38/92

SUPREME COURT OF VICTORIA

KENNEDY v VICTORIAN RIGGING PTY LTD

Gobbo J

10 August 1992

CIVIL PROCEEDINGS – REHEARING APPLICATION – GRANTED UPON CONDITION APPLICANT/ DEFENDANT PAY AMOUNT CLAIMED INTO COURT – COUNSEL GIVEN NO OPPORTUNITY TO MAKE SUBMISSIONS – NO EVIDENCE AS TO APPLICANT'S FINANCIAL CIRCUMSTANCES – WHETHER DISCRETION PROPERLY EXERCISED.

Upon an application to set aside an order made in a civil proceeding, the magistrate, without giving the applicant/ defendant an opportunity to make submissions as to the conditions upon which the Court's discretion might be exercised or give evidence as to the applicant's financial circumstances, granted the application upon the condition that the applicant pay into Court the total amount claimed plus interest and costs. Upon appeal—

HELD: Appeal allowed.
1. Where on an application to rehear a civil claim there is material which suggests an arguable defence, unless there is some other compelling reason, there is no justification for the Court to order that the application be granted upon the applicant's paying the whole judgment sum into Court.

2. The condition imposed in the present case (in the absence of any relevant evidence) was, by its nature, an order for final judgment which effectively denied the applicant/defendant a rehearing. Accordingly, the magistrate's discretion miscarried.

GOBBO J: **[1]** This is an appeal from a Master declining to give relief under Order 58. The background to the application is as follows: the applicants had sought in the Magistrates' Court at Melbourne to secure a re-hearing in respect of a complaint by a company called Victorian Rigging Pty Ltd against the applicants.

The Magistrates' Court on 21 May 1992 in the absence of the defendants FJ & ML Kennedy made an order against them for $19,090 together with $1,284.10 interest and $2,455.50 costs. On 15 June, 1992 the applicants applied for a re-hearing pursuant to the *Magistrates' Court Act* and on 8 July that hearing took place before the learned Magistrate. The Magistrate ordered that, upon the defendants paying into Court the sum of $21,358.10, comprising the judgment sum of $19,090 itself plus the judgment interest plus costs thrown away and costs of the day in the agreed sum of $984, on or before 22 July, 1992, the judgment entered on 21 May 1992 be set aside and the defendants have leave to defend.

There is affidavit material before me setting out what occurred before the Stipendiary Magistrate. This being an *ex parte* application there is, of course, no material in rebuttal at this stage. There is no dispute, of course, as to what was placed by way of affidavit material before the Magistrates' Court as that affidavit sworn 12 June 1992 and filed on behalf of the defendants, the applicants in these proceedings, have been put before me as an exhibit in this application.

According to the affidavit sworn by the barrister **[2]** who appeared for the defendant at the re-hearing application there was argument about the question as to why the defendants had not appeared and also as to their belief that they had a good defence to the claim. This was on the basis that the contract in respect of the work carried out by the plaintiff was one between the plaintiff and a company FJ & ML Kennedy Pty Ltd which it was common ground, or appeared to be common ground, was already party to a contract with the plaintiff in respect of other work.

The dispute was whether or not the work the subject of the claim in this case had been ordered by the defendants or by the company that they controlled. There was certainly material before the learned Magistrate that indicated that there was an arguable defence, or at any rate that excluded any basis for finding that the defence set up in this way by the applicants was a

sham or without foundation. After the argument had concluded the learned Magistrate gave a decision and made the order that I have set out.

It is submitted that the Magistrate's discretion must have mis-carried or must have been exercised on an erroneous basis because the learned Magistrate had given leave, albeit on conditions, and did not appear to find that the defence was a sham.

On the material before me it appears that there was no discussion about the conditions that might be imposed other than a concession on the part of the applicants through their counsel that the applicants would have to pay the costs thrown away. That very indication in the **[3]** narrative is confirmatory of the submission put to me that there was no discussion otherwise about the conditions upon which the discretion might be exercised.

In particular, it was submitted there was no material before the learned Magistrate that would have enabled her to be able to form a view as to whether or not the applicants could afford to make the payment into Court.

It is submitted on behalf of the applicants that not only was the subject not canvassed in argument but they were afforded no opportunity of addressing the matter as the learned Magistrate made her order without giving any opportunity to make submissions on this matter or inviting any submissions or further evidence.

I am of the opinion that where there is *prima facie* material that provides a basis for an arguable defence it is at least questionable whether an order should be made in the absence of some obvious justification compelling the payment of the whole judgment sum into Court. The significance of that latter step was that where an applicant did not have the means to meet judgment then it was equivalent to not setting aside the judgment at all since it was a condition that could not be met.

There is no doubt that a Magistrate has wide powers to impose conditions before discretion may be exercised. That is to be found in the plain words of the section itself; it would also be a matter that would be inherent in the nature of the discretion. But, an order compelling payment in of the whole of the judgment sum, where that sum is a substantial sum of money, in excess of $20,000, to be paid into Court as a condition of **[4]** leave without there being any basis or material that might support an inference that the applicants could in fact manage in some way or another to make such a payment, in my view proceeds upon an erroneous consideration of the matter. I am mindful of the fact that this Court is not here to re-try the exercise of discretion by another Court. It is simply here to afford an opportunity to allow possible errors in law to be the subject of investigation.

I have been very troubled by this matter because much of what has been put to me has the flavour of an invitation to exercise my discretion in a different way. I reject that invitation, express or implied, and reiterate that there must be some point of law raised. I have concluded, however, that there is a point of law and it lies in the fact that here the discretion must have miscarried as it was exercised upon no evidence whatsoever, actual or inferential, as to the means of the applicants to make the payment into Court. In these circumstances, I am of the view that there should be a review afforded.

I indicate my additional concern that in some ways the applicants were the authors of their own misfortune through the failure of their counsel to deal with the matter in the most satisfactory way. It seems to me that in the present case, assuming that the account given is the correct one, counsel for the applicants should have, first of all, asked the Magistrate for reasons, and secondly have raised the question of the means of his clients, and if at that point the Magistrate had declined to re-open the matter – which is unlikely – then of course **[5]** it would have been quite another matter.

I am, as I say, troubled about the case, but I do not believe that I should deny the applicants the opportunity to review where an order was made in the way that I have described even though its effect might have been mitigated had counsel acted otherwise.

The second matter that I need to address is that the learned Master in declining to grant relief apparently proceeded upon the view that there could not be a review granted because the *Magistrates' Court Act* affords an appeal to the Court only under s109 on a question of law from the final order of the Court in that proceeding. It was said that an order by a court declining to grant a re-hearing was not a final order but was an interlocutory order. I am satisfied, at any rate, for what I might call threshold purposes of granting this application at this stage that an order denying a re-hearing where there is a final judgment in place is in my view a final order. It would be otherwise, of course, if a re-hearing had been granted and then the other party had sought to challenge that because that would be obviously by its nature an interlocutory order. But, in this case the order was by its very nature final even though it purported to take the shape of a grant of a re-hearing upon conditions.

If, substantively, the order granted was in effect a confirmation of the judgment and effectively a denial of a rehearing, then it is at least arguable that it amounted to a final order. The matter may have to be pursued further, but at this preliminary stage I am sufficiently satisfied there ought to be relief upon the **[6]** grounds that I have indicated, that the learned Magistrate's discretion had mis-carried in that the imposition of a condition in the absence of any evidence effectively prevented the operation of any right of re-hearing.

APPEARANCES: For the plaintiff Kennedy: Mr CR Northrop, counsel. Mahony Galvin Rylah, solicitors. No appearance of or for the defendant Victorian Rigging Pty Ltd.
