45/89

SUPREME COURT OF VICTORIA

SIMILAR OR EQUAL APPROVED PRODUCTS PTY LTD v MANNWAY (VICTORIA) PTY LTD

Ormiston J

22, 23 May 1989

CIVIL PROCEEDINGS – REHEARING – ORDER MADE BY DEFAULT – SUMMONS PROPERLY SERVED – NO ARGUABLE DEFENCE ON THE MERITS – WHETHER COURT MAY REFUSE APPLICATION TO REHEAR: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S152.

Upon an application to set aside an order made by default in a civil proceeding, it is necessary for the applicant to show, in the absence of irregularity or fraud or some other special factor, that it has an arguable defence upon the merits.

ORMISTON J: [1] This is another case where the absence of transcript in a lower court has made this Court's task upon an order to review exceptionally difficult, and in some senses almost impossible of resolution. The present applicant, defendant to a default summons issued on 19 February 1988, suffered a default order in the Magistrates' Court at Cheltenham on 13 April 1988 for $9,499.60, together with costs, on a claim brought by the complainant for work and labour done during the months of May to June 1987.

The applicant having, as has been conceded, been properly served by post with the default summons on 17 March 1988 in South Australia and pursuant to the *Service and Execution of Process Act*, sought to set aside the default order obtained in its absence pursuant to s152 of the *Magistrates (Summary Proceedings)* Act 1975. That application was heard at the Magistrates' Court either at Cheltenham, Sandringham or Dandenong – the documentary material is so poor that it is impossible to determine which – and it was ordered that the application brought by the defendant should be dismissed.

The circumstances of the application are confused by the affidavit material used in support of that application, and indeed, by the affidavit material used to oppose the application, but I would understand the defendant to be saying that it had a defence on the merits to the claim and that in all the circumstances it should not be precluded from defending the case and having the matter re-heard.

The ground upon which the learned magistrate rejected the application is by no means clear, there being two **[2]** partly conflicting versions in the affidavits sworn by the barristers who appeared on each side in the court below, the ultimate conclusions of the magistrate appearing in three brief paragraphs in one affidavit and in four brief sub-paragraphs in the other. There was a further ground in the order nisi granted by Master Evans on 30 September last which related to costs, but that ground, lettered A, has not been pursued by the applicant on the hearing before me. The material before the magistrate suggested that those responsible for the running of the defendant company had not themselves seen the summons until some months after it had been formally served on its registered office at Wingfield in South Australia. The applicant also asserted that no harm might come to the complainant by reason of its delay in bringing the proceedings for re-hearing before the Magistrates' Court, and that no prejudice had been or was likely to be suffered by the complainant if the order were set aside.

Reliance has been placed before me, and was placed before the learned magistrate, on two decisions of the Full Court, *Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173 and *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596, which are both appeals relating to the setting aside of judgments in the County Court. It was accepted that the same principles should apply to an application pursuant to s152 of the *Magistrates (Summary Proceedings) Act* which reads:

> "Where a conviction or order is made by a Magistrates' Court or by a justice or justices not sitting as a Magistrates' Court when one party does not appear, the party who does not appear may subject to and in accordance with the provisions of this Part apply to **[3]** the Court or, in the case of a conviction or order by a justice or justices not sitting as a Magistrates' Court, the Court in which the conviction or order is recorded for an order that the conviction or order be set aside and that the information or complaint on which it was made be re-heard."

Without examining the authorities in detail, I am inclined to the view that the jurisdiction under s152 is somewhat wider than that which applies to the setting aside of default judgments, as discussed by the Full Court. The matter was not seriously argued before me and in substance the present case is an application which arises out of the making of a default order, of a kind which was made pursuant to the *Magistrates (Summary Proceedings) Act* where the defendant to a default summons failed to give notice of defence within twenty-one days after service of the summons upon it. By s9B the Clerk of the Court is authorised in those circumstances to make an order in the complainant's favour.

The applicant's affidavits ranged over a large number of matters, and indeed the original affidavit said very little as to the merits of the complaint, the first affidavit being sworn on 15 July 1988 by a solicitor at Pakenham and in circumstances where the magistrate reasonably felt, and I do not think it was an unreasonable suspicion, that the deponent did not know of his own knowledge many of the matters to which he deposed.

The claim itself was for work and labour done and brought by a cartage contractor against the defendant which appears, so far as the materials before this Court go, to be the manufacturer or supplier of concrete products. From the affidavit material it would appear that the complainant **[4]** had agreed to deliver certain of the defendant's products at rates which were agreed and on terms, some of which were set out in a letter which was exhibited to one of the affidavits, and which indicated particular prices and rates per load of materials, together with what appears to be an additional rate where any unloading delays occur in excess of one and a half hours per load at a rate of $35 per hour. Little more is known of the terms from the affidavit materials, but it does appear that shortly after that letter was sent in March of 1987 the complainant sent a series of statements, which were in fact called "remittance advices", setting out what it claimed it had delivered on behalf of a firm called SEP Concrete of Ordish Road, Dandenong, which I believe to be a division of the defendant company, that is the company which is the present applicant.

Those statements refer to invoices commencing on 10 April 1987 and extending through to about 26 June 1987, with three other additional and irrelevant entries. Each debit was for a small amount ranging from $40 or $50 up to $520 on the first statement, and there was a second statement so badly photocopied that it is almost impossible to read, which appears to have omitted the items up to a date in May 1987, or thereabouts, and which upon a reading of the balance as at 26 June 1987 amounted to $9,699.60, in respect of which a credit is therein recorded on 17 July 1987 in the sum of $200.

As I have said, the first affidavit sworn in support of the application to set aside the order said very little about the merits of the claim, and in my opinion, on an application such as the present, it is necessary for an **[5]** applicant to show, in the absence of irregularity or fraud, or some other special factor, that it has an arguable defence upon the merits. This first affidavit admitted that the defendant had employed the complainant to act as courier on several occasions, but then asserted that it was a term that deliveries were to be charged at a fixed rate not including delays and waiting time. It went on to assert that the claim in the summons included certain delay and waiting time charges which should not have been charged to the defendant but which, in the language of the deponent, should have been charged direct to the client. Counsel was unable to say confidently what this reference to a "client" was, either in this affidavit or what the references were in another affidavit to the complainant's "contractors". But one might fairly assume that it was intended to refer to the person or proprietor on whose behalf the work was being done at the site to which these concrete products were being delivered. It matters not greatly, although it again points to the unsatisfactory nature of the materials before the Court.

Whatever the correct construction of the affidavit, that particular matter raised by way of defence appears clearly enough to have been denied by the letter to which I have referred and which was exhibited to an affidavit sworn on behalf of the complainant, being a letter of 5 March

1987, referring to a rate in respect of unloading delays. Moreover a later affidavit in reply sworn by one of the directors of the defendant company, made no attempt to deny that letter's application, albeit that it incorrectly referred to it as a letter sent on 5 March 1988.

[6] The first affidavit said very little more about the circumstances of the debt alleged against the applicant, or of the grounds upon which it asserted that it had an arguable defence. Most of the affidavit was directed to excuses why it did not receive or attend to the original default summons, and an assertion that no real prejudice was likely to flow from the order which it has requested.

The respondent, that is the complainant, then filed two affidavits which included as an exhibit the letter to which I have referred, and also referred to certain correspondence and a conversation which suggested that the defendant was aware of the claim a considerable time before it brought its application. Part of that material was clearly hearsay upon hearsay and of a kind which was and could have been of little assistance to the court below, although it should be remembered that upon an application of this kind, being an interlocutory application, statements from a deponent's information and belief with the grounds of belief stated may be admitted in evidence pursuant to Rule 129 of the *Magistrates' Courts Rules* 1980.

There was in addition a letter which is said to have constituted an acknowledgement of debt which had been sent on 6 April 1988 to the complainant. The letter by a director of the defendant company (that is the defendant to the proceedings below) after referring to some personal illnesses and bereavements, referred to the fact that the assets of the company were to be auctioned and that, in his words, the proceedings "will be drip fed from 1 May 1988". Finally, with some spelling errors, it sought to personally thank the complainant for its co-operation in being patient **[7]** regarding "our debt". In the argument before the magistrate some weight was placed on this, and indeed the magistrate himself placed some weight on it, but it is more than apparent from its language that it could not constitute an acknowledgement of the debt which was the subject matter of the complainant's claim. Counsel for the complainant did not pursue any such argument in this Court.

Again, the complainant's affidavits were largely directed to questions of reasons for delay and prejudice. In reply a further affidavit was sworn by the director Mr Ryan on behalf of the defendant/applicant. On this occasion, after dealing with a number of matters which are not of present significance, and, after asserting that in relation to the letter of 6 April 1988 that he did not intend to admit the complainant's claim, but that he simply sought an indulgence which was not given, he turned at long last to the matters upon which the defendant sought to rely as providing a good defence on the merits.

The first basis upon which he relied was that the defendant could not ascertain what was owed. By way of particulars of this somewhat curiously phrased defence, it was asserted that the remittance advice or statements dated 30 June 1988 and 30 September 1988 were different in that some $14,188 was said to be owing in the first statement, but that some $9,699.60 was said to be owing in the later statement. The proposition has only to be stated for it to be seen how fatuous such an assertion is. A reading of the two statements shows no inconsistency to which counsel could point, other than the fact that some fifteen or twenty items in the first statement which appear to go back to 10 **[8]** April 1987 did not appear on the later statement. The later statement of course was the basis of the complainant's default summons in that, subject to the payment of the $200 which indeed appeared on that very statement, it was that sum which was therein claimed.

As a matter of fact, and as a matter of law, the two statements could not establish the factual assertion made that the defendant could not ascertain what was owed. In any event, of course, that is not a defence, and can only be relied upon in an application such as the present in special circumstances, such as where the defendant is in a position where it cannot reasonably be expected to know the circumstances under which a debt or liability was incurred as may arise where a defendant is an executor or a liquidator, trustee in bankruptcy or the like. It certainly did not show that the defendant could not ascertain what was owed from those statements which were perfectly clear, at least in their original form before photocopying.

The second basis upon which it was said the defendant had a good defence was that the complainant's defective records did not show that the work was done. Of course the statement in part is argumentative in that it refers back to those records which I have already said were perfectly simple and capable of comprehension. There were, however, two other bases in this paragraph which the defendant/applicant relied upon. It first said that the complainant's several inconsistent statements to the defendant and their invoice form contained no reference to the defendant's order number, and the defendant does not have orders which correspond with the alleged work. **[9]** The first part of the statement appears to carry the matter no further in that, although it is obvious that the defendant's order number is not on the complainant's statements which contained only references to its own invoice or other internal numbering system, nevertheless the defendant said that he did not have orders which corresponded with the alleged work.

It was objected that the defendant had not condescended to particulars and that it did not show that it had considered any particular items on these accounts, nor did it assert that any one or any or more of these items failed to correspond with relevant orders. In my opinion, this is a most unsatisfactory basis for asserting the defendant has a defence on the merits, and, bearing in mind the misunderstandings which the defendant had previously evinced, that does not satisfy me that the magistrate ought to have found that there was a defence.

Secondly, it was said in respect of these defective records that the said statements contained many references to invoices of which "the defendant has no knowledge". Again, I have not the faintest idea what was meant by "knowledge", but I assume that in some way the defendant is attempting to assert that it did not know of the invoices which are referred to in the statements.

It is significant that the defendant does not say that the work, which appears to have been performed on the dates set out in detail in these statements, was not performed, and it has limited its reliance on this matter to a lack of knowledge of the invoices. In my opinion, the magistrate could well have found that nothing in this subparagraph constituted any **[10]** good defence, at least a defence which was sufficiently defined to justify the making of an order setting aside the complainant's default order.

Thirdly, the defendant asserted that the complainant's claims were inconsistent with the contract between the complainant and the defendant. This is in fact the only ground which of itself asserts that the complainant's claim was wrongly based and which might constitute an arguable defence on the merits, as the first two bases were designed only to show that there was some ground upon which it could argue that the complainant's records were defective. However, what was said in support of this last claim to a defence on the merits was in the first place, that by the letter which appeared to be dated 5 March 1988 (an obvious misprint in the light of the fact that the summons was issued on 19 February 1988), the complainant had quoted cartage at a rate of $480 to the defendant which had subsequently been charged at $520 in some sixteen instances. Apart from failing to identify what those sixteen instances were, counsel was unable to point to any such instance on the last statement and only two on the first statement, which did not appear to be the subject matter of the ultimate claim brought by the claimant since they were the first two items on the first statement. Moreover it is inconsistent with the letter which was in fact produced as an exhibit to the affidavit filed earlier that month on behalf of the complainant, to which I have already referred. Although two rates appeared in that letter of 5 March 1987, those rates being $280 per load, and $520 per load, it would seem from an earlier version of the **[11]** letter corrected by hand on the copy that the rate was $480 per load. But the letter exhibited to the affidavit was not challenged, nor was it suggested at any stage that there had been any falsification of that letter in the sense that the figure of $520 had been substituted for loads which were to be sent to Glenrowan. In those circumstances the assertion in the affidavit was manifestly inconsistent with the letter which had been put in evidence on behalf of the defendant, apart from its apparent irrelevance to any sum claimed by the complainant on the second and later remittance advice.

Next, in respect of this inconsistency with the contract, the deponent said that "the complainant alleges waiting time claims in its records in the order of $1340, when the defendant is informed and verily believes that no contractor's delays occurred and the defendant is not liable for delays caused by the complainant's contractors".

Counsel had some difficulty explaining to me the meaning of this particular paragraph. In the first place the records produced as exhibits to the affidavit, being the two remittance advice, did not appear to have any reference to $1340 – at least counsel could not point to any part of those remittance advice which contains such a claim. More importantly, ignoring the fact that the deponent on this occasion refers to matters on information and belief without stating the grounds for that information and belief, no particulars are given pursuant to Rule 129 as to what is referred to as "the contractor's delays" which it is denied occurred, nor is it asserted in any detail and with particularity what delays were asserted to have been caused by the complainant's contractors. However, be that as it **[12]** may, it is clear from the letter to which the deponent refers that the complainant is entitled to claim for delays, and, moreover, the clause in question does not distinguish in any way between what are asserted to be contractor's delays, by which I would understand delays on the part of the complainant cartage contractor, and delays caused by the complainant's contractors, by which I would guess again reference is made to the persons to whom the goods were being delivered on behalf of the defendant.

There is, however, nothing which would suggest in that document or in any material before the Court that any distinction was drawn in the contract between the parties, between delays caused by the contractor himself or caused to it itself, or delays caused by the complainant's contractors, whoever they may have been. The contract, or the terms of the contract appearing in the letter, have a general reference to unloading delays without reference to any individual or to any responsibility on the part of any individual. No argument was put in law as to the meaning of this letter which would suggest that it was confined in the way which the deponent, Mr Ryan, suggested. Moreover, no other documentation was put to the Court, nor was it asserted that there was any oral term agreed between the parties as to the nature of the delays for which the complainant might charge.

In those circumstances, there is no legal basis for the deponent's assertion that the defendant was not liable for delays caused by the complainant's contractors. The magistrate was certainly entitled to hold that that was so. In those circumstances on this ground, again, none of the **[13]** material before the Court and none of the matters deposed to on behalf of the defendant provided an arguable defence to the complainant's claim.

I was concerned that the learned magistrate did not direct himself to this last issue in his recorded reasons which differed slightly in each affidavit. However, whether or not the magistrate reached the conclusion that no arguable defence had been put forward, and I am rather inclined to the view that he did reach that conclusion, upon my analysis of the materials the respondent to this application is entitled to uphold the order of the magistrate on any ground which may fairly have been relied upon on the material before the court below.

There is a good deal more in the affidavit material which suggested to the magistrate, and I would not disagree with him, that much of this later, inadequate, badly drafted and imprecise material was simply put forward in order to delay execution upon the order obtained by the complainant. But I would prefer to rest my decision upon the ground that no arguable defence has properly been made out such as would have founded the jurisdiction to set aside the order pursuant to s152 of the *Magistrates (Summary Proceedings) Act*, and it is therefore not necessary to examine further the magistrate's findings as to the cause of delay, the reason why the party, that is the defendant, failed to appear when it was originally served, or questions of prejudice as between both parties. In my opinion, on the material before this Court, in the form in which it was presented both to this Court and to the magistrate in the court below, that material was quite **[14]** inadequate to support a view that the defendant had made out a defence on the merits to the complainant's claim. For those reasons I propose to discharge the order nisi and to order that the applicant pay the respondent/complainant's costs of and incidental to this application.

APPEARANCES: For the applicant Similar or Equal Approved Products: Mr PR Gibbons, counsel. Duffy & Simon, solicitors. For the respondent Mannway: Mr RD Shepherd, counsel. Egan Lobb & Walker, solicitors.
