23/06; [2006] VSC 261

SUPREME COURT OF VICTORIA

INSURANCE MANUFACTURERS of AUSTRALIA PTY LTD v KING & ANOR

Gillard J

14, 18 July 2006

CIVIL PROCEEDINGS – MOTOR VEHICLE ACCIDENT – CLAIM MADE ON INSURER – REFUSAL BY INSURER TO INDEMNIFY DRIVER – CLAIM COMMENCED IN MAGISTRATES' COURT SEEKING DAMAGES AGAINST INSURER FOR BREACH OF CONTRACT – DEFENCE LODGED BY INSURER – INSURER REQUESTED FURTHER INFORMATION FROM DRIVER CONCERNING MOBILE TELEPHONE CALLS MADE DURING THE RELEVANT PERIOD – INSURER DELIVERED A PROPOSED DRAFT DEFENCE SIX DAYS BEFORE HEARING – APPLICATION BY INSURER ON THE HEARING FOR LEAVE TO FILE THE AMENDED DEFENCE – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999, O35.

1. As a general rule, parties to litigation should be permitted, at any time, to amend their pleadings to raise *bona fide* and relevant matters unless prejudice is caused to a party which cannot be overcome by some suitable order. The provisions of Order 35 of the *Magistrates' Court Civil Procedure Rules* ('Rules') permit a court to order that any document in the proceeding be amended for the purpose of determining the real question in issue between the parties or of avoiding a multiplicity of proceedings.
***McKenzie v Commonwealth of Australia* [2001] VSC 361, applied.**

2. Where a magistrate refused to allow a party leave to file an amended defence on the grounds that the amendment should have been raised a lot earlier and that the applicant party was guilty of delay, the magistrate failed to give effect to Order 35 of the Rules and accordingly was in error.

GILLARD J:

1. In this proceeding instituted by originating motion, the plaintiff seeks judicial review of a decision made by a magistrate sitting at Dandenong, who refused an application by the plaintiff as defendant in the proceeding for leave to file and serve an amended defence.

2. After the learned magistrate pronounced his decision, the Magistrates' Court proceeding was adjourned to enable the defendant in the proceeding, the present plaintiff, to bring a proceeding in this Court to review the decision.

Parties

3. The plaintiff, Insurance Manufacturers of Australia Pty Ltd ("the insurer"), is an insurance company and at the relevant time insured a vehicle owned by Warwick Leigh King ("Mr King"), the first defendant in this proceeding. Mr King owned a 1999 Holden HSV utility motor vehicle, which he alleged was involved in a collision at Cockatoo on or about 23 October 2005, and as a result was damaged.

4. The second defendant is the Magistrates' Court of Victoria at Dandenong. In accordance with the normal practice, the Court has informed this Court that it will not take part in the proceeding and will abide by the result.

Proceeding in Magistrates' Court

5. On 13 January 2006, Mr King, through his solicitors, filed a complaint in the Magistrates' Court sitting at Dandenong, claiming damages for breach of contract against the insurer, and alleging that the insurer had failed to indemnify him in respect to the damage caused to his vehicle in a collision which occurred on or about 23 October 2005 in Cockatoo. Mr King claimed the sum of $26,000.

6. On 10 February 2006, the insurer's solicitors forwarded to Mr King's solicitors its notice of defence. The insurer admitted ownership, that it had insured Mr King, that it was involved in a collision, and that he had made a claim on the insurer. It denied it was in breach of contract for failing to indemnify him.

7. In paragraph 10, the insurer alleged that Mr King had a duty to co-operate in making a claim. It was alleged in paragraph 11 that he had failed to co-operate by failing to provide certain information which had been requested. The information requested was his telephone account, listing all mobile telephone calls made for the period 22 October to 26 October 2005.

8. It was then asserted that in the circumstances, because he had failed to provide the information, the defendant was not in a position to accept or deny his claim. It is important to note that at that point, the defence did not allege that the insurer had denied the claim. What was alleged was that the insurer required further information before making a decision.

9. The Magistrates' Court fixed the matter for hearing on 6 July 2006 at Dandenong. By facsimile sent on 30 June 2006, the insurer's solicitors delivered to Mr King's solicitors a proposed draft amended defence. This was some six days prior to the hearing. On 5 July 2006, the insurer's solicitors sent another facsimile pointing out that it did not seek to rely upon paragraph 15(e) of the new defence. Clearly, this could not prejudice Mr King. Indeed, it was to his benefit.

10. The matter came on for hearing before the magistrate at Dandenong on 6 July 2006. Application was made for leave to amend the defence in accordance with the document forwarded on 30 June 2006. After hearing submissions, the learned magistrate refused to grant leave. He delivered reasons. It will be necessary to refer to them later.

Judicial Review

11. The principles which a court applies in a judicial review are well established and I have discussed them in a number of cases. It is only necessary to refer to one of those cases. See *Sielawa v Secretary to the Department of Human Services and Anor*,[1] where the principles are exhaustively stated. It is unnecessary for me to repeat them. However, there are a number of matters that I need to emphasise.

12. There is no doubt that the common law jurisdiction of this Court to review decisions of inferior courts is exercisable in reviewing decisions of Magistrates' Court. However, the jurisdiction is limited. It is supervisory and does not entitle this Court to canvass matters that it would on an appeal. The jurisdiction is different to an appeal. An appeal is the creature of statute. See *Fox v Percy*.[2]

13. On the other hand, the judicial review jurisdiction is a creature of the common law. The present jurisdiction is concerned with jurisdiction and the legality of what was done by the Magistrates' Court and is not concerned with the merits of the decision under review. In particular, it is not concerned with whether the decision was fair or correct. Order 56 is concerned with procedure. It abolishes the remedies in the nature of the old prerogative writs, but nevertheless preserves the jurisdiction of this Court to make prerogative writ-type orders. The rules do not affect the common law jurisdiction of this Court. Equally, this Court has jurisdiction to make an order in the form similar to the old prerogative writ of *certiorari*, namely, quashing the decision under review.

14. The scope of the jurisdiction was exhaustively discussed by the High Court in *Craig v South Australia*[3] in respect to inferior courts and administrative tribunals, although that case was concerned with a statutory court in South Australia. The High Court[4] identified the most important and well-established grounds of review, namely, jurisdictional error, failing to observe some applicable requirement of procedural fairness, fraud, and error of law on the face of the record.

15. When exercising this limited jurisdiction, this Court is not entitled to examine whether in fact the magistrate made the right decision or whether it was fair, just or reasonable, but is concerned instead with ensuring that he acted within jurisdiction and that in performing his decision making process, he complied with the law and took into account all relevant matters.

16. In *Craig's* case, the High Court drew a distinction between tribunals and inferior courts. In that case,[5] the High Court defined some examples of jurisdictional error by an inferior statutory court, for example a Magistrates' Court. Their Honours said:

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises a jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or a failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or a disregard of the nature or limits of the jurisdiction."
> (Emphasis added).

17. Their Honours then went on to give examples and observe that jurisdictional error will occur where the Court disregards or takes into account some matter in circumstances –

> "... where the statute or other instrument establishing it and conferring its jurisdiction requires that a particular matter be taken into account or ignored as a pre-condition of the exercise of any authority to make an order or decision in the circumstances of a particular case. Again an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern."[6]
> (Emphasis added).

18. The magistrate's decision refusing the application by the plaintiff for leave to file an amended defence is not at this stage open to appeal. Section 109 of the *Magistrates' Court Act* 1989 deals with an appeal to this Court from an order of the Magistrates' Court. The right to appeal is on a question of law "from a final order of the Court".[7]

19. The decision made by the magistrate was not a final order. However, at the end of the proceeding, it would be open to the plaintiff, if it was unsuccessful in the proceeding below, to appeal the final order and in so doing raise the question of the magistrate's refusal to permit the amendment. However, that would be a long way down the track. Although it would be relevant to a question of discretion in the present matter, it seems to me that it is appropriate to decide the issues raised which may have some bearing on the proceeding hereafter. In any event, at this stage this is the only avenue open to the plaintiff insurer.

20. One other matter that has to be addressed at this stage, is what constitutes the record in a review where *certiorari* is sought to quash an order on the ground of error on the face of the record. The rules require, as did the common law, the production of that record. The general rule is that the record of an inferior court comprises the initiating document, pleadings if any, and the record of the Court evidencing the outcome.

21. By reason of s10 of the *Administrative Law Act* 1978, the reasons for the decision form part of the record of the Magistrates' Court. See *Thompson v Judge Byrne*;[8] and *RSL v Liquor Licensing Commission.*[9] In addition, a record may be expanded to include the transcript of the proceeding, if in fact it is incorporated into the record by reference. However, it must be an express incorporation. See *Craig's* case.[10]

22. Although the transcript of the submissions were placed before this Court, there was no suggestion in the record that it has been incorporated and, in my view, it is not part of the record. If an attack is made on the basis that there is an error of law on the face of the record, this Court is restricted to that record and the decision will only be quashed if it is affected by an error of law which is disclosed on the face of that record.

23. Where the attack is made on grounds other than an error on the face of the record, then the Court can taken into account any relevant material placed before it, subject, of course, to the rules of evidence and procedure. See *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* per Denning LJ.[11] In that case, his Lordship stated that the parties could by agreement expand the record.

24. Mr Klempfner of counsel for the plaintiff referred the Court to a decision of Kaye J, where his Honour considered as part of the record the submissions made which led to the decision.

However, it is clear from what his Honour said that his Honour proceeded on that basis because the parties had agreed to expand the record. In my opinion, I am restricted to looking at the complaint, the pleadings and the reasons, when considering the issue of error on the face of the record. When the ground is that the decision should be quashed on the ground of error on the face of the record, the Court is not confined to jurisdictional error. The principles were summarised by Professor Wade in his work *Administrative Law*,[12] where the learned author said:

> "What must be emphasised here is that the High Court's power to quash a decision merely because it displays some mistake in the record of its proceedings is an altogether exceptional power. It is exceptional because it is not a form of 'jurisdictional' control, ie. it is not a branch of the doctrine of *ultra vires*. A decision which is erroneous on its face, perhaps because it reveals some misinterpretation of the law, can be quashed even on the assumption that it is within jurisdiction and therefore involves no excess of power. All jurisdiction involves the power to make mistakes, provided they are made within the area of jurisdiction conferred. A mistake which appears on the face of the record, if it is held to involve no excess of jurisdiction, does not render a decision a nullity. The decision is *intra vires*, yet paradoxically the Court has power to quash it."

25. This is to be contrasted with an attack on the decision on the ground that it is the result of jurisdictional error. When such an attack is made, the jurisdiction is confined but the Court may look at all evidence before it in order to determine whether there is jurisdictional error.

The magistrate's reasons

26. After hearing submissions, the magistrate delivered his reasons. It is apparent that he made a verbal error, which was drawn to his attention. He then gave further reasons correcting his earlier reasons. In my opinion, the reasons which form part of the record include the correction. It is necessary to state his reasons, which were:

HIS HONOUR: The application to adjourn is refused. In my view the prejudice, clearly the greater prejudice would be to Mr King if the matter was to be adjourned. With the greatest of respect the initial notice of defence made it blindingly obvious that the defendant was not satisfied with the particulars as the accident provided by Mr King. I think that is implicit in reading the defence, a querulous look, but if you look at the notice of defence it was filed by the defendant it clearly indicates that the defendants have some problem with the version of events given by the plaintiff, and surely at that time that is the time where the defendant should have raised all of the issues you now seek to raise.

MR BURCHILL: Sorry, I wasn't sure whether Your Honour just said the adjournment application was refused or the application to amend was refused.

HIS HONOUR: No, the application to adjourn is refused, I'm sorry. The application to adjourn is refused.

MR KLEMPFNER: Sorry, we might be at cross purposes.

MR BURCHILL: Yes, I think we might be a bit, sorry, Your Honour. My understanding is that my learned friend's application is to seek to amend the defence.

HIS HONOUR: Yes.

MR BURCHILL: If Your Honour accedes to that application - - -

HIS HONOUR: It necessarily follows. I am refusing the application to amend the defence.

MR BURCHILL: Sorry, yes. I thought Your Honour announced that you're refusing to adjourn it and, sorry, I misunderstood what Your Honour was saying to me.

HIS HONOUR: I think I have not articulated it clearly enough. The application to amend the defence is refused. Again I go back to the reasons; it should have been blindingly obvious right from the start to the defendants, if they were going to call into issue the credibility of the version given by the plaintiff, it should have been raised at the time and not at the 11th hour. In my view the greater prejudice in allowing the amendment would clearly be to Mr King. So the application to amend is refused. Where do we go from there?

Grounds

27. The plaintiff, as it was bound to do, stated the grounds in support of its relief claimed in the originating motion that the decision should be quashed. In substance, it is alleged that the magistrate failed to take into account relevant considerations, that he took into account irrelevant considerations and that he misdirected himself as to the applicable principles.

28. The starting point must be the statutory provision which the magistrate was obliged to apply. Order 35 of the *Magistrates' Court Civil Procedure Rules* 1999 deals with a subject described as Miscellaneous Rules. Rule 35.02 deals with amendments. It provides:

> "35.02 For the purpose of determining the real question in issue between the parties to any proceeding, or of correcting any defect or error in any proceeding, or of avoiding a multiplicity of proceedings, the Court may at any stage order that any document (including a complaint) in a proceeding be amended or that any party have leave to amend any document in the proceeding."

29. This rule is in exactly the same terms as Rule 36.01 of the *Supreme Court Rules*. It is important to emphasise that the Court may grant an amendment "at any stage", and that although the order is discretionary, the authorities show that in order to give effect to the opening words of the rule, as a general rule, amendments should be permitted unless prejudice is caused to a party which cannot be overcome by some suitable order. This is made very clear by what the High Court said in *Queensland v J.L. Holdings Pty Ltd.*[13]

30. What their Honours said was to re-affirm a principle that goes back many years. I considered the cases in *McKenzie v Commonwealth of Australia*,[14] where at paragraph 31, I stated the principles in the following terms:

> "As a general proposition, parties to litigation should be permitted, at any time, to amend their pleadings to raise *bona fide* and relevant matters, unless the amendment is likely to prejudice the other party, and the prejudice cannot be overcome. Justice in my view, demands amendment, unless the effect would be to cause an injustice to the other party."

31. It is clear that the magistrate considered the questions of prejudice to the parties and was of the view that the greater prejudice would be suffered by Mr King, as he put it: "if the matter was to be adjourned". But the question of the matter being adjourned, whilst relevant, nevertheless was not of great importance.

32. The magistrate stated that it must have been obvious, by reference to the notice of defence when first delivered, that the insurer was not satisfied with the information given by Mr King relating to the accident. He repeated that, by stating that the insurer had had some problem with the version of events given by Mr King. He stated that that is when the insurer, as defendant, should have raised all the issues.

33. At that stage, the magistrate was interrupted and was asked whether it was a question of whether an adjournment application was refused or whether the application to amend was refused. When the magistrate appreciated that he may not have not stated his reasons as intended, he did state that the application to amend the defence was refused. He repeated that it was obvious from the beginning that the defendant insurer raised an issue of the credibility of the version given by the plaintiff.

34. The magistrate was of the view that the insurer should have raised the issue earlier and not at the eleventh hour. On the other hand, having stated that it was his view that the greater prejudice in allowing the amendment would be suffered by Mr King, he failed to identify precisely what that was. If one looks at the other part of the record, which was the original defence, it is clear that the magistrate misunderstood the defence which led him into error.

35. The original defence asserted that Mr King was obliged, under the terms of the insurance contract, to co-operate when making a claim, and to co-operate with the insurer by providing it with information requested which was relevant to the claim. It was asserted that the insurer had requested a fully itemised telephone account, listing all mobile telephone calls made for the period 22 October 2005 to 26 October 2005.

36. It was then stated that until that information was provided, the insurer was not in a position to accept or deny the claim. The amended defence alleged that the claim made by Mr King was fraudulent, and one of the particulars asserted that he had claimed he had collapsed in an embankment pit after the collision and 'came to' much later with nobody around. It was further alleged in the proposed amended defence that he had been seen stepping into a motor vehicle about five minutes after the accident.

37. If those matters are proven, then it is fairly clear that the assertions made by him were inconsistent. It is said that he was acting fraudulently in making the claim that he did, taking into account matters that I have just stated. There is a well established principle that no lawyer should sign any pleading which alleges fraud unless there is a basis for it.

38. It is fairly clear, by comparing the original defence and the proposed amended defence, that later information came into the knowledge of the plaintiff insurer which led to the proposed amended defence. It is clear from what the magistrate said that he had misunderstood the factual matters. This clearly infected all that he did. But more importantly, he failed to advert to the general principle permitting amendments, and based his decision upon the facts that the amendment should have been raised a lot earlier and that the insurer was guilty of delay.

39. The rules of the Magistrates' Court obliged the magistrate to permit an amendment to ensure that the real question in issue was raised between the parties, and also to avoid multiplicity of proceedings. It is clear that the magistrate failed to consider that rule or its effect. It is not a question of him misconstruing the obligation of the rule. He failed to give effect to it.

40. It is clear from what the magistrate said that he thought the question of delay was the only question. In my view, he misconceived the nature of the function which he was performing, namely, to decide whether or not leave should be granted in accordance with Rule 35.02, and in accordance with the well established principles that go back well in excess of 100 years. Any prejudice, if indeed there was any, could be overcome by an adjournment with costs, and, if thought appropriate, indemnity costs. He allowed the perceived delay to infect his consideration of the application. This was an error of law.

41. It cannot be overlooked that Mr King's advisors had six days in which to consider the new issues and to take instructions. His advisers could not have proceeded on the assumption that the application to amend would be denied and, accordingly, they would have been obliged to turn their mind to the new issues and to how they would contest them. Mr Burchill of counsel, who appeared on behalf of Mr King both in the Magistrates' Court and before this Court, submitted that the magistrate properly exercised his jurisdiction and that it is not open on judicial review to quash the decision, if this Court disagreed with the result.

42. Whilst I accept that the latter proposition of Mr Burchill, as a general proposition, is correct, I do not accept that the magistrate did exercise his jurisdiction in accordance with the law, for the reasons which I have stated. It follows that, in my opinion, the plaintiff has established an error of law on the face of the record and the decision made by the magistrate must be quashed.

43. That now brings me to the question of what should happen. The proceeding in the Magistrates' Court was adjourned pending the outcome of this judicial review. No doubt a new hearing date will be fixed and the matter will proceed. In the circumstances, I think the most appropriate order to make after quashing the decision is that the matter be remitted to the Magistrates' Court, and that the application for leave to amend the defence should be considered in accordance with the law and these reasons.

44. Subject to any submissions by counsel, I propose to make the following orders:

(i) That the Court dispense with the requirements of Rules 5.03(1) and 8.02 of the Rules of Court and authorise the plaintiff to commence a proceeding by originating motion in Form C;

(ii) That the Court hear and determine immediately the originating motion;

(iii) That the decision made by the magistrate, Mr Barrow, in the proceeding in the Magistrates' Court at Dandenong on 6 July 2006 refusing the application for leave to file an amended defence, be quashed;

(iv) That the Magistrates' Court of Victoria sitting at Dandenong consider the plaintiff's application for leave to amend its defence in accordance with the law;

(v) That the first defendant pay the plaintiff's costs of this proceeding, including any reserved costs;

(vi) That the Court grant the first defendant, Mr Warwick Leigh King, an indemnity certificate under s4 of the *Appeal Costs Act* 1998 in respect of the costs.

[1] (2003) VSC 140.
[2] [2003] HCA 22; (2003) 214 CLR 118; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2.
[3] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[4] At p176.
[5] At p177.
[6] *Supra* at p177.
[7] See s109(1).
[8] [1998] 2 VR 274 at 280; (1997) 93 A Crim R 69.
[9] [1999] VSCA 37; [1999] 2 VR 203 at 209; 15 VAR 96.
[10] *Supra* at pp181-2.
[11] [1951] EWCA Civ 1; [1952] 1 KB 338 at 352-3; [1952] 1 All ER 122; [1952] 1 TLR 161.
[12] 6th ed. at p45.
[13] [1997] HCA 1; (1997) 189 CLR 146 at 155; (1997) 141 ALR 353; 71 ALJR 294.
[14] [2001] VSC 361.

APPEARANCES: For the plaintiff Insurance Manufacturers of Australia Pty Ltd: Mr DA Klempfner, counsel. Gadens Lawyers. For the first defendant King: Mr HA Burchill, counsel. Kenyons, solicitors.
