proposition that he did intend so to defend. It borders on the outrageous that a notice of defence that is only two days out of time should, by virtue of that time default, lead to an order's being made in favour of the complainant by reason of that default when the defendant at **[11]** all times fully intended to make a defence to the complainant's claim.

But, in addition, on each file there was an order granting the applicant leave to interrogate. That had been made by Mr Moon SM on 18 February 1986 and a copy of the interrogatories for the examination of the complainant was also on file. In the case of Csar's action, there was, on that file, a copy of a Third Party notice given to the respondent Grbac. There was also a number of letters from the applicant's solicitors addressed to the Clerk of Courts. I can refer to a letter of 12 February, in which the notices of defence were referred to and a request was made that they be filed. On 7 March, the solicitors wrote, referring to the order made on 18 February that the defendant be granted leave to file and serve interrogatories for the examination of the complainant and enclosing a copy of those interrogatories. Then, finally, on 11 March by a letter dated 11 March, received the following day, only five days before the impugned order was made, the applicant's solicitors wrote in these terms:

> "We refer to your recent correspondence and to our subsequent telephone conversation upon the Clerk. We have contacted the solicitors acting for Mr Grbac and Mr Csar and requested their consent to both the matters being listed for hearing on the same day and secondly, consent to the notice of defence being filed out of time. Despite two telephone attendances upon the solicitors for Grbac and Csar, we have received no response other than the practitioner's secretary has passed the matters on to the practitioner handling the matter. This firm, the firm of **[12]** Penttila & Co." (who I interpolate was the solicitor for Jordan) "and we understand Nicholas Hughes & Co." (I interpolate again, the solicitors for Grbac and Csar) "are all ready to proceed to have the matter heard on 21 March 1986. We anticipate that it will be necessary to make application on the morning of the hearing for the notice of defence to be filed out of time. We have little doubt that counsel appearing for Grbac and Csar will consent to this application."

The fact is that, on the date prior to 7 March (when a request was made for an *ex parte* order) namely, 6 March, agreement was reached to have all three matters heard on the 21 March, which was the return day of the matter instituted by Jordan. The letter I have just referred to reflects that agreement. It is difficult to resist the conclusion that the Magistrates had not consulted these documents on the file and particularly the letter to which I have just referred. Had they done so, it is clear that the only conclusion to which each could have come was that the defendant did intend to take every step necessary to permit his defence to be "made" on the hearing of each of

the special summonses. It is clear, therefore, I consider, that neither order should have been made and that the appropriate order was to have refused the request. For those reasons, it appears to me that the primary grounds relied on have been made out and that, unless there is some good reasons for exercising my discretion adversely to the applicant, the orders nisi should be made absolute.
