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SUPREME COURT OF VICTORIA

OAKLEY THOMPSON & CO (A FIRM) v PRIME APPOINTMENTS PTY LTD

Byrne J

7 September 1995

CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE – DISCOVERY – ORDER FOR NOT COMPLIED WITH – COMPLAINT SUMMARILY DISMISSED – TEST TO BE APPLIED FOR DISMISSAL – WHETHER DISCRETION MISCARRIED.

OT's complaint was summarily dismissed for failure to comply with an order for discovery. Upon appeal—

HELD: Appeal allowed. Order of dismissal set aside.
1. An order of summary dismissal is a very extreme measure which should be made only where there is an intentional and contumelious default, or an inordinate or inexcusable delay or where a combination of default and delay is such as to cause the other party incurable prejudice.

2. Whilst OT's action in relation to discovery was late, evasive and did not comply with the Rules of Court, it could not be described in the circumstances as contumelious. Accordingly, the Magistrate was in error in summarily dismissing the complaint. The Magistrate should have had regard to the very severe consequences of the summary dismissal, the fact that further discovery could have been ordered and that the trial was not due to take place for some time in the future.

BYRNE J: **[1]** This appeal is brought pursuant to section 109 of the *Magistrates' Court Act* 1989 by the plaintiff before the Magistrates' Court of Victoria at Melbourne, against an order made by that court on 8 June 1995. On that occasion the magistrate ordered that the plaintiff's complaint be dismissed for non-compliance with an order of Magistrate Gurvich of 23 May 1995 and further ordered that the plaintiff pay the defendant's costs of the proceeding, which totalled $4,267.03. His Worship granted a stay, presumably on the order as to costs. The appellant, the firm of solicitors, Oakley Thompson & Co (whom I shall refer to as "the Solicitors"), sued Prime Appointments Pty Ltd, a company which engages in the business of personnel location, for damages in the sum of $17,650. The claim arises out of an agreement made between the Solicitors and Prime Appointments in November 1992 whereby, in broad terms, the Solicitors say they retained Prime Appointments to find an administration manager for their office. It is said that, as a result of this engagement, Prime Appointments introduced one Peter Young to the Solicitors as a likely employee. The Solicitors say in their statement of claim that, in reliance upon the terms of the agreement between them and Prime Appointments, they engaged Mr Young for that office and agreed with him a substantial salary, effective 12 January 1993. The Solicitors' complaint is, in essence, that Mr Young was unsuitable and that the consideration paid by them to Prime Appointments, therefore, wholly failed. The Solicitors' claim is for **[2]** damages, being the moneys paid for the pre-selection services of $6,750 and moneys paid to Mr Young between 12 January 1993 and 2 April 1993, the date on which his employment was terminated, which moneys amounted to $10,900.

Two defences were filed by Prime Appointments, the first in December 1994 and a later one in May 1995. The first defence is not very informative and, doubtless for that reason, a fuller defence was delivered in May 1995. In that defence the engagement agreement was, in general terms, admitted and certain of its terms were relied on. Prime Appointments admits that it introduced Mr Young to the Solicitors and that the Solicitors engaged Mr Young; otherwise the second defence contains denials.

The matter was listed for hearing before Magistrate Gurvich on 23 May 1995. It was unable to proceed on that day and His Worship was persuaded to make orders for further discovery by the Solicitors and for interrogation on the matters which might arise out of this discovery. The interrogatories are ordered to be delivered not later than the end of June 1995. The terms of the discovery order were these:

> "That the plaintiff make a full and complete discovery in accordance with the rules of the court and law in respect of the documents not yet discovered by 4 pm on 24 May 1995."

The background of this order is that there was an ongoing complaint by Prime Appointments as to the adequacy of the Solicitors' discovery. This is not in itself surprising. What is surprising, it seems, from what was put before me today, was that the Solicitors **[3]** sought to justify the discovery that had been made and its limitations by reference to the fact that they had disclosed all discoverable documents in their possession.

It seems that the Solicitors had up to some time in 1994 conducted their practice with the assistance of a service company, Blaze Cross Pty Ltd. It now appears that Mr Young was said to have been engaged by that company and not by the Solicitors. This seems to have caused difficulties because Blaze Cross went into liquidation some time in 1994 and it may be, as I was told from the Bar table, that the documents relating to Mr Young's wages, tax records and the like were held not by the Solicitors but by the liquidator of the service company. This is a very surprising and unsatisfactory position because, of course, the issues before the magistrate did not include the question whether the Solicitors themselves engaged Mr Young. I am now told that this is to be an issue.

The Solicitors, as I have noted, sought damages, namely the sum of money which they had paid Mr Young. It seems clear from what I have been told that that was an entirely incorrect factual basis. What is surprising is that in those circumstances a firm of Solicitors acting for a litigant plaintiff – and I put to one side the more remarkable fact that this client was the very same Solicitors – was putting before a court a state of facts which seems to be on any view, incorrect. Add to this, that they then sought to rely upon the true state of affairs to resist a litigant's ordinary obligations to make discovery.

[4] The order that was made is challenged on a number of grounds which are set out in the order of Master Wheeler of 7 July 1995, as follows:

> "(a) Did the order of Mr Gurvich M made 23 May 1995 create a legal obligation on the plaintiff to provide a further affidavit, letter or some communication in circumstances where no further documents were to be discovered?
>
> (b) (i) Was there any evidence on which the Magistrate properly instructed could come to the conclusion that Mr Coburn M did on this occasion?
> (ii) Were there other considerations which justified the Magistrate coming to the conclusion he did?
>
> (c) Did the Magistrate exercise his discretion correctly in granting the order dismissing the proceeding?
>
> (d) Whether Mr Coburn M misdirected himself by allowing an amendment to the application to be in the terms of Rule 11.07 of the *Magistrates' Court Civil Procedure Rules* 1989 when the application was not based upon non-compliance with a notice for discovery."

Before me, however, two points only were argued. The first was that the magistrate had no power to make the order that he did. As mentioned to counsel in argument, I am at a loss to see how this is a point which can be taken. It is not included in the questions of law which have been formulated by the master. It was suggested - rather bravely, I thought - that it would be supported by paragraph (d). Paragraph (d) states that Mr Coburn, the magistrate, misdirected himself by allowing an amendment to the application which was being heard by him and which resulted in the order of 8 June. That is on no view a challenge to his jurisdiction.

I mention in passing yet another remarkable **[5]** feature of this case, namely that the amendment about which complaint is made in paragraph (d) was made at the suggestion of counsel for the Solicitors before the magistrate, accepted by counsel for Prime Appointments before the magistrate, and then opposed by counsel for the Solicitors before the magistrate. Again, it is not difficult to suppose that this contributed to the disquiet which the magistrate must have felt about the manner in which the case was being conducted before him.

I express no view as to the jurisdiction of the magistrate, having regard to the clear view I have formed on the second principal point that was argued before me. This was whether the magistrate fell into error in exercising the discretionary jurisdiction which he assumed to dismiss

the Solicitors' complaint. It was accepted by the parties before me that, this being a discretionary decision, the power of the court on an appeal of this nature to interfere is limited. It is not for this court to conclude error of law simply because it would have taken a different course. It must appear "that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he misstates the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so": *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202. I proceed on the basis that the appeal should only be allowed if error of the kind mentioned is found **[6]** in the magistrate's order and reasons and where it would be an injustice to the parties to permit the order to stand.

I deal with the second aspect first. It is obvious enough that the Solicitors suffer a grave disadvantage in having their claim summarily disposed of without trial. This, to my view, is the prejudice which the court should have regard to. It was put on behalf of Prime Appointments that in truth, since the Solicitors could start again, their only penalty was one of costs. I do not agree with that. In my view, even though it may be that the Solicitors could start again, the dismissal of the claim in these circumstances is a grave prejudice which should be visited upon them only where it is appropriate in a proper exercise of the court's discretion.

The more difficult question is whether the magistrate fell into error in concluding, as he did, that this was a case appropriate for an order of summary dismissal. It is clear that such an order is a very extreme measure and that it should be made only where there is an intentional and contumelious default or an inordinate or inexcusable delay or, I might add, where a combination of default and delay is such as to cause the other party incurable prejudice.

It will be apparent from what I have said that the conduct of the Solicitors as litigants and as practitioners has fallen far short of what I would have expected of any litigant represented by a competent firm of solicitors. The order of Magistrate Gurvich which I have quoted above was in fact ignored. No response **[7]** whatsoever was made to it in terms of filing an affidavit as the order directs or even in terms of writing a letter to the Solicitors for Prime Appointments saying that there were no documents which were properly discoverable in accordance with His Worship's order.

What did happen was that a week after the time prescribed by Magistrate Gurvich had expired and after the application for summary dismissal had been made, the Solicitors, acting it would seem not as solicitors but as litigants, swore an affidavit of 31 May 1995. Omitting formal parts, this affidavit says the following:

> "There are no documents not yet discovered by the plaintiff in this proceeding."

It was, again bravely, suggested that this was a compliance with the magistrate's order. It is sufficient that I note that it is late, that it does not comply with the Rules of Court as required by the magistrate's order, and that it is, to my mind, evasive. The deponent makes no attempt to address in substance or in form the complaint which was made before Magistrate Gurvich and in response to which Magistrate Gurvich made his order. The affidavit might in some circumstances be construed as contumelious; I am not prepared to draw such an adverse inference.

Nevertheless, the magistrate, to my mind, fell into error in dismissing the complaint as he did. It is clear that, although he had regard to the unsatisfactory history of this matter, he failed to have sufficient regard to the very severe consequences of the order which he made; he failed to have regard to the fact **[8]** that the complaint of Prime Appointments could be sufficiently met by directing that an affidavit be filed with a default provision; and, above all, he failed to have regard to the fact that the trial would not take place for many months, so that appropriate, more conservative coercive powers of the court could be brought to bear without the necessity of such an extreme course.

I am sympathetic with the difficulties facing the magistrate and I am empathetic with his reaction to them, but to my mind the course that he followed was so out of proportion to the problem to which it was addressed that it cannot be permitted to stand. Accordingly, I will allow the appeal and set aside the order. *[After discussion as to costs, His Honour continued]* … Appeal allowed.

Order of the Magistrates' Court at Melbourne of 8 June 1995, whereby the court dismissed the plaintiff's complaint and ordered that the defendant pay the costs of the proceeding and of the application, fixed at $4,267.03, be set aside. I will refuse the appellant's application for costs. I will grant a certificate under section 13 of the *Appeal Costs Act.*

APPEARANCES: For the Appellant: Mr A Panna, counsel. Solicitors: Oakley Thompson & Co. For the Respondent: Mr J Bolton, counsel. Solicitors: Holt & Macdonald.
