21/99; [1999] VSC 315

SUPREME COURT OF VICTORIA

MAXWELL v TCB ALWAYS PTY LTD & ANOR

Beach J

24 August 1999

CIVIL PROCEEDINGS – REHEARING – DELAY OF NINE MONTHS AFTER ORDER MADE IN DEFAULT OF DEFENCE – DEFENCE ON MERITS CLAIMED BY DEFENDANT – DEBT ALLEGEDLY INCURRED BY COMPANY – COMPANY DEREGISTERED – DEBT CONTINUED TO BE INCURRED BY DEFENDANT AFTER COMPANY DEREGISTERED – FINDING BY MAGISTRATE OF NO ARGUABLE DEFENCE TO CLAIM – FINDING THAT DELAY INAPPROPRIATE IN THE CIRCUMSTANCES – APPLICATION TO SET ASIDE REFUSED – WHETHER MAGISTRATE IN ERROR.

M. employed TCB Always to provide security services for his business. TCB issued proceedings to recover from M. the amount due for services rendered. The complaint was personally served, no defence was filed and an order was made against M. in default of defence. Some 9 months later M. applied for an order to set aside and rehear. On the hearing of the application M. claimed that he was not liable for the debt. He said that a company now deregistered was liable. The magistrate found that M. continued to incur the debt for a period of 6 months following the deregistration of the company. The magistrate said that the delay in making the application was inappropriate in all the circumstances and refused the application. Upon originating motion for judicial review—

HELD: Originating motion dismissed.
It was open to the magistrate to conclude that M. did not have an arguable defence to TCB Always claim. It was also open to the magistrate to take the view that the delay in seeking to set aside the judgment was such as to disentitle M. to the relief sought.

BEACH J:

1. On 13 May 1998 the first-named defendant, TCB Always Pty Ltd, trading as TCB Elite Security Services Pty Ltd, filed a complaint in the Magistrates' Court at Melbourne whereby it sought to recover the sum of $7,953,99 from the defendant, Allan Maxwell, trading as Legends Piano Bar.

2. According to the particulars of the claim, Maxwell had employed TCB Always to provide security services at 831 Glenhuntly Road, Caulfield South up to 21 March 1998.

3. The complaint was personally served on Maxwell in accordance with rr.5.02 and 5.03(b) of the *Magistrates' Court Civil Procedure Rules* on 24 May 1998. The affidavit of service in relation to the complaint reads:

> "That I served a copy of this Summons together with two Notices of Defence by delivering it to his" - that is the defendant's - "place of residence to a female person who said she was the Defendant's wife, a person apparently over the age of 16 years and residing there at 31 Grangeview Drive, Skye on the 24/5/1998, at 9 p.m."

4. There was a dispute concerning that service at a later stage of the proceedings before the Magistrates' Court and to which I shall refer in a moment. However, it is now readily conceded by counsel for Maxwell that appropriate service of the complaint was effected upon him and that the Magistrate's later finding to that effect was correct.

5. At all events, Maxwell did not give notice of defence in relation to the complaint and on 24 June 1998 a default judgment was entered against him for the sum claimed plus interest of $117.94 and costs of $395.80.

6. On 25 March 1999 Maxwell applied for a rehearing of the proceeding in accordance with s110 of the *Magistrates' Court Act* 1989 and O 30 of the *Magistrates' Court Civil Procedure Rules*. The application came before Magistrate Coburn on 14 April 1999. That day His Worship made an order that the application be adjourned to 12 May 1999, that Maxwell file and serve an affidavit

as to the merits of his defence by 28 April 1999 and that TCB Always file and serve any affidavit in reply by 5 May 1999.

7. On 12 May 1999 the application came on for hearing before Magistrate Fleming. Her Worship made an order refusing the application and to the effect that Maxwell was to pay to TCB Always its costs of the application. In reaching that conclusion in the matter the Magistrate said:

> "I am satisfied that the defendant was served in accordance with the Rules. If the defendant genuinely contested the service I would expect some affidavit material to that effect, or, if the process server is being challenged I would expect that in fairness to the process server he would be called to meet that challenge. Neither of those things occurred and this matter was originally listed before Mr Coburn on the 5th May and those matters could have been attended to on that occasion in preparation for today."

8. As I have already indicated, no question is now raised on Maxwell's behalf concerning service of the original complaint.

> "The affidavit material before me goes to the question of the identity of the defendant. I only have affidavit material from the defendant and his solicitor, Mr Rickards. There is no affidavit material of the plaintiff. The onus, however, of this application is on the defendant to satisfy me that I should grant the application. The defendant deposes to formerly running the business, however, gives no dates as to when he ran the business. The exhibits reveal that the registered proprietor of the business was the company Robo Artists Management Pty Ltd and that company was deregistered, it says, in or about 1st August 1997. The debt was alleged to have been incurred by the defendant up to the 21st March 1998. The pleadings don't clarify when the debt was alleged to have commenced, however there is at least six months since the company was deregistered that the business continued to incur or to use the services of the plaintiff. Having heard the submissions of counsel I am mainly concerned about the delay in this matter. Given my finding that the defendant was served in accordance with the Rules, the judgment was obtained on the 24th June 1998 and I propose to dismiss the application on the basis that I think the delay is inappropriate in all the circumstances."

9. On 12 July 1999 Maxwell, to whom I shall now refer as the plaintiff, filed an originating motion in the court naming as defendants TCB Always Pty Ltd trading as TCB Elite Security Services Pty Ltd and Magistrate Fleming and by which he seeks the following relief:

> "1. Relief in the nature of *certiorari* to quash the decision of the second-named defendant made on 12 May 1999 refusing the plaintiff's application for a rehearing pursuant to s110 of the *Magistrates' Court Act* 1989.
>
> 2. An order pursuant to s110 of the *Magistrates' Court Act* 1989 that the final order made by Registrar Mithen on 24 June 1998 be set aside and the proceeding be reheard.
>
> 3. Alternatively to (2), relief in the nature of mandamus to direct that the plaintiff's application for a rehearing dated 24 March 1999 be heard before a magistrate according to law. "

The following are the grounds relied upon by the plaintiff:

> "1. The second-named defendant erred in finding that the plaintiff—
> (a) had delayed in bringing the application for a rehearing pursuant to s110 of the *Magistrates' Court Act* 1989.
>
> (b) had been properly served with the complaint in accordance with *Magistrates' Court Civil Procedure Rules* 1989.
>
> (c) did not have a *prima facie* defence on the merits of the case.
>
> 2. The second-named defendant erred in the exercise of her discretion in refusing the plaintiff's application for a rehearing pursuant to s110 of the *Magistrates' Court Act* 1989."

10. It is now well established that *certiorari* is not an appellate procedure enabling a superior court to supervise the acts of an inferior court. The remedy is available only upon a number of distinct grounds. So much was made clear by the High Court in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. At p175 the court said:

> "Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record."

Later, at CLR p177, the court continued:

> "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 that jurisdiction does exist. Such a jurisdictional error can infect either a positive act or a refusal or 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 disregard of the nature or limits of jurisdiction."

11. It is argued in the present case that the failure of the Magistrate to take into account relevant considerations could constitute jurisdictional error.

12. In that regard counsel for the plaintiff relied upon the following passage in *Craig*, at p180, which reads:

> "Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

13. And a passage in the decision of Teague J in *Sophiadakis & Ors v Aleksandar Reljic & Anor* (7/5/1999). In that case His Honour was considering the meaning to be given to the word "ordinarily" where used in that passage of the High Court's decision in *Craig*. At p10 His Honour said:

> "I take the use of 'ordinarily' to indicate that it would only be in an exceptional case that the failure to take into account relevant considerations or the taking into account of irrelevant considerations by an inferior court will constitute jurisdictional error. Mr Berglund for the plaintiff argued that the circumstances of this case were sufficient to bring it beyond the realms of 'ordinarily' and hence the Magistrate's actions constituted jurisdictional error."

14. I am unable to agree that even if that is the correct view to be taken of the matter there is anything unordinary about this case. In my opinion, it is simply not open to the plaintiff in this case to argue that the magistrate fell into jurisdictional error.

15. If the plaintiff is to succeed he must, in my opinion, demonstrate error of law on the face of the record. Having had regard to the magistrate's reasons for her ruling, I am not satisfied that there was any error of law in this case. The order of the magistrate is discretionary and being so there is a strong presumption as to its correctness. In that regard I refer to the observations of Kitto J in *Australian Coal and Shale Employees' Federation & Anor v The Commonwealth & Ors* [1953] HCA 25; (1956) 94 CLR 621. At p627 His Honour said:

> "I shall not repeat the references I made in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513; [1950] ALR 944 to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the

> presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

16. In the present case the magistrate was clearly not satisfied that the plaintiff had an arguable defence to the defendant's claim. But, of more significance, the magistrate took the view that the delay in seeking to set the judgment aside was such as to disentitle the plaintiff to the relief he sought.

17. I am unable to say that that result is so unreasonable or plainly unjust that this court can infer that there has been a failure properly to exercise the discretion which the law reposes in the magistrate. Accordingly, the originating motion will be dismissed with costs to be taxed, including reserved costs, and paid by the plaintiff.

APPEARANCES: For the plaintiff Maxwell: Mr P Solomon, counsel. Michael Rickards, solicitor. For the defendant: Mr G Moore, counsel. Goldsmiths, solicitors.
