55/90

SUPREME COURT OF VICTORIA

BURNS v RAE

JD Phillips J

24, 25 September 1990

CIVIL PROCEEDINGS – JURISDICTIONAL LIMIT – TWO CLAIMS MADE IN SUMMONS – ONE WITHIN, ONE WITHOUT JURISDICTION – "THE AMOUNT SOUGHT TO BE RECOVERED" – WHETHER CLAIM AMBIGUOUS – WHETHER BEYOND JURISDICTION: *MAGISTRATES' COURTS ACT* 1971, SS50, 51.

1. In deciding whether a civil claim is beyond the jurisdiction of the court, the, court should look at the whole of the summons to see whether an unambiguous claim in excess of the court's jurisdiction has been made. If such a claim has been made, the court cannot gain jurisdiction by any subsequent amendment or abandonment.

***Donelan v Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490, applied.**

2. Where, in a building dispute, the sum of $15,250 being cost of rectification was claimed on the front of the summons but in the particulars a claim was made for "damages limited to $40,000" without specifying any additional or consequential loss, the claim was ambiguous and accordingly, a magistrate was in error in striking out the summons on the ground that the claim was beyond the court's jurisdiction.

[Note: See now s101 of the *Magistrates' Court Act* 1989 which gives power to a court to amend a complaint which is wholly or partly beyond the court's jurisdiction. As to venue and transfer of proceedings, see Order 29 of the *Magistrates' Court Civil Procedure Rules* 1989. Ed.]

JD PHILLIPS J: **[1]** These are two orders nisi arising out of a default summons and a special summons both issued out of the Magistrates' Court in Heidelberg. The default summons was issued by one Duncan Rae (the respondent to these orders nisi) against Ronald Burns (the applicant on these orders nisi) for $6,000, which was claimed as the balance of work and labour done by the respondent for the applicant. The special summons was issued several months later by the applicant against the respondent claiming damages for defects in work which had been done. According to the particulars given, the cost of rectification was $15,250.

Both summonses came on for hearing at the Heidelberg Magistrates' Court on 7 March 1990. Both respondent and applicant were represented by counsel. On behalf of the applicant, counsel sought to have the hearing of both summonses transferred to the Magistrates' Court at Wonthaggi on the ground that that was the "proper Court" under s76 of the *Magistrates (Summary Proceedings) Act* 1975. That application was rejected by the Magistrate.

It was then submitted by counsel for the respondent that the special summons issued on behalf of the applicant was invalid as beyond the jurisdiction of the Magistrates' Court in that it claimed an amount of $40,000. The Magistrate agreed and, presumably acting under s51(9) of the *Magistrates' Courts Act* 1971 ordered that the complaint be struck out and that the complainant pay $2,355 for costs.

The Magistrate then proceeded to hear the default summons issued by the respondent, notwithstanding a submission on behalf of the applicant that the applicant was not ready to proceed, neither the applicant nor his **[2]** witnesses being present in Court. When the application for adjournment was refused, counsel for the applicant withdrew after establishing that the respondent's claim was in truth for $4,450 and not for $6,000 as appearing on the summons. The Magistrate went on to enter judgment on the default summons against the applicant for $4,450 together with interest in the sum of $573.20. Apparently the Magistrate declined to make an order for costs on the ground that all costs incurred had already been included in the order made on the striking out of the special summons.

The applicant sought and obtained the present orders nisi to review under s88 of the

Magistrates' Courts Act. Both orders nisi were granted by Master Evans on 8 May 1990. The first, in proceeding number 6067 of 1990 in this Court, relates to the order made by the Magistrate on the special summons and the grounds are that the Magistrate erred in law –

> "A In ruling that the applicant's claim by special summons was in excess of the Court's jurisdiction. B. In refusing to adjourn the hearing of that claim to the Magistrates' Court at Wonthaggi in accordance with the provisions of s76 *Magistrates (Summary Proceedings) Act* 1975."

The second, in proceeding number 6095 of 1990 relates to the order made by the Magistrate on the default summons, and the only ground is that the Magistrate erred in law –

> "in refusing the adjourn the hearing of the respondent's summons to the Magistrates' Court at Wonthaggi for hearing at the same time and before the same Magistrate as the applicant's special summons in accordance with the requirements of s76 of the *Magistrates (Summary Proceedings) Act* 1975."

In the case of each order nisi, the material on which the applicant relies is substantially in the same form. In each case, there is an affidavit sworn by Declan Fellowes **[3]** Hyde on 6 April 1990, Mr Hyde being the barrister who appeared for the applicant before the Magistrate on 7 March, and an affidavit of Michael David Klotz sworn, in the one case on 6 April and in the other case on 9 April, 1990, Mr Klotz being the solicitor having the conduct and management of the proceeding on behalf of the applicant before the Magistrate. No answering affidavit has been filed on behalf of the respondent, nor has the respondent appeared to argue the case in response to the orders nisi.

As there has been no appearance for the respondent, my first task is to be satisfied about service. In the case of both orders nisi, the Master directed service of the relevant documents "on the respondent". The applicant's solicitor, however, sent the documents to the solicitors who had been acting for the respondent in the proceedings in the Magistrates' Court. While this might be perfectly understandable, there is some risk in this course where service is not accepted on behalf of the respondent. After all, the proceeding in this Court is, I think, a new matter.

The affidavit of service first filed in these proceedings was not clear on the point and Mr Klotz, the applicant's solicitor, gave oral evidence before me on the matter of service. Even so, the point was not wholly clarified and another affidavit was accordingly required. Further affidavits have now been filed. In addition to the initial affidavit of service, which was sworn on 17 September, 1990 and which is now filed in proceedings number 6095, there is an affidavit of cross-reference sworn by Mr Klotz on 25 September, 1990 in proceeding number 6067 and a **[4]** further affidavit filed in proceeding number 6067 sworn by Mr Klotz on 25 September, 1990 and an affidavit of cross-reference sworn by Mr Klotz on 25 September, 1990 in proceeding number 6095.

As a result, there is now affidavit evidence on file to show that the documents which were despatched by the applicant's solicitor, under cover of a letter dated 1 June, 1990, reached the defendant's solicitors and that the latter had instructions to accept service on behalf of the respondent. I am satisfied now, by reference to the affidavit material filed, that there is sufficient proof of service.

I turn first to the Magistrate's refusal of the application which was made to him for transfer of the hearing of the two summonses to the Magistrates' Court at Wonthaggi, on the ground that that was the proper Court under s76 of the *Magistrates (Summary Proceedings) Act* 1975. The relevant subsections of s76 are sub-sections (1), (2) and (3).

According to the affidavit material, the application for transfer to Wonthaggi was put to the Magistrate on the basis, which was simply asserted from the Bar table, that the subject matter of both summonses was a building job done by the respondent for the applicant at Phillip Island, that the applicant himself lived at Cowes and that some of the witnesses whom the applicant wished to call were at Wonthaggi or thereabouts. The Magistrates' Court at Wonthaggi was said to be the Court nearest to Cowes.

The application for transfer had been notified by the applicant's solicitors to the respondent's solicitors by **[5]** telephone on 1 March, 1990 and by letter dated 2 March, 1990, sent by the

applicant's solicitors to both the respondent's solicitors and to the Clerk of Courts at Heidelberg. It appears that there was no contest about the notification. According to Mr Hyde's affidavit, the Magistrate rejected the application in this fashion, and I read from para 12 of that affidavit:-

> "The learned Magistrate ruled on my submission that;
> (a) he had a discretion to adjourn the matter to Wonthaggi; and
> (b) he would not so adjourn the matter on the basis that my client had previously consented to the matter being adjourned from an earlier hearing date within the Heidelberg Magistrate's precinct."

In support of the orders nisi, Mr Bloch, who appeared for the applicant, submitted that the Magistrate was in error in regarding himself as having a discretion in the matter and that on the proper construction of s76 the Magistrate was bound to have acceded to the applicant's submission for transfer on the facts described in the submission. This was the first point on which Mr Bloch addressed and although the argument put to me was that the Magistrate had erred in regarding himself as having a discretion in the matter, the order nisi in both cases describes the error as lying in the Magistrate's refusal to adjourn the hearing and transfer the proceedings – and in the case of the default summons, in refusing to adjourn and transfer so that the hearing might take place at the same time and before the same Magistrate as the applicant's special summons.

In the course of the argument before me, Mr Bloch accepted that as it is the defendant's position that grounds **[6]** an objection to venue under s76 of the *Magistrates (Summary Proceedings) Act*, there was little real possibility of establishing error by the Magistrate under s76 in the case of the applicant's special summons. Mr Bloch frankly said that on his instructions, while the applicant lived at Cowes, the respondent lived in the Balwyn area. There may not have been much point in the applicant succeeding under s76 in relation only to the default summons and there were other difficulties, quite separate difficulties, in the way of establishing error under s76 in relation to the default summons Mr Bloch chose, in the end, not to pursue the point under s76 and as this was the only point taken in relation to the Magistrate's order made on the default summons, the order nisi in proceeding number 6095 must be discharged.

In relation to the special summons, there is, as I have said, a second ground in the order nisi, that the Magistrate erred in law ruling that the applicant's claim was in excess of the Court's jurisdiction. The respondent's objection, through counsel, was that the special summons sought damages in excess of the $20,000 which was the jurisdictional limit of the Magistrates' Court. The special summons, as I have said, claimed damages for bad workmanship. The particulars attached to the summons alleged an agreement between complainant and defendant for the carrying out of building works at Cowes, that as a condition of the agreement the defendant was to perform the work competently, that the defendant failed to perform the work competently and that the cost of effecting "all necessary repairs to make good the damages (*sic*) stated **[7]** above is the sum of $15,250". So far so good, but the particulars concluded with the statement:-

> "And the complainant claims damages limited to $40,000."

The claim is plainly one for unliquidated damages and it is that feature that makes the special summons the appropriate form: see the *Magistrates (Summary Proceedings) Act* s9(2). Nevertheless, Mr Bloch drew my attention to the front page of the special summons which at its foot contains this statement,

> "If you pay the amount of the claim, $15,250 and costs $310 to the complainant or his solicitor without giving notice of defence, you may avoid further costs."

There is thus one inconsistency in the amounts mentioned in the summons. The question of jurisdiction arises because the Magistrates' Court is the creature of statute. As was said by Gillard J in *Donelan v The Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490 at 496 about the County Court:-

> "The County Court is a creature of statute with a defined limited jurisdiction. Since it is a Court of inferior jurisdiction there is no presumption in favour of the Court having jurisdiction in any particular matter. Its jurisdiction to deal with a matter must be found in the statutory provisions giving rise to the Court."

The relevant provisions at the relevant time were s50(1) and s51(2) of the *Magistrates' Courts Act* 1971. So far as relevant they read as follows:

> "50(1) In addition to any other jurisdiction every Magistrates' Court shall have jurisdiction in the following cases:
> (aa) It may hear and determine any cause of action which is not by this or any other Act excluded from the jurisdiction of the Court.
>
> 51(2) The Court does not have jurisdiction in any cause of action—
> **[8]** (a) in which the amount sought to be recovered the value of the subject matter is more than the jurisdictional limit unless the parties consent in writing ... "

The expression "jurisdictional limit" is defined by s3 to mean-

> "(a) in the case of an action where the damages claimed consist of or include damages in respect of personal injuries— $5,000;
>
> (b) in any other case— $20,000."

Therefore what is determinative must be whether "the amount sought to be recovered" in the case of the special summons was "more than" $20,000. In so expressing it, the question is like that which has arisen before under s37 of the *County Court Act* 1958. There, the jurisdiction of the County Court is limited to actions "where the amount, value or damages" which is "sought to be recovered is not more than" the specified sum. That provision has been considered in *Coastal Estates Pty Ltd v Melevende* [1965] VicRp 60; (1965) VR 433, *Donelan v Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490 (and in the High Court *Incorporated Nominal Defendant v Donelan* (1973) 43 ALJR 138) and *Brincat v Kilsby* [1983] VicRp 57; (1983) 1 VR 625. From these decisions it appears that the amount "sought to be recovered" is to be determined by reference to the wording of the special summons here at issue.

The effect of the words "the amount sought to be recovered" has also been considered in a number of decisions in the County Court. Mr Bloch referred me to the unreported decision of His Honour Judge Hassett in *Eden v Jones & Anor*, 4 September 1986, unreported. There His Honour rehearsed, not only the decisions of this Court, but also several decisions of Judges of the County Court and in **[9]** the end concluded that in a case like the present, where the summons itself displays some internal inconsistency, the question of what amount was sought to be recovered should be resolved by a fair reading of the summons as a whole. I agree, and I adopt, with respect, if I may, the following passage, from the unreported judgment of His Honour Chief Judge Waldron in *Cusani v Bauer*, as set out in the judgment of Judge Hassett:-

> "However, the critical point is whether or not an unambiguous claim has been made in the summons which is beyond the jurisdiction of the Court. As Smith ACJ said, in *Donelan v Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490 at 496, 'If the statement of the claim appearing in the summons and particulars, showed without ambiguity that it was in excess of jurisdiction, the Court could not gain jurisdiction by any subsequent amendment or abandonment.' As I read what His Honour was there saying, one must look at the summons overall, and if, but only if, from that reading, an unambiguous claim in excess of the jurisdiction is seen to be made, the proceedings are a nullity. In my opinion, it is not a question of the claim on the face of the summons prevailing over the particulars of the claim contained in the statement of claim or *vice versa*. Rather, it is a question of whether, considering the whole of the summons, an unambiguous claim in excess of the jurisdiction has been made."

Technical points such as the present one under consideration do not enhance the law when they succeed, and it seems to me that the principle, enunciated by His Honour the Chief Judge is a salutary one, when considering any objection to the jurisdiction based upon s51(2)(a), of the *Magistrates (Summary Proceedings) Act*.

In this case, on a fair reading of the special summons *in toto*, I agree with Mr Bloch that the amount sought to be recovered, is $15,250 and not $40,000. The breach of the building agreement which is alleged is bad workmanship, and the claim is for the cost of rectification. That is in line **[10]** with such authorities as *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613. The cost of rectification is the usual measure of damages in such cases, unless there is additional and consequential loss, none of which is asserted in the particulars of demand. It is significant,

perhaps, that s93 of the *Magistrates (Summary Proceedings) Act* limits the evidence to be led on the special summons, in providing that no evidence of any demand or cause of action shall be given on behalf of the complainant on the hearing of a complaint, except such as is stated in the summons issued on the complaint or in the summons as amended.

It seems to me that in this case it can be said, fairly and properly, that "the amount sought to be recovered" in the special summons is $15,250, for the cost of rectifying the defects The conclusion is supported by what is said in the statement appearing at the foot of the front page of the summons, and to which Mr Bloch drew my attention. Notwithstanding that the claim is for unliquidated damages, that statement specifying an amount, the payment of which, with costs, might avoid further costs, is a statement required on every summons, whether default or special, by virtue of rule 33 of the *Magistrates' Courts Rules*, 1980 as amended by the *Magistrates' Courts Rules* 1986: see 1986 Statutory Rules No. 223, Rule 2(7).

For these reasons, I accept the submission that the Magistrate erred in law in concluding that the special summons was outside the jurisdiction of the Court and fell to be dealt with under s51(9) of the *Magistrates' Courts Act*. In my view, the summons should not have been struck out under that sub-section. Rather, the applicant should **[11]** have been given such leave to amend as was necessary, in order to remove from the summons the offending reference to $40,000. And in so concluding, I have simply assumed without deciding that what His Honour Judge Hassett said in *Eden v Jones*, to confine the effect of *Coastal Estates v Melevende* was correct; if it was not, then what was said there by Adam J [1965] VicRp 60; [1965] VR 433 at 447, may provide further ground to support the conclusion which I have otherwise reached, that the special summons in this case did not lie outside the jurisdiction of the Magistrates' Court.

In the result, the order nisi in proceeding no. 6067 must be made absolute and the special summons, on which the Magistrate made his order of 7 March, 1990, remitted to the Magistrates' Court at Heidelberg for hearing and determination according to law. The question whether the applicant would want to discontinue that proceeding and start afresh by issuing out of the Magistrates' Court at Wonthaggi, is of course a matter entirely for the applicant and his legal advisers.

Two problems remains however. First, the Magistrate made no order for costs on the default summons on the ground, it is said, that all the costs incurred, had been awarded in favour of the respondent and against the applicant when the Magistrate had earlier struck out the special summons for want of jurisdiction. I say nothing about the propriety of the Magistrate taking that course in relation to costs, because no attack was made by reference to it in the order nisi. But I now propose to set aside the order made by the Magistrate on the special summons, which included the order for costs, while leaving intact the **[12]** judgment entered by the Magistrate on the default summons, which, as I have said, included nothing for costs. That is scarcely fair to the respondent as Mr Bloch frankly conceded and he seeks to avoid the result if possible.

I think that justice will be met if, in remitting the special summons to the Magistrates' Court for hearing and determination, I direct that on any question of costs the Magistrate should take into account (1) that on 7 March, 1990, no order for costs was made on the default summons because all costs had already been ordered on the special summons, and (2) that the order made on the special summons on 7 March, 1990 has since then been wholly set aside.

In so directing, I do not mean that the applicant should have to pay all of the costs of the day on the special summons on 7 March. The point taken against the applicant on 7 March, should in my view, have properly failed, but it is, I think, fair that the respondent receive some consideration on any question of costs hereafter, for the costs that were not awarded on the default summons on 7 March 1990, but which might have been awarded had the Magistrate not earlier made the award of costs that he did on the special summons.

Secondly, there is the matter of the stay. The order nisi in proceeding no.6095 relating to the default summons, contained in para.4 (as indeed did also the order nisi in proceeding no.6067) a stay of execution on the Magistrate's order, which in the case of the default summons, was (in effect) judgment for $4,450 plus interest of $573.20. I propose to discharge that order nisi in relation to the default summons and thereupon the stay would cease to **[13]** operate.

Yet, ordinarily, in a case like the present, where a builder seeks the balance of money due for work and labour done and the building owner cross-claims for defective workmanship, the Court would grant a stay, should judgment be entered on the claim, pending the hearing and determination of the cross-claim, so that at the end of the day the one result could be set off against the other and only the balance paid. That is what I think should have happened here, but I doubt that I have the power to grant now the stay that the Magistrate would have granted on the order on the default summons, because I am not setting aside the Magistrate's order. That remains intact. In order to avoid the extra expense of a separate application by the applicant to the Magistrates' Court for a stay now, I think that I should simply suspend the operation of my own order in relation to the order nisi in proceeding no.6067 until the special summons has been heard and determined (or if not determined after a hearing, until the special summons has been otherwise determined by whatever means).

I intend, by suspending the operation of my own order, that the order nisi will remain on foot and that the stay will remain in place for the period marked out, as if the hearing of the order nisi were for the time being simply adjourned *sine die*. I prefer not to make an order simply adjourning the order nisi, because that would leave the parties unsure of the outcome of the order nisi. It is better, I think, to make it plain that the order nisi is to be discharged, but as at a suitably future date.

Finally, on the question of the costs of these **[14]** proceedings, s94 puts them in my discretion. In the proceeding no.6095 of the *Magistrates' Courts Act* which relates to the default summons, I shall make no order for costs. In proceeding no.6067 which relates to the special summons, I shall grant the applicant his costs to be taxed in default of agreement, but I direct that such costs include only one half of the costs of the hearing before me. Accordingly, the orders that I make are as follows:

In proceeding no.6067, which is the order nisi directed to the order made on 7 March 1990 by the Magistrates' Court at Heidelberg in relation to the special summons issued by the applicant against the respondent, I order that: (1) the order nisi be made absolute; (2) the order made by the Magistrates' Court on 7 March 1990 be wholly set aside including the order for costs; (3) the special summons (a copy of which is exhibit 'DFH2' to the affidavit of Declan Fellowes Hyde sworn 6 April 1990) be remitted to the Magistrates' Court at Heidelberg for hearing and determination according to law; (4) the respondent pay the applicant's costs of the proceeding, such costs to be taxed in default of agreement, but such costs to include only one half of the costs of the hearing before me.

In proceeding no.6095, which is the order nisi directed to the order made on 7 March 1990 by the Magistrates' Court at Heidelberg on the default summons issued by the respondent against the applicant, I order that: (1) upon the hearing and determination of the special summons (a copy of which is exhibit 'DFH2' to the affidavit of Declan Fellowes Hyde, sworn 6 April 1990) or, if that special summons be not determined after a hearing, upon the **[15]** determination otherwise of the said special summons, the order nisi granted by Master Evans on 8 May 1990 be thereupon discharged; (2) there be no order for costs of this proceeding.
