

24/69

SUPREME COURT OF VICTORIA

MATHERS v STEFANETTI

Newton J

21 October 1969

LANDLORD AND TENANT – APPLICATION MADE FOR EJECTMENT OF PARTY – PROCEEDINGS ISSUED IN THE SUPREME COURT TO ENFORCE CLAIM – WARRANT OF EJECTMENT ISSUED BY MAGISTRATE – WHETHER PROCEEDINGS SHOULD HAVE BEEN ADJOURNED *SINE DIE* PENDING COMPLETION OF THE SUPREME COURT PROCEEDINGS – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute. Magistrate's order set aside and the hearing of the complaint adjourned *sine die*.

1. Under s33 of the *Landlord and Tenant Act* 1958 the Magistrate had no jurisdiction to decide whether the claim on the part of the defendant for specific performance was valid, because it was an equitable claim.

2. It was not a proper exercise of the Magistrate's discretion to require the defendant within a period of about 14 days to obtain an injunction from the Supreme Court, if the defendant wished the complainants' proceedings in the Court of Petty Sessions not to proceed. The defendant had already commenced an action in the Supreme Court to enforce his claim, and if the complainants wished to obtain possession of the land it was for them to take all necessary steps to get that action dismissed.

3. The Magistrate should not have proceeded to hear the case but should have adjourned it *sine die* with liberty to any party to bring the matter on upon 7 days notice in writing to the others.

NEWTON J: This Order Nisi will be made absolute on the fourth ground thereof, on the basis that the Stipendiary Magistrate's refusal to grant the defendant's application for an adjournment was wrong. I find it unnecessary to determine the correctness of any of the other grounds of the Order Nisi.

It is common ground between the parties that by an action commenced in this Court by a writ of Summons issued at Sale on 26 February 1969 (No. 3 of 1969) the present defendant as plaintiff is claiming as against the present complainants as defendants specific performance of an alleged contract for the purchase by him from the complainants of the land now in question, each contract being said to arise from the alleged exercise by the present defendant of an option of purchase which is alleged to have been contained in the lease. It is also common ground that this claim by the present defendant is a *bona fide* claim, even if in the end and after full investigation in this Court, it should prove unsuccessful, as to which I express no view.

The complaint and summons in the present case was issued on 7 May 1969; i.e. after the commencement of the defendant's said action against the complainants. Even now the complainants have not yet delivered a defence in that action.

Under s33 of the *Landlord and Tenant Act* 1958 the Stipendiary Magistrate had no jurisdiction to decide whether this claim on the part of the defendant for specific performance was valid, because it was an equitable claim, see, for example, *Healy v Southern Milk Transport Pty Ltd* [1954] VicLawRp 63; [1954] VLR 448 at pp451-2; 61 ALR 842. Indeed the Stipendiary Magistrate appears to have appreciated this his proper course in the circumstances was, in my view, to have dismissed the complaint, as is pointed out in *Healy's case*, *supra* at p452. For if the defendant's claim was valid, which the Stipendiary Magistrate could not decide by a decision binding upon the parties then the defendant was entitled to remain in occupation of the land in question, so that there was "reasonable cause" within the meaning of s33 "why possession should not be given" to the complainants: see *Healy's case*, *supra* at p452; *Dalton v O'Gorman* [1921] VicLawRp 105; [1921] VLR 599; 27 ALR 352; 43 ALT 105; *McGee v McDiarmid* [1941] VicLawRp 38; [1941]

VLR 160; [1941] ALR 175; and *Clarke v Watson* [1943] VicLawRp 17; [1943] VLR 81 especially at pp85-86; [1943] ALR 129. I should expressly state that none of those decisions appears to have been brought to the attention of the Stipendiary Magistrate by the solicitors who appeared before him for the parties.

I do not consider that it was a proper exercise of the Stipendiary Magistrate's discretion to require the defendant within a period of about 14 days to obtain an injunction from this Court, if the defendant wished the complainants' proceedings in the Court of Petty Sessions not to proceed. The defendant had already commenced an action in this Court to enforce his claim, and if the complainants wished to obtain possession of the land it was for them to take all necessary steps to get that action dismissed.

It is not asserted in any of the grounds of the Order Nisi that the Stipendiary Magistrate ought to have dismissed the complaint, but only that he should have adjourned it. And before me Counsel for both parties agreed that if I considered (as I do) that the Stipendiary Magistrate ought not to have proceeded with the case, then the most expedient course would be to substitute for his order that a warrant of ejectment issue, an order adjourning the complaint *sine die* with liberty to any party to bring the matter on upon 7 days notice in writing to the others. I shall therefore follow that course. But I should say that, as at present advised, I consider that the Court of Petty Sessions ought not to deal with the matter before the defendant's said action No. 3 of 1969 has been finally disposed of.

Mr Emery who appeared for the complainants before me submitted that if I made the Order Nisi absolute with costs, as I intend to do, I should grant an indemnity certificate to the complainants under s13 of the *Appeal Costs Fund Act* 1964. I have some hesitation about granting an indemnity certificate, since if my conclusions be right, the proceedings in the Court of Petty Sessions ought never to have been commenced. But in the end I have decided that in all the circumstances it is proper to grant an indemnity certificate.

Subject to any comments which Counsel may now wish to make as to form, I shall order as follows:

Order that the Order Nisi be made absolute with costs, including reserved costs, all of which are fixed at \$120.

Order that the orders of the Court of Petty Sessions that a warrant of ejectment issue to be executed within thirty days of the date of its issue but to lie in the office of the Clerk of Petty Sessions Sale for fourteen days from the date of issue, and that the defendant pay \$30 costs, be set aside and that in lieu thereof it be ordered that the hearing of the complaint in the Court of Petty Sessions be adjourned *sine die*, with liberty to any party or parties to bring it on for further hearing upon seven days notice in writing to the other parties or party.

There will be an order pursuant to s13(1) of the *Appeal Costs Fund Act* 1964 that an indemnity certificate be granted to the respondents in respect of this Order to Review.

APPEARANCES: For the applicant/defendant Mathers: Dr A Endrey, counsel. Ambrose Riches & Co, solicitors. For the respondents/complainants Stefanetti: Mr HC Emery, counsel. RSB Skinner, solicitor.