**17/88**

**SUPREME COURT OF VICTORIA**

# *GALAXY INTERNATIONAL PTY LTD v BATES and ANOR*

**Nathan J**

**4 December 1987; 12 February 1988 — [1988] VicRp 85; [1988] VR 948**

**JURISDICTION – INFORMATION AND SUMMONS – ISSUED BY INTERSTATE JUSTICE – RETURNABLE IN VICTORIA – WHETHER INFORMATION AND SUMMONS VALID – INFORMATION LISTED IN MENTION COURT – ADJOURNED BY CONSENT – WHETHER INFORMATION "LAID": *MAGISTRATES' COURTS ACT* 1971, SS10, 22A; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS5, 17.**

An ACT Justice of the Peace received an information alleging offences under the *Customs Act* 1901 (Cth.) and issued a summons requiring GIP/L to appear at the Melbourne Magistrates' Court in February. On the return date, the matter was listed in the Mention Court and adjourned by consent of the parties to June on which date it was again adjourned to October. When the matter came on for hearing in October, the question of the validity of the issue of the information and summons was raised and the magistrate ruled that it was "laid" when it was first adjourned by the Mention Court in February. Upon review—

**HELD: Declaration made that the information and summons were invalidly issued and were not validated by adjournments granted by the magistrates constituting the Mention Court.**
**1. The sources of authority to lay and receive an information and issue a summons thereon returnable in a Victorian Court are solely Victorian statutory provisions. Accordingly, where a Justice of the Peace for the Australian Capital Territory received a Victorian information and issued a summons returnable in Victoria, he did so without power and the proceedings were invalid.**
***Mortimore v Stecher* [1971] VicRp 106; (1971) VR 866, applied.**

**2. For an information to be properly "laid", there must be a presentation of the document to the issuing Justice in a manner which engages the mind whereby the Justice becomes cognisant and appreciative of the ministerial task being performed. Where, in the course of adjourning an information a magistrate may have inadvertently or transitorily handled the information, this did not amount to a laying of the information.**
***Hargreaves v Bourdon* [1963] VicRp 13; (1963) VR 89, applied.**

**NATHAN J:** **[1]** Two issues require adjudication arising from this Writ and Notice of Motion. First, whether an interstate or territorial Justice of the Peace (a JP) can have laid before him a Victorian Information? Second, and more importantly, whether the process by a Victorian magistrate of adjourning an Information initially presented to and laid before an interstate or territorian JP can amount to its being "laid" within the meaning of the *Magistrates (Summary Proceedings) Act* 1975 No. 8731. These questions arise as **[2]** follows. In January 1987 what was purported to be an Information, alleging offences under the Commonwealth *Customs Act* 1901 s234(d) and (e) was signed by one Hodges acting on behalf of the informant and first defendant (Bates). Under the terms of s245A of the Act, it is not necessary for an Information to be sworn. The actual Information was entitled "Customs Act", "Judiciary Act", both of the Commonwealth, and "Magistrates (Summary Proceedings) Act" 1975 of Victoria. Victorian Stamp duty was paid in respect of it.

At the same time and on the same document a Summons was issued and directed to the plaintiff (Galaxy) requiring it to appear at Melbourne in February 1987. The Justice of the Peace who issued that Summons (Barnes) did so in Canberra, ACT on 20th January 1987 and wrote on it that he was a JP for the Australian Capital Territory. Stopping there for a moment, a fundamental issue, which is the first question becomes apparent, that is whether a "foreign" JP can validly issue Victorian proceedings. For reasons which I state more fully later, he cannot. Both the Information and summons which came before the ACT Justice of the Peace are void so far as this jurisdiction is concerned.

In February 1987 on the return date set out in the Summons the matter was mentioned before Mr G Hoare, a Victorian Stipendiary Magistrate, at the Magistrates' Court in Melbourne.

He adjourned the matter, obviously being under the impression and certainly not apprised to the contrary by counsel, that the Information and Summons had been issued by a Victorian Justice. At the adjourned date, in June **[3]** the case was again mentioned and a further adjournment granted. Not until the hearing on 26th October 1987 before the second defendant (Levine) was the issue of the invalidity of the Information and Summons raised.

I accept that counsel for Galaxy was not previously aware of the point, which is of significance because the time limit for the laying of an Information (one year) expired between the adjournment in February and the purported hearing in October. Thus the second question comes into focus, because, unless Bates can establish the adjournment procedure in Melbourne in February amounted to a laying of an Information within the meaning of the *Magistrates (Summary Proceedings) Act*, the Information laid before Barnes in the ACT is of no effect. He cannot do so for two reasons, firstly, it was invalidly issued and secondly it cannot be cured. I turn now to elaborate these conclusions after indicating how the issues have come before me.

When the Information was called on for hearing in October, Levine ruled that it was "laid" when it was first adjourned in Melbourne in February. Galaxy immediately issued a Writ seeking Declarations that the Information and Summons were invalidly laid. That Writ is now further supported by a Notice of Motion seeking a judicial review of Levine's decision, under the terms of RSC 0.54. Thus the matters came and were argued before me.

As to the events which occurred before Mr Hoare SM in February, (and there is no reason to suppose the procedure was any different when it came before **[4]** Mr Tobin SM in June), I have the following evidence. Mr Cabral, a Clerk of Courts and Court Co-Ordinator at Melbourne, and I paraphrase his affidavit and oral evidence, says when an Information is lodged by either post or personal delivery at Melbourne a bench clerk classifies it as a criminal or quasi-criminal matter; matters such as this are noted as quasi-criminal. On the scheduled return date it is listed for Mention. This means the case is called in open Court, if an appearance is announced or is already noted on a face sheet attached to the Information and the plea is not guilty a hearing or further adjournment date is fixed. In this case Galaxy did not appear in either February or June but had previously notified Bates of its consent to an adjournment. The best evidence I have of what occurred at those times is from Mr Cabral who says:

> "In most cases where the parties consent to an adjourned date by letter they are not required to attend Court in order to obtain the order for adjournment. If there is no appearance by the parties the usual practice is for the bench clerk who is present in Court to tell the presiding magistrate that the matter is to be adjourned by consent to a specified date – in this instance to 26 October 1987. This would normally be done without the bench clerk handing the Court file to the magistrate although sometimes the file is handed to the presiding magistrate if he wishes to inspect it to satisfy himself that the requested adjournment is made with the consent of both sides. The magistrate would then, as he did in this instance, record the adjourned date (namely 26 October 1987) in the Court Register and sign his name under that entry."

I will return to the question of whether this procedure constitutes a laying of an Information but first dispose of the issue of whether Barnes (the ACT JP) could issue or have laid before him a Victorian Information? **[5]** Because an Information can only be laid before a justice I now deal with the meaning of the word "justice" as it appears in the *Magistrates (Summary Proceedings) Act* 1975 No. 8731 and the *Magistrates' Courts Act* 1971 No. 8184. By Part III of the latter Act the office of Justice of the Peace is established. The Governor in Council may appoint as many as he thinks necessary to keep the peace in Victoria (my emphasis) (s10). The qualifications for such appointments are set out in ss11-18. It is s22A which sets out the authority of "justices", obviously meaning justices of the peace. As appropriately edited it reads:

> "In addition to any power at common law ... every justice ... **may exercise** the following powers ...
> (a) He may receive an information in respect of an offence of any kind ...
> (b) He may issue in respect of an information ... his summons to the party against whom the **information is laid** ... " (my emphasis)

So much for the statutory powers of justices. I turn now to consider their ministerial functions as set out in the *Magistrates (Summary Proceedings) Act*: Part III thereof deals with "Matters Preliminary to Trial". Section 17 is sub-headed "Justices to receive informations." It

reads:

> "s17(1) Where an information is laid before a justice that a person has committed in Victoria:
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> ... (an offence) the justice shall receive the information and shall issue his summons or warrant ..."

Noting that the obligation is upon a justice to keep the peace in Victoria and not elsewhere, I am compelled to **[6]** conclude that the powers which a justice exercises are similarly constrained. This conclusion is supported by both authority and common sense. Dealing with the authorities first. *Shilton v Miller* [1930] VicLawRp 60; [1930] VLR 400; 36 ALR 334; *Kendic v Kendic* [1960] QWN 13; 54 QJPR 77 ; and *Mortimer v Stecher* [1971] VicRp 106; [1971] VR 866 all proceed on the basis of informations being laid before local justices and not otherwise. Also both Acts specifically refer to Victoria, and for obvious reasons cannot have extra-territorial operation.

Turning to the common sense arguments: it is apparent the qualifications for justices of the peace could vary from jurisdiction to jurisdiction. It cannot be that a justice exercising ministerial powers in connection with the administration of justice in Victoria can be qualified to do so in any other jurisdiction, and the reverse is equally correct. Further, it is also worth remembering that until the *Abolition of Bailiwicks Act* of 1968 the power of justices was geographically limited to the area of their home bailiwick (or province), thus recalling the limited character of their powers.

The subject information here was expressly stated to be under the terms of the Victorian Act and the Summons sought to compel the submission of the defendant to a Victorian Court. Barnes as an ACT JP did not have the power to receive or have laid before him a Victorian information nor did he have the power to issue a Victorian summons. The sources of authority to lay and receive an Information and concomitantly issue a Summons which compels the defendant to submit to this jurisdiction are solely **[7]** the Victorian Acts. They relate to Victorian justices of the peace and not others, therefore the proceedings issued out of Canberra ACT were invalid, and for reasons to which I now turn, have not and cannot be cured.

Mr Davies for Bates argued that when Mr Hoare SM dealt with the Information in February, it was then laid before him. He said that strict procedural requirements did not prevail and all that was necessary was for the Information to be brought to his attention as part of the prosecution process. He relied upon *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866; *R v Leeds Justices; ex p Hansen* [1981] QB 892; [1981] 3 All ER 72; [1981] Crim LR 711; (1981) 74 Cr App R 109; [1981] 3 WLR 315; (1981) 146 JP 1 and later when the same issues were considered by the House of Lords in *R v Manchester Stipendiary Magistrates ex parte Hill* [1983] 1 AC 328; [1982] 2 All ER 963; [1982] Crim LR 755; (1982) 75 Cr App R 346; [1982] 3 WLR 331; (1982) 146 JP 348 and *Electronic Rentals Pty Ltd v Anderson* [1971] HCA 13; (1970-71) 124 CLR 27; [1971] ALR 513; 45 ALJR 302. However, these authorities do not support his contentions for reasons I shall go into and in any event due to the different procedures followed in England, the English authorities are of little help when interpreting the Victorian legislation.

Although the procedural antecedents of an Information, as the step which initiates criminal proceedings are common to both Australia and England, subtle but important differences have emerged as to how that process is to be pursued. In England the Summons is not necessarily attached to the Information. But in this jurisdiction the *Magistrates (Summary Proceedings) Act* Part III s17 (*ibid*) sets out that "where an information is laid before a justice ... he shall receive it and issue his summons." Section 5(1) sets out that an Information shall be in writing and sub-s2, **[8]** ... the information may be laid either with or without oath ... and shall be comprised in the same document ..." The words used are critical and mandatory. A JP having had an information "laid" before him must issue his summons, which must be on the same document. Thus the issuing of the Summons which compels the person to submit to the Victorian jurisdiction is not merely an integral but is also a vital part of the laying of an information; this is not the case in England. There is no inconsistency between the *Magistrates (Summary Proceedings) Act* and the *Magistrates' Courts Act* to which I now make reference. Part III s22A of the latter falls within the Part dealing with the appointment and powers of justices of the peace generally. Of the various powers a JP may exercise, perhaps one of the most significant is the power to receive informations. After having an information presented to him for the purposes of it being laid under s17(1) of the *Magistrates (Summary Proceedings) Act*, a JP must then mandatorily exercise one of the powers

given to him under s22A of the *Magistrates' Courts Act* and that is to receive the information and issue his summons. The laying of the information involves the receipt of it and the issuing of the summons. The steps cannot be desegregated. All involve the JP in the exercise of ministerial functions which must engage his attention in the task he is then performing. To accept the proposition that a JP (and for the purposes of this argument a JP and SM are synonymous), was having an information "laid" before him when he thought or was induced to believe he was adjourning it, is absurd. Imagine **[9]** the surprise Mr Hoare SM would have registered if asked what he was doing in February and was told he was not adjourning the hearing of a summons but actually having an information laid before him.

Further, the actual words in the Act are apposite; they are "laid before him" not just, laid or put, but "before him". These words carry the implication that there must be a presentation of the document; in such a way as to engage his mind in the further task of receiving it. An information is not laid before a justice merely by him coming into possession of it. A mere inadvertent handling of an information cannot amount to it being laid before him. To hold otherwise would reduce the laying of an information and its concomitant functions of receipt of and the issuing of a summons to a task of a cipher, suitable for a robot. Justices are neither and this argument must be rejected.

In this case it is probable that Mr Hoare may not have actually handled the information or a document at all, he could have been informed of it by his bench clerk. Even if he did physically touch it, the mere transmission of it across his bench could not constitute the laying of it when he thought he was adjourning by consent a valid instrument.

I return to the authorities which support those conclusions. Those binding me are firstly *Electronic Rentals Pty Ltd v Anderson* [1971] HCA 13; (1971) 124 CLR 27; [1971] ALR 513; 45 ALJR 302. The case concerned a New South Wales information laid by an officer of a statutory corporation. An order nisi was obtained on the basis that the justice's attention had not been drawn to the contents of **[10]** it or of the summons. Windeyer J, speaking for himself but in a way in which the other members of the Court cannot be read to have differed, said:

> "Does this mean that an information was 'laid before a justice', within the meaning of s52 of the *Justices Act*, if the justice was not told the nature of the document put into his hand, did not read it, and as a result of what was said to him believed it to be not what it was? I do not think so. The word like the word 'exhibit', is well known in law as meaning to present or put forward an accusation or charge (usually in the form of an information or indictment) or some other relevant allegation as in 'lay the damages' or 'lay the venue'. An information is not laid by handing a document to a justice and misleading him as to its nature. Such mis-information is not an information."

It is certain that Mr Hoare SM was not told, nor could he have believed he was having an information laid before him in February when he adjourned it. To paraphrase Windeyer J, such information as he did have was mis-information. The Full Court of Victoria in a case which considered the *Justices Act* 1958 s34, the predecessor of the *Magistrates (Summary Proceedings) Act* examined, *inter alia*, the nature of an information, the laying receiving of and the issue of a summons. *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 867 per Winneke CJ, Gowans and Menhennitt JJ said (p874):

> "The nature of an information was examined by Winneke CJ, in *Wright v Mooney* [1966] VicRp 30; [1966] VR 225, at p227. It is a statement that an offence has been committed by a specified person at a specified time and place. It is 'laid' when it is laid before or exhibited to or received by a justice of the peace. What is meant is that it is laid before him in the sense of being presented to him: per Sholl J in *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89 at p90. It is a unilateral act. The correlative act in the justice is that of 'receiving it'. Section 34(1) of the Act draws a distinction between laying the **[11]** information before the justice and his receiving it, just as s32(2) draws a distinction between making a complaint to a justice and his receiving it. The 'receiving' of the complaint appears to involve no more than his accepting it as communication to him of a statement of the commission of the offence.
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> It follows from this analysis that if the information is laid before or exhibited to or presented to the justice and there are no extraordinary circumstances which would present a barrier to his recognizing it as a statement of the committal of an offence, the information is laid for the purposes of the Act."

These authorities are unanimous in the view that for an information to be properly laid

the justice must know what task he is performing. If any further authority for this proposition is necessary it is to be found in *Hancock v W. Angliss & Co. (Aust) Pty Ltd* [1961] VicRp 93; [1961] VR 590; *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89; *R v Scott; ex p Church* (1924) SASR 220; *Long v Warner* (1975) 10 SASR 289; *R v Manos; ex p Samuels* (1981) 28 SASR 262. Nothing in the House of Lords decision in the *Manchester Justices case* is inconsistent with the view. Even if it were, I would now, since the *Australia Acts (Request) Act* No. 10203 be obliged to follow the earlier decision of the Victorian Full Court. (*R v Judge Bland; ex p DPP* [1987] VicRp 17; [1987] VR 225). To lay an information before a justice, which involves its receipt and the issuing of a summons, requires presentation to the justice in a manner which engages the mind in such a way whereby he becomes cognisant and appreciative of the ministerial task he is then performing. The justice must become aware of the nature of the information, although not **[12]** necessarily of all its details. He must know the character of the function he is statutorily empowered to perform. A mere inadvertent, transitory handling of an information does not amount to a laying of it.

It follows that I shall make the Declaration sought in the Writ and Motion. The Information and Summons purportedly laid before and issued by Mr Barnes of the ACT are of no effect. They were not validated by Mr Hoare SM or Mr Tobin SM. The statutory time limit may have expired, but that is a matter which Galaxy may raise as a defence if proceedings are instituted. The first defendant is ordered to pay the plaintiff's applicant's costs.

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