19/02; [2002] VSC 78

SUPREME COURT OF VICTORIA

STRAGAN & CO PTY LTD v CHRISTODOLOU and ORS

Beach J

13, 26 March 2002

CIVIL PROCEEDINGS – APPLICATION TO SET ASIDE AND REHEAR – APPLICATION PREVIOUSLY MADE AND REFUSED – ABUSE OF PROCESS – FACTORS TO CONSIDER ON SECOND APPLICATION – SECOND APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR.

The applicant applied to a magistrate for an order against him to be set aside and reheard. The application was refused. Some months later, the applicant again applied for the same order and was successful.

HELD: Order set aside.
1. Except where there has been a dismissal of the first application for a technicality or where there is fraud or where new evidence becomes available after the dismissal of the first application, a second application is almost certainly doomed to failure.
***Guss v Magistrates' Court of Victoria and Anor* [1998] 2 VR 113, applied.**

2. The material put forward by the applicant at the hearing of the second application was not new evidence. It was available to the applicant at the time of the hearing of the first application. The magistrate hearing the second application was in error in failing to consider whether the application was an abuse of process and bound to fail because the applicant had previously applied to set aside the judgment on precisely the same grounds.

BEACH J:

1. This is the return of an originating motion filed in the Court by the plaintiff Stragan & Co. Pty. Ltd. whereby the plaintiff seeks relief in the nature of *certiorari* being an order that the order made by the Heidelberg Magistrates' Court sitting at Melbourne on 22 October 2001 setting aside the order of the Heidelberg Magistrates' Court made on 3 December 1999 be set aside.

2. The background to the application may be summarised as follows.

3. On 6 October 1999 the plaintiff filed a complaint in the Heidelberg Magistrates' Court whereby it sought to recover certain outstanding accounting fees from the defendants John Christodolou (the first defendant) and Nick Christodolou and Georgina Christodolou (the second defendants).

4. On the face of the complaint adjacent to the words "Nature of Complaint" appear the words "Payment of Professional Service Fees". On the face of the complaint adjacent to the words "Amount of Claim" appears the figure $40,000 that being the limit of the civil jurisdiction of the Magistrates' Court.

5. By its particulars of claim the plaintiff claims that between 14 December 1994 and 13 May 1999 it rendered invoices to the second defendants in respect of accounting work carried out on their behalf totalling $42,186.40 and in respect of which it had only received a payment of $4,536.40 leaving a balance of $36,650 outstanding. By its complaint it sought to recover that sum together with interest totalling $15,745.17 from the second defendants. However, it is clear from the base of the complaint that the plaintiff abandoned that portion of its claim which exceeded $40,000.

6. The plaintiff's claim against the first defendant is based on a guarantee dated 16 May 1997 given by him to the plaintiff whereby he guaranteed payment of the sum of $32,485 by the second defendants to the plaintiff in respect of accounting services rendered to the second defendants.

7. None of the defendants gave notice of defence to the plaintiff's claim and on 30 November

1999 the plaintiff lodged an application for judgment against the defendants in the sum of $40,000 together with interest of $741.37 and costs of $868.05.

8. On 3 December 1999 a default judgment was entered against each defendant in the sum of $40,000 together with interest of $795.29 and costs of $808.

9. On or about 18 April 2001 the first defendant filed an application for rehearing in the Heidelberg Magistrates' Court. The relevant portion of the document reads:

> "TAKE NOTICE that the Firstnamed Defendant attends to apply to the Court for an Order that the Order be set aside and the Complaint be re-heard as soon as possible. The Firstnamed Defendant did not file a Notice of Defence for the following reasons: 1. He was not personally served with the Complaint as deposed to in the Affidavit of Service of Terrence David Wright sworn 17 October 1999. 2. He has never resided at Apollo Road, Taylor's Lake. 3. He was never aware of these proceedings prior to being visited by the Sheriff on 12 April 2001. 4. He relies further on the grounds specified in his Affidavit filed herein."

10. The application was heard by the Court on 6 June 2001 and was refused.

11. On 21 September 2001 the first defendant filed a second application for a rehearing in the Heidelberg Magistrates' Court.

12. The relevant aspects of the application read:

> "TAKE NOTICE that the First Defendant intends to apply to the Court for an Order that the judgment entered against him on 3 December 1999 be set aside and the Complaint be re-heard as soon as possible. 1. The First Defendant did not appear on 3 December 1999 for the following reasons: (a) He was not personally served with the Complaint as deposed to in the Affidavit of Service of Terrence David Wright sworn 17 October 1999. (b) He was not given any notice of the Plaintiff's intention to apply for judgment on 3 December 1999. 2. The First Defendant did not file a Notice of Defence in respect of the application heard on 3 December 1999 for the following reason: (a) The First Defendant and the Plaintiff entered into Terms of Settlement on 3 December 1999 in relation to the said proceedings. 3. The judgment entered by the Plaintiff was irregular on the following grounds: (a) The First Defendant was not served with the Complaint; and/or (b) It was obtained without the Plaintiff giving notice to the First Defendant of its intention to apply for such judgment; and/or (c) The Plaintiff was not entitled to enter the judgment as it was contrary to the Terms of Settlement entered into by the parties."

13. The application came before a different Magistrate on 22 October 2001 and was allowed.

14. Before the second Magistrate various matters were raised on behalf of the first defendant in relation to the merits of his defence to the plaintiff's claim which were not raised before the Magistrate who heard and dismissed the first application.

15. They included arguments that the guarantee in question may not have been signed by the first defendant and that the signature purporting to be his signature is a forgery, and that the entry of judgment on 3 December 1999 was contrary to terms of settlement executed by the parties that same day.

16. The second Magistrate did not make any findings in respect of such arguments or any observations concerning them, but in determining to set the judgment aside simply said:

> "I am satisfied that the applicant was not served with the original proceedings and it follows that the judgment entered against the applicant on the 3rd December 1999 was irregular and should be set aside."

17. In *Guss v Magistrates' Court of Victoria and Another*[1] Batt J (as he then was) was required to consider a decision of the Magistrates' Court dismissing a plaintiff's third application to set aside a default judgment in favour of a defendant.

18. His Honour held that except where there has been a dismissal of the first application for a technicality or where there is fraud or where new evidence becomes available after the dismissal of the first application, a second application to set aside a default judgment is almost certainly

doomed to failure. At p123 his Honour said:

> "But in my view the second defendant was also correct in his submission that the magistrate was not bound to consider the whole of the material and in particular the material which he and Mr Myers had previously considered. In my view, that conclusion is required by the judgments of Brooking JA and Hayne JA in *DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582 at 595-8 and 601-6, when properly understood, even though small passages in those judgments, if taken by themselves, might be argued to point in the opposite direction. Further, on the view of Hayne JA and, I think, of Brooking JA, the magistrate was probably only bound to consider material that was not available at the time of the previous application. Their Honours relied on the principle relating to abuse of process, holding that a second application is an abuse of process unless there is proof of fraud or it is sought to adduce 'fresh' evidence, in the sense used in relation to admission of evidence in appeals. If the evidence was available at the time of the first application and there is no explanation of why it was not then put forward, then, at least, the second application will constitute an abuse of process. Those conditions were satisfied in the third application in the present case and, if, as I think, that part of *Christie v Baker* is applicable to s110, the magistrate was bound to dismiss the application and not to investigate it, contrary to the plaintiff's contention before me. If anything, the magistrate's test of 'newness' was too generous. Certainly he should not have gone further, as the plaintiff contended. In my view, there is no reason for treating the judgments in that case as inapplicable to s110. In other words, there is no reason for considering that those judgments, or the parts of them that I have cited, depended upon features of s23A of the *Limitation of Actions Act* 1958 which are absent from s110. The fact that refusal of an application under s110 leaves a final judgment standing is the counterpart of the consideration discussed in the first full paragraph of 605 by Hayne JA. Moreover, the considerations discussed by Hayne JA at 602, 604 and 605 (third paragraph) apply equally here."

19. The material put forward on behalf of the first defendant at the hearing of the second application was not new evidence. It was available to the first defendant at the time of the hearing of the first application. Accordingly if the second Magistrate did consider it, and we have no way of knowing whether he did, he should not have done so.

20. For as Brooking JA said in *Christie* (*supra*) at p597:

> "If the decisions I have cited do not lead to the conclusion that an issue estoppel arose here then in my opinion they at least support the conclusion that on the facts of the case the respondent having not come fully prepared with proper materials in the first instance and having not sought any adjournment once the gap in his case became apparent, and having offered no explanation of his failure to put forward the material which was later provided, should not be allowed to vex the appellant with a second application."

21. However, regardless of that aspect of the matter, in my opinion the second Magistrate in the present case fell into jurisdictional error in allowing the first defendant's application on the basis he did.

22. In doing so he failed to consider whether the application was an abuse of process and bound to fail because the first defendant had previously applied to set aside the judgment on precisely the same grounds, there was no fraud, and there was no new evidence which became available after the dismissal of the first application.

23. The order of the Heidelberg Magistrates' Court sitting at Melbourne made on 22 October 2001 setting aside the order of the Heidelberg Magistrates Court made on 3 December 1999 is set aside.

24. I order that the first defendant pay the plaintiff's costs of the proceeding including any reserved costs.

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[1] [1998] 2 VR 113.

APPEARANCES: For the plaintiff Stragan & Co Pty Ltd: Mr P Riordan, counsel. Dellios West & Co, solicitors. For the first defendant: Mr M Sifris, counsel. Herman Partners, solicitors.
