19/88

SUPREME COURT OF VICTORIA

WINGARD v STOSEVSKI

JH Phillips J

8 April 1988 — (1988) 7 MVR 265

PRACTICE AND PROCEDURE – MAGISTRATES' COURTS – CIVIL JURISDICTION – SPECIAL SUMMONS ISSUED – AMOUNT OF DAMAGES CLAIMED NOT SPECIFIED IN SUMMONS – WHETHER SUMMONS A NULLITY – WHETHER OMISSION AN IRREGULARITY – WHETHER SUMMONS CAPABLE OF AMENDMENT.

Where a special summons returnable in the Magistrates' Court failed to specify the amount of damages claimed, the omission was an irregularity which did not go to the court's jurisdiction and accordingly, the summons was capable of amendment.

***Legon v Count* (1945) KB 391; [1945] 1 All ER 710; and**
***Osborne v Snook* (1953) 1 All ER 332, followed.**

JH PHILLIPS J: **[1]** This is the return of an Order Nisi to review a decision of the Magistrates' Court at Sunshine sitting at Broadmeadows made on 3 December 1986. There was on that day before the court a special summons issued by the complainant seeking damages for injuries due to the negligent driving of the defendant. The person who had drafted the particulars of the claim therein, apparently slavishly following a precedent appropriate to this court, concluded the particulars of claim by the sentence "And the plaintiff claims damages." As a matter of history, the summons was dated 11 November 1985 and was served on 7 December 1985. An application **[2]** on behalf of the defendant for leave to serve interrogatories had been granted on 24 April 1986 and the interrogatories were answered on 25 November 1986. An amended notice of defence was filed on 18 November 1986. This notice included allegations that the complaint was either outside jurisdiction or invalid or a nullity. Prior to the commencement of the calling of evidence on 3 December 1986 the learned Magistrate was informed by the parties that they sought his determination as to whether or not the court had jurisdiction to hear the matter in the light of the final sentence in the particulars of claim already referred to.

After argument, the learned Magistrate allowed an application on behalf of the complainant to amend the summons so as to include the words "$5000" at the end of the claim. It was common ground between counsel who appeared before me that as of 3 December 1986 the magistrate had jurisdiction to entertain an action for personal injuries where the amount claimed did not exceed $5000.

Mr Webster, who appeared for the applicant, indicated that a short point was involved in this matter. The question was whether the special summons before the Magistrate was a nullity and therefore, it was said, incapable of amendment, or whether the failure to specify a sum of damages not exceeding $5000 was simply an irregularity which might be cured by resort to the court's powers of amendment. Later in argument an issue arose as to whether the prior conduct of the defendant may have waived any irregularity. Mr Webster submitted that the relevant **[3]** section of the *Magistrates' Courts Act* establishing the court's jurisdiction was section 50(1) paragraph (db) (inserted by Act number 9349 of 1979) which confers a jurisdiction on the Magistrates Court. That paragraph reads:

> "(db) Where the amount value or damages or the value of the chattel sought to be recovered is or are not more than $3000 whether on balance of account or otherwise it may hear and determine any cause of action in tort..."

I interpolate that by Act number 10077 of 1984 (the *Magistrates' Courts (Jurisdiction) Act* assented to on 15 May 1984) "$5000" was substituted for the expression "$3000" in the above paragraph (db).

Mr Webster submitted that the important phrase in the subsection was the phrase "sought to be recovered" and he argued that by claiming unlimited damages a claim in excess of the jurisdiction had been made by the complainant. He referred to aspects of the judgments in *Donelan v The Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490, a decision of Smith ACJ, Gillard and Newton JJ. That was a case where the plaintiff's claim was for $8000 damages in the County Court, which sum represented the limit of that court's jurisdiction. However, the jury brought in a verdict of $16,000 and judgment was entered in the nature of interest and costs.

On appeal it was held that the learned judge at first instance had no jurisdiction to enter judgment thus. The appeal really turned on the effect of section 37A of the **[4]** *County Court Act*. Accepting that the circumstances of that case substantially differed from those of the instant one, Mr. Webster nevertheless relied on certain statements by members of the court, which statements he frankly acknowledged were *obiter*. At page 507 Newton J said this:

> "It is well established that where the jurisdiction of an inferior court is limited by a provision such as section 37(1)(a) then the summons whereby an action is commenced in that court must specify the amount which the plaintiff claims, and it is also well established that provided the amount so specified is within the jurisdictional limit of the court, then *prima facie* the court has jurisdiction to entertain the action; indeed it has been said that the amount claimed by the summons which commences the action is the foundation of the court's jurisdiction."

His Honour then set out a number of authorities which supported those statements. At page 492 of the report Smith ACJ observed:

> "There is nothing in section 37A which relieves a plaintiff from the necessity to state, in his summons and particulars of demand, a sum which is within the limits of the jurisdiction laid down in section 37."

His Honour then referred to *Legon v Count* (1945) KB 391; [1945] 1 All ER 710, and added at page 496:

> "If the statement of the claim appearing in the summons and particulars showed without ambiguity that it was in excess of jurisdiction, the court could not gain jurisdiction by any subsequent amendment or abandonment."

Finally, Gillard J at page 497 said:

> "First, the plaintiff in a personal action must set out the amount of **[5]** his claim or value of the property being litigated in his original plaint to show that on the face of the plaint at the commencement of his action, it is within jurisdiction."

In *Legon v Count* the Court of Appeal had before it a factual situation which is identical with the instant case, except that the County Court was the inferior court concerned and in that court the plaintiff had been non-suited. Apparently the judge had acted on his own volition in doing so.

The particulars of the plaintiff's claim did not specify the amount of damages claimed and the County Court judge refused the plaintiff's solicitor leave to amend the particulars of claim by adding after the claim for damages the words "not exceeding 100 pounds." The learned judge held he had no jurisdiction to try a case claiming unlimited damages and therefore could not entertain the case at all and thus had no jurisdiction to order an amendment. The plaintiff, as I have said, was non-suited.

On appeal it was held (McKinnon, Lawrence and Morton LJJ) that the County Court judge had jurisdiction to allow the amendment and should in the circumstances have done so. In the course of his judgment McKinnon LJ with whom Lawrence and Morton LJJ agreed, described the form of particulars of claim as follows:

> "It is quite clear that it was technically an irregularity for the plaintiff to lodge his claim without specifying the amount."

McKinnon LJ pointed out that this very matter had been discussed and decided upon in *Farmer v Upton* (1930) 46 TLR 252. That case is described in an editorial note to the report **[6]** of

Legon v Count in the All England Reports as follows:

> "In that case the County Court judge allowed the amendment but it may be remarked that (a) the two judges of the divisional court strongly disagreed as to whether there was power to amend and (b) the particulars they are limited to claim 'not exceeding 100 pounds.' It was the uncertainty of the amount on which the amendment was required. The court regards this decision here as supported by the provision in the *County Courts Act* 1934 that where a claim exceeds 100 pounds, now 200 pounds, the excess may be abandoned. Such abandonment, wherever it takes place, must be entered at the end of the particulars by the *County Court Rules*."

However, Mr Webster accepted that *Legon v Count* was followed in *Osborne v Snook* (1953) 1 All ER 332 by a strong court (Somerville, Burkett and Romer LJJ). **[7]** Mr Webster also referred to *Coastal Estates Pty Ltd v Melevende* [1965] VicRp 60; (1965) VR 433, but having read a carefully considered judgment of his Honour Judge Read in *Pound v Webb and Ors* (unreported judgment given 30 September 1977) in which his Honour indicates he had resort to the actual file of the County Court in *Coastal Estates*, I am satisfied that that case did not involve a claim beyond jurisdiction.

Finally, Mr Webster referred to *Brincat and Anor v Kilsby and Ors* [1983] VicRp 57; (1983) 1 VR 625. That case was complicated by the circumstances that two claimants, both injured in the same motor car collision, commenced proceedings in the County Court against three defendants, each claimant seeking damages of $20,000 as co-plaintiffs on the one summons. It was held that the total amount claimed in the action was $40,000 and thus exceeded the jurisdiction of the court.

At page 626 of the report, there is given by Lush J a convenient summary of the point taken:

> "The argument presented on the appellant's behalf by Mr Duggan was that the summons began a civil proceeding which, by the definition in s3, was an action. The entire proceeding was one action. The amount sought to be recovered in it was accurately and conclusively stated on the face of the summons as $40,000. The Court therefore had no jurisdiction to hear it... He relied on *Donelan v Incorporated Nominal Defendant* for the propositions that jurisdiction depends on the amount claimed, and that if an excessive amount is claimed the summons cannot be saved by amendment after issue. He relied on the same case in the High Court, ([1972-73] ALR 1139; (1973) 47 ALJR 138) for the proposition that the 'amount sought to be recovered' is the amount claimed in the summons."

8] His Honour concluded:

> "In my opinion, the argument presented by Mr Duggan is correct."

Essentially, Mr Webster contended, by not stating a claim within jurisdiction, the result is the summons is a nullity and incapable of amendment. Mr Kilduff, for the respondent, submitted that particulars of claim must be looked at as a whole in order to determine if the claim went beyond the jurisdiction. He pointed out that the amount specified as particulars of special damage amounted to some $80 for an ambulance and $53 for the Melbourne Radiological Clinic and that it was a case where the only amounts unquantified were for pain and suffering and future economic loss. Therefore, he argued, upon examination it was plainly a claim within the jurisdiction. Further, he submitted that if the amount sought to be recovered was as set out in the summons and particulars as within the jurisdictional limit, then that jurisdiction continues, unless there is a determination that the damage exceeds that limit. Then, if the plaintiff abandoned any excess before verdict, the cause of action remains within the jurisdictional limit.

Mr Kilduff referred to *Ex parte Palmer, re McCabe and Anor* (1967) 69 SR (NSW) 140; [1968] 1 NSWR 118, which decision was followed in *Helensburgh Workers Club v Marshall* (1984) 2 NSWLR 566, but neither of those cases involved an initial claim beyond jurisdiction. Mr Kilduff also referred to aspects of the judgments in *Melevende*, which deal with the topic of the abandonment of any excess of a claim, but I do not consider that they are relevant to these proceedings. **[9]** He also submitted that the failure to specify a sum in the particulars was simply an irregularity which did not go to jurisdiction and that in this case, it was capable of amendment by the Magistrate or had been waived by the defendant's prior conduct. He asserted that it was plain that the members of the court in *Legon v Count* and *Osborne v Snook* treated an identical claim as a mere irregularity.

Mr Kilduff also drew attention to section 51 subsection (4) of the Act. This subsection was inserted by Act number 16 of 1986, which received assent on 22 February 1986 and was accordingly in force when this matter was decided in the Magistrates' Court. It reads:

> "(4): It is not necessary to aver or, unless the issue is raised by a party to prove that the amount sought to be recovered, or the value of the subject-matter of the dispute, is within the jurisdictional limit."

I interpolate here that "aver", according to *Jarvis*, means in pleading terms, "allege." It is to be noted that this subsection appears in a framework where the court is in part given a general jurisdiction, subject to statutory exclusions and where provision is made for transfer to it of proceedings in the County Court. The question whether this subsection has application to process originated in 1985 was not really argued before me.

Mr Kilduff referred in this connection to *Doro v Victorian Railways Commissioners* [1960] VicRp 12; (1960) VR 84. For his part, Mr Webster was content to submit that section 51(4) cannot have application to process which is, as he put it "a nullity." In any event, I have come to conclude **[10]** that the resolution of this matter does not involve application of that subsection. Mr Webster also referred, on the issue of the defendant's conduct in seeking leave to interrogate and interrogating, as to which I have given the respondent leave to file additional evidence, to *Simpson and Anor v Crowle and Ors* [1921] 3 KB 243; [1921] All ER 571 and *Farquharson v Morgan* [1894] 1 QB 552; (1891-1894) All ER 595, but I have reached the view that this matter does not fall to be decided on this aspect.

In my opinion, there is no conflict between the decisions in *Donelan* and *Brincat* in the Full Court of this court and the decisions of the Court of Appeal in *Legon* and *Osborne*. The only member of the Court in *Donelan* who expressly adverted to the topic of amendment was Smith ACJ. He denied its application to a claim and particulars which "showed without ambiguity, that it was in excess of jurisdiction." That is not this case. This is a case in my opinion of an ambiguous claim – a claim which upon its face may or may not be within jurisdiction.

A claim thus pleaded was expressly treated as a technical irregularity in *Legon*, which decision was followed in *Osborne*, and with the utmost respect, I concur in that view of it. Mr Webster accepted that if the omission of a sum within jurisdiction from the complaint was an irregularity, rather than a matter going to jurisdiction, then the Magistrate plainly had power to amend the complaint – see section 94, *Magistrates (Summary Proceedings) Act* 1975. Accordingly, I hold that the amendment made by the learned magistrate was made according to law and that the order nisi is discharged.
