19/69

SUPREME COURT OF VICTORIA

SMITH v O'BRIEN

Starke J

20 October 1969

PRACTICE AND PROCEDURE – NOTICE TO PRODUCE – REQUIRED TO BE SERVED AT A REASONABLE TIME BEFORE THE HEARING – NOTICE SERVED ON THE DEFENDANT'S COUNSEL AT 10:20AM THE COURT HAVING COMMENCED SITTING AT 10:00AM – WHETHER NOTICE PROPERLY SERVED – INFORMATION DISMISSED – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi discharged.
There was evidence that the notice to produce was served or purported to be served on the defendant's Counsel, at twenty minutes past ten, the Court having sat at ten o'clock. How long after that the information came on for hearing was not revealed, but the Magistrate clearly would have known when he started the case, and he knew the time that the notice to produce was alleged to have been served. He in his discretion decided that it had not been served at a reasonable time before the hearing and accordingly, the information was properly dismissed.

STARKE J: I probably indicated enough during argument to reveal what my view of this case is. One of the two short points which had to be determined was whether a notice to produce the certificate required under the Act was in fact served within a reasonable time. Mr Larkins conceded that if I was against him on this point, the other points arising under the order nisi to review need not be resolved.

The fact is that the defendant was not in Court. The Prosecutor desired to lead secondary evidence of the certificate, and to do this in view of the decisions he had to serve a notice to produce on the defendant. In fact he served the notice to produce on counsel for the defendant. The interesting point of whether this was good service on the defendant or not has not really been argued before me, because it is now not necessary so to decide it, and I expressly refrain from deciding any such point.

But as to the point as to whether the time before the hearing that the notice to produce should have been served, I think the I am really bound by the Magistrate's ruling. The Magistrate said at p5 of Mr Ian Andrew Murray's affidavit this:

> "In my opinion no notice to produce has been served on the defendant or his solicitor. I do not think that a barrister is a solicitor. In any event" – and this is the significant part of his observations – "in my opinion the notice was not served at a reasonable time before the hearing and accordingly I do not think that any valid notice to produce was properly served".

There is evidence that the notice to produce was served or purported to be served on Mr Buckner for the defendant, at twenty minutes past ten, the Court having sat at ten o'clock. How long after that the information came on for hearing is not revealed, but the Magistrate clearly would know when he started the case, and he knew the time that the notice to produce was alleged to have been served. He in his discretion decided that it had not been served at a reasonable time before the hearing.

Now in order to upset this discretionary order of the Magistrate, Mr Larkins concedes that he must show that the Magistrate took into account things that he should not have taken into account, he failed to take into account things that he should have taken into account, or that his order was so unreasonable on the face of it that whilst the error could not be detected, the discretion must have miscarried.

None of these things appear here, the Magistrate has bent his mind to the problem, has

exercised his discretion in full knowledge of the facts which I have not.

In those circumstances, in my view, the information was properly dismissed, and in the result the order nisi will be discharged. I order that the respondent's costs be paid by the applicant, these costs I fix at $120.

APPEARANCES: For the applicant/informant Smith: Mr J Larkins, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant O'Brien: Mr HC Berkeley, counsel. Mallesons, solicitors.
