**12/94**

**SUPREME COURT OF VICTORIA**

# *PAPER-CORP PTY LTD v GTH ENGINEERING PTY LTD & ANOR*

**Beach J**

**3 February 1994**

**PROCEDURE – ADJOURNMENT – CIVIL PROCEEDING – DEFENCE WITNESS ILL – EVIDENCE OF SAID TO BE RELEVANT – APPLICATION FOR ADJOURNMENT REFUSED – RIGHT RESERVED FOR FURTHER APPLICATION TO BE MADE IF ASCERTAINED WITNESS' EVIDENCE RELEVANT - WHETHER DISCRETION PROPERLY EXERCISED.**

**Where an application for an adjournment of a civil proceeding was made on the ground that a witness whose evidence was said to be critical to the defendant's case was ill, a magistrate was not in error in refusing the application but reserving the right for a further application to be made if it became clear that the witness' evidence was relevant to the case.**

**BEACH J: [1]** This is the return of an originating motion whereby the plaintiff, Paper-Corp Pty Ltd, seeks the following relief or remedy:

> 1. A declaration that the order of Mr L. McLean Magistrate made at Melbourne Magistrates' Court on 16 August 1993 refusing the plaintiff, Paper-Corp Pty Ltd, an adjournment of the hearing of complaint no. D01497053;
> (a) is and was *ultra vires* or invalid;
> (b) the refusal to grant the adjournment, the said complaint prevented the plaintiff, Paper-Corp Pty Ltd, from presenting its case in defence of the complaint;
> (c) the refusal to grant the adjournment, the hearing of the said complaint constituted an injustice to the plaintiff;.
> 2. Relief in the nature of *certiorari* to quash the orders made at Melbourne Magistrates' Court on 16 August 1993 of;
> (a) Mr L. McLean Magistrate refusing the plaintiff an adjournment of the hearing of complaint no. D01497053; and
> (b) the subsequent order made by Mr F.W. Hender Magistrate, on the claim for $6,382.83, $2,048.25 interest and $3,453.30 costs.
> 3. A declaration that to proceed to hear and determine the said complaint was and is in the circumstances an abuse of process of the court.
> 4. An order that complaint no. D01497053 be referred to the Melbourne Magistrates' Court for rehearing.

The background to the originating motion may be **[2]** summarised as follows: On 27 September 1991 the defendant in the present proceeding, GTH Engineering Pty Ltd (GTH) issued a complaint out of the Magistrates' Court at Melbourne against Paper-Corp seeking to recover the sum of $6,382.83 for work and labour done. The relevant details of the claim appear in paragraph 3 of the complaint which reads:

> "The defendant is indebted to the plaintiff in the sum of $6,382.83 for work and labour done by the plaintiff for the defendant at the defendant's request between the months of February 1991 and March 1991. Particulars: The work was the dismantling and reinstatement of industrial machinery as directed by the defendant and confirmed in the defendant's order no. 59 and its directors. Full particulars of the plaintiff's claim are set out in its invoice no.3002-775 dated 27 March 1991."

The evidence before me establishes that on two occasions following service of GTH's complaint on Paper-Corp, default judgments were entered in the Magistrates' Court against Paper-Corp. However, subsequent applications made on behalf of Paper-Corp succeeded in having each default judgment set aside. The hearing of the complaint was originally fixed for 20 May 1993. However, as a consequence of Paper-Corp's failure to comply with the rules of the Magistrates' Court, the matter could not proceed to trial that day and it was specially fixed for hearing on 16 August 1993.

On 11 August 1993 the solicitors for Paper-Corp informed the solicitors for GTH that a director of Paper-Corp who was to be called to give evidence on Paper-Corp's behalf, Mr Peter C. Gregory, was ill, that Mr Gregory resided in Perth and that as a consequence of **[3]** his illness he would not be able to attend the hearing on 16 August, and in that situation Paper-Corp intended to seek an adjournment of the proceeding. The solicitor for GTH informed the solicitor for Paper-Corp that his client would not consent to any application for adjournment and that the application which would be made to the magistrate on 16 August would be opposed.

The complaint came before Mr L. McLean Magistrate on the morning of 16 August. The solicitor appearing for Paper-Corp proceeded to apply for an adjournment of the hearing. In support of his application, he relied upon an affidavit which had been sworn by him on 12 August 1993. The relevant paragraphs of that affidavit read:

> "3. That I received a telephone call from Mr Peter C. Gregory on 11 August 1993 who advised me that he would not be able to attend the hearing due to ill health. 9. That now shown and produced to me and marked with the letters NL1 is a copy of the medical certificate dated 11 June 1993 received from Mr Gregory."

It is not possible to decipher the doctor's signature on the certificate. It could be one of three doctors carrying on their practice at 450 Stirling Highway, Cottesloe, Western Australia. The certificate reads:

> "Re: Peter Gregory, 40 Oustin Street, Mosman Park. Mr Gregory is unable to attend court on 16/8/93 due to a medical condition. Faithfully ..."

and then there is an indecipherable signature.

The affidavit also sets out why it was that Mr Gregory was to be called to give evidence.

> "8. That Mr Peter C. Gregory has had several discussions with William J. F. Polliet, director of the plaintiff, and Mr Gregory's evidence of those discussions is an important part of the defendant's defence."

In addition to relying upon the affidavit to which I **[4]** have referred, the solicitor for Paper-Corp gave certain evidence in relation to the application. I don't believe that it is necessary to set out the substance of that evidence in these reasons for judgment. The basis upon which the application for adjournment was opposed by counsel for GTH Engineering was that, in his submission, Mr Gregory was not a relevant witness in the proceeding in that Mr Gregory was not involved in the particular dealing between Paper-Corp and GTH and was therefore not in a position to give evidence relevant to the complaint before the court that day. The magistrate retired for a short time to consider his decision in the matter and upon his return refused the application. In refusing the application he said:

> "I have read the authority to which I was referred and accept that the law is that I should grant an adjournment where refusing an adjournment would otherwise prejudice a party. I have been told that Mr Gregory is a key witness and is unavailable to attend court and to give evidence. That is supported by an affidavit and a document which purports to be a medical certificate. Oral evidence has also been given as to Mr Gregory's illness and inability to attend court. Such evidence does not elaborate on Mr Gregory's illness. I find that Mr Gregory practised as a solicitor in Victoria for some time, and some weight must be given to the fact that he should have known of the inadequacy of the purported medical certificate he procured. I have been told that Mr Gregory's evidence is critical to the dispute. I refuse the application for the adjournment and if evidence given during the proceeding makes Mr Gregory's evidence critical to the defendant's case, an application for an adjournment will be entertained at that stage."

Later that morning the complaint was referred for hearing to a second magistrate, Mr F. W. Hender. When the complaint was called on, there was no appearance on behalf of Paper-Corp. The affidavit material before me establishes that present with Paper-Corp's solicitor at the court that morning was a director of Paper-Corp named **[5]** Andrew Koutrouzas. The evidence further establishes that when Mr McLean refused the application for adjournment Paper-Corp's solicitor and Mr Koutrouzas simply departed from the court. Mr Hender then proceeded to hear GTH's complaint and in due course made the orders to which I have already referred.

Paper-Corp now applies to this court by way of originating motion to set aside both the order refusing its adjournment and the order made by Mr Hender on GTH's complaint. As was made clear by the Court of Appeal in *Maxwell v Keun* (1928) 1 KB 654; [1927] All ER 335, an appellate court will be very slow to interfere with the discretion vested in a court of first instance with regard to such a matter as the adjournment of the trial of an action before it and very seldom does so. But if it appears that the result of an order refusing an adjournment will be to defeat the rights of the appellant altogether and to do that which the appellate court is satisfied would be an injustice to one or other of the parties, the court has power to review the order and, indeed, it is its duty to do so. Of course that decision, as I have already indicated, was handed down in 1928.

In *Sali v SPC Limited & Anor* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841, the High Court considered the decision of the Court of Appeal in *Maxwell's* case. At CLR page 843 it said:

> "In *Maxwell v Keun* the English Court of Appeal held that although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition, an adjournment which, if refused, would result in a **[6]** serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action. However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become. In determining whether to grant an adjournment the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. As Deane J pointed out in *Squire v Rogers* [1979] FCA 48; (1979) 39 FLR 106; (1979) 27 ALR 330 this may require knowledge of the working of the listing system of the particular court or judge and the importance and the proper working of that system of adherence to dates fixed for hearing. What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources."

In the present case, I can discern no error on the part of the learned magistrate in refusing the application for an adjournment of the complaint. The magistrate was entitled to have regard to the fact that the complaint had been issued on 27 September 1991, that default judgment had been entered against the defendant on two separate occasions since the complaint had been served on it, that the matter had been fixed for hearing before the court on 20 May 1993 but, as a result of Paper-Corp's non-compliance with the rules, had been adjourned to be specially fixed for hearing on a later date which, as events turned out, proved to be 16 August. The magistrate was also entitled to take into account the fact that there was a challenge to the relevance of any evidence that the witness Gregory might give.

Being mindful of the matters to which I have just referred, I think it was perfectly appropriate for the magistrate to say as he did: "I shall refuse your **[7]** applicant for adjournment but if evidence given during the proceeding makes Mr Gregory's evidence critical to the defendant's case, an application for an adjournment will be entertained at that stage." In other words, the magistrate before whom the complaint first came was not making a final determination in relation to the application for adjournment. All he was saying was, when the matter is heard, and one presumes he realised it would be heard by some other magistrate at the Melbourne Magistrates' Court that day, if the evidence makes it clear that Gregory is a relevant witness, then renew your application for an adjournment at that stage. But instead of adopting that course, the solicitor for Paper-Corp and its director chose to simply leave the court, thereby allowing GTH's proceeding to be heard undefended.

**[8]** In my opinion the finding I have made in the matter thus far that the Magistrate, that is Mr McLean, did not err in the exercise of his discretion, is sufficient to dispose of the originating motion. I would say, however, that having regard to the delay in instituting the proceeding in this court seeking to set aside the orders in question, that is, that Paper-Corp waited until the very last day available to it to institute the proceeding, I may well have declined to exercise my discretion in its favour even had I considered that the Magistrate was in error in the matter. The

originating motion will be dismissed. I order that the defendant's costs of the originating motion be taxed and when taxed paid by the plaintiff.

MR WHEELAHAN: If Your Honour pleases, I seek costs on a solicitor/client basis. (Discussion ensued re costs)

**HIS HONOUR:** The view I take of the matter is this originating motion has been brought before the court really by reason of Paper-Corp's failure to follow what I would have said was the most sensible approach to have been adopted in the matter before the Magistrates' Court on the 16th of August, namely, as all of GTH's witnesses were present at the court, and as one of the directors of Paper-Corp was present before the court, to allow the proceeding to be heard reserving, as it were, to Paper-Corp its right to make an application to the Magistrate hearing the proceeding for an adjournment once it became clear that Gregory's evidence was relevant to the case. I have not the slightest doubt that if, during the **[9]** hearing before Mr Hender, it had become apparent that Gregory's evidence was relevant to the case, His Worship would have then adjourned the case part heard to enable Gregory to be called. That course was not pursued by Paper-Corp and as a consequence it has subjected GTH to the expense and inconvenience now of defending the originating motion. In that situation I consider that it is appropriate that Paper-Corp pay GTH's costs on a solicitor/client basis and I so order.

**APPEARANCES:** For the plaintiff Paper-Corp: Mr V Ruta, counsel. Alan Wainwright, J Okno & Co, solicitors. For the defendants GTH Engineering: Mr M Whelahan, counsel. GWP Aarons & Co, solicitors.

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