02/83

SUPREME COURT OF VICTORIA

BOYD & ANOR v NOLAN & ORS

O'Bryan J

18 October 1982

DEFAULT SUMMONS – APPROPRIATE ENDORSEMENTS – 3 DEFENDANTS – JOINDER – CLAIM AGAINST EACH DEFENDANT – WHETHER AMOUNT IN EXCESS OF JURISDICTION – AGREEMENT TO PAY FUTURE FEES – WHETHER CONTRACT TO GUARANTEE: *INSTRUMENTS ACT* 1958, S126.

Boyd, an accountant, was asked by Nolan to carry out accounting services for a number of companies which Nolan owned or controlled. Boyd agreed, and he performed services for A Co. amounting to $1845.48 and B Co. for $597.50. When these fees were not paid, Boyd told Nolan that no further accounting services would be performed unless Nolan agreed to become personally responsible for future fees. Nolan agreed and Boyd carried out further accounting work for Nolan's 2 companies totalling $1335.00. As payment was not forthcoming, Boyd caused a Default Summons to be issued claiming $2630.48 for work done "for and on behalf of Nolan;" "further or in the alternative", claiming $1845.48 for work done "for and on behalf of" A Co. at Nolan's request; and "further or in the alternative", claiming $597.50 for work done "for and on behalf of" B Co. at Nolan's request. It was submitted on Nolan's behalf:
(i) that the summons was a nullity because the claim exceeded the jurisdiction of the court; and
(ii) that as the oral agreement was in the nature of a guarantee, and not in writing as required by the *Instruments Act* 1958, no claim could be made under it. Boyd did not proceed with his claim against the 2 companies.

HELD:
(i) that there was no claim for an amount in excess of the court's jurisdiction; and
(ii) that the oral agreement was an agreement to pay future accountancy fees and not a contract of guarantee.

O'BRYAN J: *[After describing the form of the summons, His Honour continued]*: In the Magistrates' Court the applicant, through his counsel, submitted that the Summons was a nullity because the claim exceeded the jurisdiction of the Court. Section 50 of the *Magistrates' Courts Act* 1971 provides:

> "Every Magistrates' Court shall have jurisdiction in the following cases—
> (d) where the amount claimed does not exceed $3,000 it may hear and determine any cause of action—
> (i) for a debt or liquidated demand whether on balance of account or otherwise;
> (ii) (not relevant.)"

The cause of action was an *indebitatus assumpsit* claim for the value of professional services: *Alexander v Ajax Insurance Co Ltd* [1956] VicLawRp 70; (1956) VLR 436 at 442-3; [1956] ALR 1077. The claim was one for a debt or liquidated demand. The Particulars of Demand annexed to the Summons were perhaps more elaborate than those usually expected in the Magistrates' Court in its Default Summons jurisdiction. Examples of suitable forms of particulars in claims of this kind are found in Bullen and Leake *Precedents of Pleading* 11th edition at pp324 and 377.

Be that as it may, the question arises whether the claim made by the complainants exceeded $3,000. If it did, the Summons was a nullity and the Court's only jurisdiction was to order the complaint to be struck out and to make an order for costs. Once a nullity, always a nullity, is the rule. After hearing argument the learned Magistrate ruled that the claim was one for $2,630.48 and he proceeded to hear the substance of the claim.

Grounds 1 and 2 of the order nisi raised the question again, before me, whether the Summons was a nullity. Mr Larkin, of counsel, who appeared for the applicant submitted that, if one has regard to the word "Further" at the commencement of paras. 5 and 6 in the Particulars of Demand the complainant is clearly saying in those paragraphs "and in addition you the second named defendant owe me $1845.48 and you the third named defendant owe me $597.50 and my total claim is $2,630.48 plus $1,845.48 plus $597.50 namely $5,273.46." In those circumstances Mr Larkin contended the amount claimed would exceed the Court's jurisdiction. Therefore, on

the face of the Particulars of Demand it was submitted, the complainants were seeking to recover from the defendants more than $3,000.

Mr Larkin further submitted that had the defendants failed to appear or to heed the "Notes for the Information of the Defendant" a judgment would have been entered against each Defendant for a separate amount, namely the amount claimed in the prayer for relief and the total judgment would have been $5,273.46 as aforesaid. Mr Larkin further submitted that the *Magistrates' Courts Rules* do not permit the joinder in one Summons of three separate claims, whether the separate claims exceed or do not exceed the jurisdiction if added together.

Mr Lacava for the respondent submitted that the Summons on its face made it perfectly clear that the total claim was $2,630.48 and the defendants could not have been under any misapprehension that the claim was one for a sum less than $3,000 and within the jurisdiction of the Magistrates' Court. Mr Lacava referred me to *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421, a decision of Newton J. There, His Honour treated a statement on the outside of the Summons that the complainant intended to abandon the excess by which the claim exceeded the jurisdiction as part of or within the Particulars of Demand. On that view the amount of the claim specified on the outside of the Default Summons in this case, namely $2,630.48 might be regarded as part of the Particulars of Demand. That fact tends to confirm the complainant intended to claim no more than $2,630.48.

I find myself unable to accept Mr Larkin's submission that the *Magistrates' Courts Rules* do not permit the joinder of three defendants in the circumstances of this case. Rule 42 is in these terms:

> "A complaint may be made and a summons issued thereon against two or more persons alleged to be liable or chargeable, whether jointly severally or in the alternative; and an order may be made against such one or more of those persons as the court may find to be liable."

Rule 43 says:

> "Where the complainant is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the extent that the question as to which (if any) of the defendants is liable, and to what extent, may be determined as between all parties."

Whilst it was not apparent in the Summons why the three defendants were joined, it has now been made clear they were joined because the complainants were unsure to what extent the corporations might be made liable to contribute to the total fees claimed, namely $2,630.48. Joinder of several defendants in those circumstances appears to be quite reasonable and normal and rule 43, at least, sanctions that course.

Mr Lacava answered Mr Larkin's argument that, had the defendants not defended the claim, judgment might have been entered against the defendants for a sum in excess of the jurisdiction by pointing out that the sum specified on the outside of the Summons plus the specified amount for costs governs the entry of judgment. I agree with his submissions. Whilst the Particulars of Demand will be looked at to see they disclose the cause of action (s9B(ii)), a default judgment could not be entered for an amount exceeding the amount of the claim specified on the front of the Summons. For the Court to enter judgment for some other amount would be inconsistent with the notice on the front of the Summons.

Finally, Mr Lacava submitted that the word "Further" in the particulars meant and the complainants intended it to mean "furthermore" and not "additionally". No matter what the word 'further' was intended to convey I do not consider that in using the word 'further' the Summons for $2,630.48 was transformed into a claim for an amount which exceeded the jurisdiction.

I am satisfied that the respondents did not claim an amount in excess of the jurisdiction of the Magistrates' Court. The matter that principally determines the quantum of the claim is the figure inserted on the outside of the Default Summons. In this case, the amount claimed is clearly and unequivocally within the jurisdiction of the court. In the Particulars of Demand, nowhere is it asserted that the totality of the claim exceeds $3,000. Even in the prayer for relief the three amounts specified are not totalled. Had there been a claim or, an assertion, be it unintentional

or intentional, in the Summons for an amount exceeding $3,000 the Summons would have been a nullity *ab initio* and incapable of amendment.

I have reached this decision without regret. A defence based upon an argument that the proceedings are a nullity is unmeritorious. (See *Jansen's case* at 428). Courts strive to save proceedings from being struck down on technical grounds such as this in the interests of justice. It follows that grounds 1 and 2 of the order nisi are not made out. Ground 3 remains to be considered as Mr Larkin abandoned ground 4 in the course of his argument.

Ground 3 is in these terms:-

> "That upon the evidence given by the complainant the Magistrate was bound to find that the agreement between the complainant and the first named defendant for payment by the first named defendant of any fees did not extend beyond an agreement to guarantee payment of fees owed by the second named and third named defendants and that being an oral agreement it was unenforceable by reason of s126 of the *Instruments Act* 1958".

The facts, very briefly, were as follows. The respondent Boyd claimed that in March 1979 he was requested by the applicant Nolan to perform accounting services for a number of companies which Nolan owned or controlled. Boyd said that he agreed to do so. Thereafter, the respondents performed accountancy services for Pace Exhaust Products Pty Ltd amounting to $1,835 and accountancy services for Exhaust City (Brunswick) Pty Ltd amounting to $589.50.

[After setting out the ground of the order nisi to review in respect of submission that the agreement was in the nature of a guarantee, and referring to the evidence given, His Honour continued]: The applicant did not give evidence. His counsel submitted that the Magistrate should find an agreement had been made in February in the nature of a guarantee. Accordingly, as the contract of guarantee was not in writing as required by the *Instruments Act* no claim could be made under it. It was also submitted on behalf of the applicant that as the respondents had not pursued a claim against the companies to recover the fees due, a claim could not yet be brought on the guarantee. The respondents did not proceed against the companies being content to claim against the applicant alone.

Counsel for the respondents contended that the agreement made in February was not a contract of guarantee, i.e. one to answer for the default or debt of another person but was an express agreement made by the applicant to pay future fees of the companies if accountancy services were provided by the respondents.

The question was clearly one for the learned Magistrate to determine on the evidence placed before him. The learned Magistrate found as a fact that the agreement made in February was one whereby the applicant had personally agreed to pay future accountancy fees, if the respondents carried out the work for the companies. That finding was clearly open to him and was one, if I may say so, that does not surprise me. The respondents well knew in February that the companies had financial problems because accounts rendered to date for accountancy services had not been paid. It would have been rather futile to ask the applicant in February to become a guarantor. It was more satisfactory and commercially sound to ask the applicant to pay future fees personally. That is how the learned Magistrate decided the issue and I should not disturb his finding of fact. Order nisi will be discharged.

APPEARANCES: Mr A Larkin, counsel for defendant Nolan. Mr P Lacava, counsel for complainant Boyd.
