03/09; [2009] VSC 30

SUPREME COURT OF VICTORIA

SHIRE OF CARNARVON v KLEIN CORPORATION PTY LTD (No 2)

J Forrest J

28 July, 28 November, 4 December 2008; 12 February 2009

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES AND RETURN OF GOODS DEALT WITH IN A VICTORIAN MAGISTRATES' COURT – JURISDICTION OF COURT DEFINED BY STATUTE – COURT'S JURISDICTION LIMITED TERRITORIALLY TO CERTAIN MATTERS – CLAIM AROSE IN RESPECT OF GOODS LOCATED IN WESTERN AUSTRALIA – NO VICTORIAN NEXUS TO CLAIM – FINDING BY MAGISTRATE THAT VICTORIAN MAGISTRATES' COURT HAD JURISDICTION OVER THE CLAIM – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS100(1), 101(4).

HELD: Jurisdictional decision quashed.
1. The jurisdiction of the Magistrates' Court of Victoria is that defined by the *Magistrates' Court Act* 1989 ('Act'). It will usually be limited territorially to matters involving residents of the State of Victoria or to causes of action arising within its jurisdiction. Section 100(4) of the Act extends the Court's territorial jurisdiction subject to compliance with its terms.

2. Section 101(4) of the Act marks out the ambit of the Magistrates' Court jurisdiction. It extends and defines the limits of its jurisdiction. The wording of s100(4), by implication, assumes that the court does not have jurisdiction in relation to extra-territorial claims absent satisfaction of either sub-s(a) or sub-s(b) of s100(4). Accordingly, for an extra-territorial cause of action to be within the jurisdiction of the Magistrates' Court, two alternative matters must be established –
(a) The residence of the defendant within Victoria at the time of service of the complaint.
(b) A material part of the cause of action must arise in Victoria.

3. The plaintiff Klein could only bring the claim if a material part of it arose in Victoria. The cause of action, which was clearly one in detinue and conversion no matter how it was pleaded, arose in Western Australia in respect of goods located in Western Australia and in respect of actions undertaken by a Western Australian resident. Even if the issue of the invoice occurred in Victoria, it did not, of itself, constitute any part of the claim by Klein against the Shire. There was no territorial nexus to the claim. No essential element of it arose in Victoria and therefore s100(4) was not engaged. The Magistrates' Court is a creature of statute and did not have jurisdiction over this claim unless one or other of the provisions of s100(4) were satisfied. They were not. Accordingly, the Magistrate should have concluded that s100(4) of the Act was not satisfied so as to give the Magistrates' Court jurisdiction over the claim.

J FORREST J:

Introduction

1. This is another chapter in a seemingly endless dispute between the Shire of Carnarvon ("the Shire") and Klein Corporation Pty Ltd ("Klein"), the alter ego of Mr Anthony Klein.

2. The contest between the Shire and Klein centres around the Shire's seizure of goods said to be owned by Klein at the Shire's premises at the Carnarvon Airport in 2004.

3. In May 2007, Klein, after a contested hearing, obtained judgment in the Magistrates' Court against the Shire for damages and return of the goods remaining in its possession ("the May decision"). The Shire now contends, to put it in a nutshell, that the Magistrates' Court had no jurisdiction to determine the claim and that the judgment is a nullity.

4. In February 2008, I dismissed an application by the Shire for an extension of time in which to appeal the May decision pursuant to s109(4) of the *Magistrates' Court Act* 1989 ("the Act")[1]

5. The Shire, now seeks, pursuant to r56.02 of the *Supreme Court Rules*, judicial review and relief in the nature of *certiorari* in relation to the Magistrates' Court judgment. As was the case

with the appeal, the Shire is again out of time in relation to this application and must, pursuant to r56.02(3), demonstrate that "special circumstances" warrant an extension of time in which to bring its application. The Shire's attack now is based upon an asserted error of law made by a Magistrate in an interlocutory decision ("the jurisdictional decision") in October of 2006 in dismissing the Shire's application to stay or strike out the claim. The Shire took no action in this Court prior to the May decision to set aside the jurisdictional decision.

Factual background

6 I have, in my previous reasons, set out the background to this claim.[2] The following resume of the significant dates and facts, attended by some observations, is to be viewed in the light of those reasons.

7. After Klein issued its proceeding, the Shire's solicitors wrote to Mr Klein on 5 September 2006 advising him, amongst other things, that the Magistrates' Court of Victoria lacked jurisdiction to deal with the proceeding and alternatively was an inappropriate Court in which to continue the proceeding. The solicitors invited Klein to discontinue and threatened to make an application to have the proceeding struck out or permanently stayed. Klein was told that the Shire would seek costs on an indemnity basis and that the letter would later be used on the question of costs.

8. True to its word, the Shire issued proceedings which were heard before a Magistrate on 18 October 2006. The Shire's application pursuant to s101 of the Act sought a stay of the proceeding on the basis that the Magistrates' Court lacked jurisdiction to deal with the claim and/or that the appropriate forum was a Court of competent jurisdiction in Western Australia. The Magistrate dismissed the application.

9. No application for judicial review was made by the Shire in respect of the jurisdictional decision. No indication was given by the Shire to Klein that it reserved its position in relation to that decision or that it proposed, in the event of it losing the substantive fight, to agitate the point in any appeal under s109 of the Act.

10. The parties prepared for trial, which occupied two days in the Magistrates' Court on 30 and 31 May 2007. On 31 May, the Magistrate decided the claim in favour of Klein. Her Honour gave judgment in the following terms:

> (a) A declaration that the title and/or the right to possession of the goods belonged to and have at all material times belonged to Klein.
>
> (b) An order that the Shire deliver to Klein the goods as set out in a schedule to Klein's amended statement of claim, the cost of which was to be borne by the Shire and which was to be insured by the Shire at its own cost.
>
> (c) An order that the Shire pay Klein damages fixed at $5,083 for the replacement value of certain goods.
>
> (d) An order that the Shire pay Klein's costs fixed at $6,286.70.[3]

11. On 8 June 2007, the Shire, after receiving advice from its solicitors, determined not to pursue an appeal to this Court. However, as I noted in my earlier reasons,[4] officers of the Shire appear to have become agitated when it came to their notice that some of the goods which it had detained were, on the Shire's understanding, the subject of a claim by Klein upon GIO Insurance on the basis that they were stolen goods. According to the Shire's solicitor:

> "this revelation was of grave concern to the appellant. The appellant was now of the view that it had been the victim of a fraud on the part of the respondent which appear to have sued the appellant in respect of goods which had in fact been the subject of a settled insurance claim".[5]

Klein denies any fraud upon GIO. It contends that the Shire has always been aware that some of its goods went missing from the Carnarvon premises and, indeed, as a result of material provided to it by the Shire, it was able to identify the goods that it said had been stolen. It asserts that within its supplementary affidavit of documents filed three weeks before the Magistrates' Court hearing, the material related to the claim for the stolen goods was disclosed.

12. The Shire then had a change of heart and proceeded to attack Klein on various fronts. It wrote to the Magistrates' Court on 10 July 2007 to determine whether the Magistrate would hear an application to set aside the judgment. On 20 August 2007, on the hearing of the application, the Magistrate dismissed the application but gave leave to the Shire to issue a collateral action to set aside the judgment. At this application to set aside judgment, orders were made which became the subject of an issue at this hearing which I will address shortly.

13. Collateral action proceedings were issued in the Magistrates' Court on 5 September 2007 and have been adjourned pending the resolution of this application. On 9 November 2007, the Shire lodged a notice of appeal pursuant to s109(5) of the Act. Both the Master and myself, on appeal from the Master, dismissed that application on the basis that exceptional circumstances had not been demonstrated to warrant a grant of leave out of time.

14. On 13 February 2008, I gave leave to the Shire to amend its writ to an originating motion to enable it to seek judicial review in the form of *certiorari* in relation to the jurisdictional decision.

This proceeding

15. The Shire now seeks an order in the nature of *certiorari* to quash the orders made in the Magistrates' Court in October 2006 and May 2007 on the basis that –

> (a) the Magistrates' Court lacked jurisdiction to determine and try the cause of action alleged by Klein; and
>
> (b) that no material part of Klein's cause of action arose in Victoria.

It also seeks a declaration that the orders made in the Magistrates' Court are null and void for want of jurisdiction on the part of the Magistrates' Court as no material part of the cause of action arose in Victoria and the Shire has never resided within Victoria. However, before it can ventilate these issues, it must obtain leave to bring the proceedings out of time. Special circumstances need to be demonstrated: r56.02(3).

16. Pausing here, it will be remembered that the Shire's attack is upon the jurisdictional decision in October 2006 refusing the Shire's application pursuant to s101 of the Act. Its application was instituted some 14 months out of time. Its submissions, however, are straightforward. On the facts before the Magistrate, he was compelled to find that the Magistrates' Court did not have jurisdiction and should have dismissed or struck out the claim on the basis of lack of jurisdiction. All that follows, it contends, was flawed. It says further that it has a powerful case in relation to want of jurisdiction or nullity and that, notwithstanding the delay in disputing the jurisdictional decision, it has demonstrated special circumstances within the meaning of r56.02(3) and therefore should obtain leave. Once it is granted leave, it says that the case is so clear that it must obtain the relief sought.

17. Klein contends that the dilatory behaviour of the Shire, its approbation and reprobation, should preclude it from now contending that the Magistrates' Court lacked jurisdiction. The Shire did not take the obvious course of instituting judicial review after the jurisdictional decision, but rather elected to fight the case on its merits. Only after being defeated on the substantive question has it now, for other reasons, decided to ventilate again the question of jurisdiction. It contends that it is simply too late to re-agitate this issue, notwithstanding its acceptance that the Shire's case in relation to lack of jurisdiction is a strong one.

The jurisdictional decision

18. The Magistrates' Court is a court of limited jurisdiction. It is defined, by s4 of the Act, as the Magistrates' Court of Victoria.

19. Section 100 of the Act prescribes the civil jurisdiction exercisable by it. Section 100(1) gives the Court jurisdiction to -

> "(a) to hear and determine any cause of action for damages or a debt or a liquidated demand if the amount claimed is within the jurisdictional limit".

It was accepted that Klein's claim was within the jurisdictional monetary limit. The question of

territorial jurisdiction is dealt with by the common law and, where applicable, statutory provisions, such as s100(4), which provides –

> "The court does not cease to have jurisdiction in respect of a cause of action because –
> (a) part of the cause of action arose outside Victoria – if a material part of it arose in Victoria; or
> (b) the whole cause of action arose outside Victoria – if the defendant resided within Victoria at the time of being served with the complaint."

20. As Gleeson CJ noted in *Falls Creek Ski Lifts v Yee*:[6]

> "Historically, there was a substantial difference between the territorial basis of the jurisdiction of a superior court, on the one hand, and that of an inferior court, on the other. That difference is reflected to this day in the differences in the statutes governing the jurisdiction of the Supreme Court and the District Court of New South Wales."

21. The same applies in Victoria. The jurisdiction of the Magistrates' Court is that defined by the Act, it is, by definition, the Magistrates' Court of Victoria. It will usually be limited territorially to matters involving residents of this State or to causes of action arising within its jurisdiction. Section 100(4) extends the Court's territorial jurisdiction subject to compliance with its terms.

22. Section 100(4) has its genesis in s36 of the *County Court Act* 1958 (Vic) which provided:

> "The court shall have power to hear and determine every action in respect of which jurisdiction is conferred upon it by this or any other Act, notwithstanding that part of the cause of action arose outside Victoria, provided that a material part of the cause of action arose within Victoria, and shall have power to hear and determine every such action notwithstanding that the whole cause of action arose outside Victoria, provided that the defendant resided within Victoria at the time of the service of the summons upon such defendant."

23. In *Falls Creek Ski Lifts*,[7] Gleeson CJ said the following in respect of this provision:

> "In the provisions of s36 of the *County Court Act* 1958 (Vic) and s47 of the *District Court Act* 1973, there are to be found the familiar concepts. If a defendant resides within the locality (now, the State) he or she may be sued by process issuing out of the court, regardless of where the cause of action arose. What has changed is that the whole State has become a 'district'. Alternatively, the basis of jurisdiction is that the cause of action arose within the State, either in whole, or at least in material part."

His Honour then went on to say:

> "The language of the statute, and the historical background, show that provisions such as s44 and s47 of the *District Court Act* 1973 are intended to mark out the ambit of the District Court's jurisdiction. To the extent to which the language of s47 operates, it extends the jurisdiction of the present District Court beyond that of the previous district courts, but it also defines the limit of that jurisdiction. The District Court has no jurisdiction other than that conferred upon it by statute, either expressly or by implication: *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23. The evident purpose of s47 is to state the territorial limits of the jurisdiction of the District Court; a matter which, historically, has been regarded as of central importance in legislation establishing inferior courts. In that respect s47 is a limiting provision of the kind referred to in *Ex parte Iskra* (1963) 63 SR (NSW) 538 at 543; 80 WN (NSW) 923 at 928."

24. Section 101(4) marks out the ambit of the Magistrates' Court jurisdiction. It extends and defines the limits of its jurisdiction. The wording of s100(4), by implication, assumes that the court does not have jurisdiction in relation to extra territorial claims absent satisfaction of either sub-s(a) or sub-s(b) of s100(4).

25. Accordingly, for an extra territorial cause of action to be within the jurisdiction of the Magistrates' Court, two alternative matters must be established –

> (a) The residence of the defendant within Victoria at the time of service of the complaint.

That can be put to one side in this case.

> (b) A material part of the cause of action must arise in Victoria.

A material part of a cause of action refers to any one or more of the essential elements of the claim which would entitle a plaintiff to recover a verdict.[8] It is only on this basis that Klein could have persuaded the Magistrate that the Court had jurisdiction to hear the claim.

26. In my previous reasons, I set out what were undisputed matters before the Magistrate. I repeat them:

> (a) The lease of the premises entered into between the Shire and Klein was executed in Western Australia.
>
> (b) The goods were, at all relevant times, located in Western Australia.
>
> (c) The cause of action ultimately claimed by Klein (i.e. detinue and/or conversion) could only have arisen in Western Australia.
>
> (d) The Shire was a Western Australian entity.
>
> (e) The invoice apparently delivered by Klein to the Shire related to the goods which were still in Western Australia.
>
> (f) The goods continued to be held in Western Australia.

27. The Shire contended that the terms of s 100(4) had not been satisfied and sought, pursuant to s101(1), to stay the proceeding or to have it struck out.

28. At the time that the Magistrate determined the question of jurisdiction, the claim was pleaded in a strange way. Klein had issued an invoice to the Shire in relation to the goods which had been seized by the Shire. The invoice was an artifice. The only contract between the Shire and Klein was the lease of the Carnarvon premises. Certainly, there was never any arrangement between the Shire as to the supply of goods by Klein to the Shire. The case was patently one in detinue or for conversion of Klein's goods by the Shire, assuming it was established that the goods were unlawfully retained or handled by the Shire. This was the case that was run in May 2006.

29. The solicitor for the Shire, Mr Alex Di Blasi's account of the Magistrate's reasons for the jurisdictional decision are:

> "(a) His Honour considered that the application should be regarded as one pursuant to Section 20 of the *Service and Execution of Process Act*, 1992 (Cwth), rather than pursuant to Section 101 of the *Magistrates' Court Act* 1989 (Vic); and
>
> (b) His Honour took the view that the discretion relating to the possible stay of the proceeding in Victoria should not be invoked because there were only two relevant witnesses to the matters in issue, one in each State, and the appellant had greater financial capacity to travel interstate than the respondent."[9]

30. If the Magistrate did consider that the application was not appropriate under s101 of the Act, then he was, in my view, mistaken. The Shire's argument was that the proceeding was wholly beyond the jurisdiction of the Court. The first question was whether the Court's jurisdiction was engaged. Then, and only then, the question of a stay should have been considered.

31. Klein could only bring the claim if a material part arose in Victoria. The cause of action, which was clearly one in detinue and conversion no matter how it was pleaded, arose in Western Australia in respect of goods located in Western Australia and in respect of actions undertaken by a Western Australian resident. Even if the issue of the invoice occurred in Victoria, it did not, of itself, constitute any part of the claim by Klein against the Shire. There was no territorial nexus to the claim. No essential element of it arose in Victoria and therefore s100(4) was not engaged. The Magistrates' Court is a creature of statute and did not have jurisdiction over this claim unless one or other of the provisions of s100(4) were satisfied. They were not.

32. The Magistrate should have concluded that s100(4) of the Act was not satisfied so as to give the Magistrates' Court jurisdiction over the claim.

Is the May decision a nullity and, if so, what are the consequences?

33. The apex of the Shire's argument is that the Magistrates' Court at all times lacked jurisdiction and therefore that proceeding was a nullity and any orders made by the Court were null and void. Indeed, it contended that it did not need to satisfy the special circumstances provisions of r56.01 as once it was determined that the proceeding was a nullity, then that was the end of the matter once the point was agitated.

34. The Shire relied in particular on what was said by Lord Denning in *MacFoy v United Africa Co Ltd*:[10]

> "The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have a court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

35. In this country it is now clear that it is not sufficient to simply assert that there is a lack of jurisdiction and do no more. The contention that there is a lack of jurisdiction is a matter which must be undertaken in the context of the relevant procedural law, notwithstanding that the cause of action may be a nullity or invalid. As the High Court recently said:

> "In the adversarial system of justice, choice rests primarily with the parties and it is generally the case that the court's power of decision or order is exercised upon the application of a party. Generally there is, in law, no restriction upon a person's right to start an action and to carry it to the point at which a choice is cast upon the defendant to make some response in order to avoid judgment in default. Once the procedural law has been engaged, all parties to the litigation are subject to it. None of the above denies the possibility of a defendant denying the plaintiff's right to invoke the jurisdiction of the court, for example where the plaintiff's right is conditional upon there being an action cognisable within that jurisdiction. *However, the material point is that that denial must be made within the structure of the relevantly engaged procedural law, and not outside it. Accordingly, the defendant may challenge at an interlocutory level the strength of the plaintiff's alleged case by seeking to have a plaintiff's action struck out for failure to disclose a reasonable cause of action, or dismissed as incompetent.* Alternatively, the defendant may have recourse to judicial review by a superior court, challenging the right of an inferior court to adjudicate the plaintiff's claim and seeking orders to prevent the inferior court continuing to hear the claim. However, the invocation of jurisdiction ordinarily enlivens the authority of the court in question at least in the first instance to decide whether it has jurisdiction."[11] (Emphasis added).

36. The Shire's contention that it need do no more than agitate the question should be rejected. It is required to take appropriate procedural steps to demonstrate that Klein's claim is incompetent by reason of its failure to establish that the claim is within the territorial jurisdiction of the Magistrates' Court as extended by s100(4) of the *Magistrates' Court Act*.[12] It has now sought to do so by seeking judicial review. This means that, because it is well out of time, it must satisfy the "special circumstances" test laid down by r56.01 and, if satisfied, then demonstrate it is entitled to the relief it seeks. Naturally, the issue of the lack of the jurisdiction of the Magistrates' Court is significant in determining whether that test is met.

Special circumstances pursuant to r56.02(3)

37. Rule 56.02(3) requires a party out of time seeking judicial review to demonstrate "special circumstances".

38. In *Lednar & Ors v The Magistrates' Court & Anor*,[13] Gillard J said as follows of the test of "special circumstances":

> "The court does have a discretion which it may exercise where special circumstances are established and what constitutes special circumstances in any particular case will depend upon the circumstances of the case. It is not appropriate to attempt to fetter the jurisdiction by seeking to define what are "special circumstances". In my opinion the chances of the plaintiff being successful in the application, the injustice to a plaintiff if the decision or order is allowed to stand, prejudice to the other party and difficulties concerning legal aid in my view are relevant factors to whether or not there are special circumstances. They have to be weighed and the court has to then determine whether in totality they constitute special circumstances."

39. Recently, in *Mann v Medical Practitioners Board of Victoria & Anor*,[14] the Court of Appeal considered the question of special circumstance in the context of O56. The Court referred to what was said by Lopes LJ in *Re Norman*.[15] In that case, it was said that such words are "wide, comprehensive and flexible words and I think that the legislature intended them to be so, and that no court can or ought to lay down any exhaustive definition of them".

40. Hansen AJA (with whom Chernov and Nettle JJA agreed) referred to, with apparent approval, what was said by the Judge at first instance:

> "First, while every case is special to the litigant concerned, the rule requires the Court to be objectively satisfied that special circumstances exist. Secondly, the existence of special circumstances is to be determined by reference to all the circumstances of a case. It is a question of characterising those circumstances. Thirdly, the rule does not limit the circumstances to those connected with reasons for delay. Fourthly, the existence of a manifest or strongly arguable case of administrative or legal error may be a relevant consideration. *Thus a manifest excess of jurisdiction might in some cases amount to special circumstances*. As to this however, he acknowledged that an error in a decision did not automatically result in special circumstances for if it did there would be little point to the 60 day time limit in the rule. In that regard he referred to *Denysenko v Dessau* where Beach J refused an application for judicial review of a Magistrate's decision holding that the fact that the decision "was demonstrably wrong cannot constitute a special circumstance within the meaning of the rule". His Honour said that he would not go as far as Beach J in discounting the existence of an apparent error of law as a potentially relevant consideration."[16] (Emphasis added.)

41. The Shire contends that the overwhelming consideration is that the Magistrates' Court had no jurisdiction over the claim; it was never enlivened and, notwithstanding its own dilatory and inconsistent behaviour, this is the paramount factor that should influence the Court in concluding that there are special circumstances. It says that it has paid all orders for costs although it has not returned the goods or paid the amount ordered by the Magistrate on the claim. It says that there is no true prejudice to Klein.

42. Klein contends that, where a deliberate decision was made to permit a limitation period to expire, that is a significant matter to be taken into account in determining whether the circumstances can be classified as special. In *Itek Graphix Pty Ltd v Elliott*, a limitation of actions case, the New South Wales Court of Appeal considered that a deliberate decision to allow a statutory limitation period to expire was a powerful factor militating against the grant of leave.[17]

43. In addition to this assertion, Klein relied upon the following matters as establishing prejudice:

> (a) The costs associated with interlocutory matters and the trial subsequent to the jurisdictional decision.
> Such costs have now been paid by the Shire.
> (b) The costs incurred by Klein in attempting to enforce the order of the Magistrate.
> (c) The need to commence and conduct further proceedings in Western Australia.
> (d) The fact that a third party has now seized the goods and that some have been lost and some have been sold.
> (e) The inability of Klein to rely upon "consent orders" entered into on 28 August 2007.

44. Given the emphasis placed by Klein upon the August orders, it is convenient to deal with that issue at the outset. Those orders provided:

> "1. The application (filed 3 August 2007) be dismissed.
> 2. The Applicant pay the Respondent's costs fixed at $638.00 (stay one month).
> 3. The order of Her Honour Magistrate Hawkins dated 31 May 2007 (paragraph 1) be varied so that the:
> (a) BENQ computers screens
> (b) ADI microscan computers
> (c) Olympic towers
> be retained by the Applicant pending the outcome of any complaint issued by the Applicant (within 30 days) in respect of a proposed collateral action to set aside the judgment.
> 4. If a complaint is not issued by 20 September 2007 the goods referred to in paragraph 3 be returned to the Respondent within 14 days".

45. On the face of it, the hearing before the Magistrate on 28 August 2007 to set aside the

judgment consequential upon the May decision has little, if any, relevance to the determination of this application. However, Mr Foster, who appeared for Klein both before the Magistrate on that occasion and before me, contended that the orders made by Her Honour were relevant to the disposition of this application. His argument was that the order was made by consent and required the Shire to return a number of the disputed goods to Klein. In fact, the goods have never been returned, notwithstanding the order. This was said to be relevant to the issue of prejudice, as well as demonstrating the inconsistent behaviour of the Shire.

46. The parties disagreed vehemently as to whether the order was made by consent. The Shire contended that the orders, which were drawn up and signed by counsel and filed with the court, were simply the embodiment of the findings made by the Magistrate; further, there was no indication on the face of that document that the orders were made by consent. Klein contended that the orders were drawn up after a series of negotiations between counsel as to their terms and should be treated as consent orders.

47. As the dispute turned upon whether there was an agreement between the parties in relation to the entry of consent orders, I permitted limited evidence to be given by both sides. This exercise was complicated by the fact that Mr Foster, who appeared for Klein, had also appeared at the hearing and did not give evidence about his discussions with counsel for the Shire or its solicitors. Notwithstanding this, Mr Klein and Mr Di Blasi gave evidence as to what occurred in the Magistrates' Court.

48. In my view, whether the orders were made by consent or otherwise is not of great significance in the determination of this application. Nevertheless, given the emphasis placed upon it by Klein, I have reached the following conclusions. I am not satisfied that the order was, in fact, a consent order. It is not said to be a consent order on its face. The orders were drawn up after a hearing and reasons given by the Magistrate and subsequent to a direction by the Magistrate that counsel work out the orders to give effect to her findings, as is often the case. I accept Mr Di Blasi's evidence, which was based upon notes made by him at the time, that there was no question of the orders being consensual but simply a working through of the Magistrate's findings to facilitate the final orders. I accept that this was the case notwithstanding that several phone calls were made by him to the principal of his firm in relation to the form of the orders. Moreover, one would have expected, if the orders were truly the embodiment of an agreement between the parties, that some form of terms would have been entered into by the parties – none were produced or suggested. The evidence of Mr Klein was not particularly illuminating in relation to the question of whether the orders were made by consent or otherwise.

49. In summary, I am not persuaded that the orders were made by consent; rather, the orders are what they appear to be – orders made by the Magistrate consequent upon the hearing of the application.

50. Turning to the other matters raised by Klein, the fact that the proceeding would have to be conducted in Western Australia is irrelevant as that is where the hearing should have taken place. Similarly, what has transpired in respect of the seizure of some of the goods by a third party in respect of a discrete and separate claim against Klein in Western Australia is of little weight. The two primary issues are those of the unnecessary costs incurred by Klein and the conduct of the Shire.

51. Klein has every right to complain about the way in which the Shire has behaved. It is abundantly clear that the Shire should have instituted proceedings to review the jurisdictional decision after it was delivered. It chose not to and then elected to fight the case on its merits. This is patently a case of, to use the vernacular "a second bite of the cherry", having lost on the first issue. The question of costs is, of course, relevant, but can be resolved in the resolution of the exercise of the Court's discretion. Notwithstanding legitimate concerns as to its conduct, I am not persuaded that the behaviour of the Shire constitutes prejudice in a real sense; rather, it seems to me to be relevant to whether a final order ought to be made and, if so, on which terms.

52. Ultimately, I am persuaded that the fundamental jurisdictional error (in the sense of the Court having no power to hear the claim) amounts to special circumstances and, subject to what follows, it is just and reasonable to extend the time in which to issue the proceeding under O56.

Certiorari will run, but on conditions

53. I have already concluded that the Magistrate was in error in not dismissing Klein's complaint as he was required to.

54. However, relief in the form of *certiorari* is, by its nature, a form of discretionary relief and a Court is entitled to take into account the circumstances surrounding the impugned decision before making such an order, as was pointed out. In *Mann v Medical Practitioners Board of Victoria*,[18] Nettle JA said:

> "That said, however, prerogative relief in the nature of prohibition or *certiorari* does not lie as of right — it is discretionary — and the considerations which are relevant to the exercise of that discretion include the utility of the relief which is sought and the conduct of the applicant, as well as the public interest that there should be an end to litigation. As Ryan J put it in *Shell's Self Service Pty Ltd v Deputy Federal Commissioner of Taxation*:
>
> > 'Those authorities which include *Ex parte Frankel* [1914] VicLawRp 92; [1914] VLR 635; 20 ALR 326; 36 ALT 72 and *R v Aston University Senate* [1969] 2 QB 538; [1969] 2 All ER 964 serve as a useful reminder that this Court should not automatically quash or set aside a decision upon finding that it has been vitiated by error of law. *It is also necessary to have regard to the conduct of the applicant for review including any delay in bringing the proceedings or acquiescence in the decision maker's error*. As well it may be appropriate to examine whether, on further consideration, the decision maker could reasonably come to some other decision more favourable the applicant for review'." (Emphasis added).

55. Counsel for Klein contended that notwithstanding any asserted error by the Magistrate being established, then the Court should not, in the exercise of its discretion, grant such relief. He relied in particular upon a decision of McInerney J in *R v Magistrates' Court at Lilydale Ex Parte Ciccone*.[19] In that case, his Honour concluded that the conduct of a Magistrate may have led to apprehended bias. However, he refused to grant *certiorari* as the party asserting such bias, with knowledge of the facts entitling him to object to the continuance of the proceeding, did not object but took an active part in the proceeding and contested the merits of the case up until judgment. His Honour concluded as follows:

> "I think the ultimate question is whether on the whole of the facts the applicant is entitled to *certiorari* and I think this is particularly true where the challenge to the order is based on an allegation of a denial of natural justice. *In such a situation the Court might well look to the overall question of the justice of the whole situation*. It is also true that in a case such as this, where the error does not appear on the face of the record and what is relied on is an alleged denial of natural justice, the issue of the writ of *certiorari* is discretionary, *and the conduct of the applicant after he has acquired knowledge of the vitiating facts may be taken into account*.
>
> Looking at all the circumstances, I think that even if the evidence does not establish a case of 'lying by' or 'nursing a point' (and I think it does not), it would be wrong to allow the applicant – his advisers having chosen to go on with the hearing up to judgment, before the magistrate – to raise this point now. *I do not think they should be allowed thus to eat their cake and have it, to approbate and reprobate*. In the circumstances, I think that the applicant is not now entitled to ask this Court to quash the order." (Emphasis added).[20]

56. The question of approbation and reprobation on the part of the Shire is highly significant. As I have said, it has at all relevant times been aware of its argument concerning jurisdiction and although there is no evidence that it actually considered judicial review of the jurisdictional decision, clearly this was an option open to it which it failed to take up until a point of time over 12 months after that decision. The facts in this case, however, can be distinguished from those considered in *R v Lilydale Magistrates Court*. Importantly, it is here a question of a patent lack of power over the claim, not that of awareness of the conduct of a judicial officer which amounted to a breach of natural justice. This, to my mind, is the predominant distinguishing factor.

57. Klein also contended, on the authority of *Kuek v Victoria Legal Aid*,[21] that absent exceptional circumstances an application under O56 should not be permitted where an appeal under s109 of the Act should have been initiated. I do not accept this submission for a number of reasons. A s109 appeal applies only to a "final" decision; the jurisdictional decision was not such a decision. Whilst it may have been open to the Shire on a s109 appeal brought against the May decision within time to raise the question of jurisdiction in an attack on that decision, I do not stay to

consider this as the question here is one of fundamental jurisdictional error. This is, I think, the type of case that Phillips JA had in mind when he postulated the "exceptional circumstances" test in *Kuek*.[22] A clear lack of jurisdiction over the claim, I think, falls within that proviso.

58. The evidence of prejudice is, as I have said, not sufficiently persuasive, apart from the financial considerations in terms of orders for costs which I now turn to.

59. In my view, it would be quite unjust to require Klein to repay any of the amounts it has been paid in respect of costs pursuant to orders made in the Magistrates' Court and relevant to the complaint since the jurisdictional decision. The Shire did not persist with the point after the jurisdictional decision, nor had it put Klein on notice that the issue remained alive. To the contrary, the Shire made it clear that the issue then became one of a fight on the merits of the case and it proceeded on that basis. Having lost, it then belatedly sought to impugn the jurisdictional decision.

60. Accordingly, orders quashing the jurisdictional decision and necessarily the May decision will be made, but only on the basis of an undertaking being given by the Shire that it will not seek recovery of any sums paid pursuant to costs orders made in favour of Klein in the Magistrates' Court on and after 18 October 2006.

Conclusion

61. If the Shire is prepared to give the undertaking I have identified, then the Court will make the following orders:

(a) That the orders of the Magistrates' Court on 18 October 2006 and 31 May 2007 be quashed.

(b) That the matter be remitted to the Magistrates' Court to be dealt with according to law.

62 I will determine the final orders after hearing submissions from counsel.

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[1] [2008] VSC 24.
[2] [2008] VSC 24 [4] – [18].
[3] Affidavit of Mr Di Blasi 29 November 2007 [17] and AD10, the certified extract of the order.
[4] [2008] VSC 24 [36] – [38].
[5] Affidavit of Mr Di Blasi 23 January 2008 [29].
[6] (1995) 37 NSWLR 344, 348.
[7] (1995) 37 NSWLR 344, 349.
[8] See *Distillers Co (Bio-chemicals) Limited v Thompson* [1971] 1 NSWLR 83; [1971] AC 458; [1971] 1 All ER 694; [1971] 2 WLR 441, *Thomas v Penna & Ors* (1985) 2 NSWLR 171.
[9] Affidavit of Mr Di Blasi 23 January 2008 [10]. No contrary version was provided or suggested by Klein.
[10] [1961] 3 All ER 1169, 1172.
[11] *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364 [15], [16]; (2006) 228 ALR 387; (2006) 80 ALJR 1214.
[12] As the jurisdictional decision was not a final order, no right of appeal was open to it under s109 of the *Magistrates' Court Act*.
[13] [2000] VSC 549 [143]; (2000) 117 A Crim R 396.
[14] [2004] VSCA 148; (2004) 21 VAR 429.
[15] (1886) 16 QBD 673.
[16] [2004] VSCA 148 [69]; see also [67] - [71]; (2004) 21 VAR 429.
[17] [2002] NSWCA 104 [91] – [98]; (2002) 54 NSWLR 207.
[18] [2004] VSCA 148 [17]; (2004) 21 VAR 429.
[19] [1973] VicRp 10; [1973] VR 122.
[20] [1973] VicRp 10; [1973] VR 122, 135. See also 134.
[21] [2001] VSCA 80; (2001) 3 VR 289 [17].
[22] See also *DPP (Victoria) v Verigos & Magistrates' Court of Victoria* [2004] VSC 97 [37] – [40].

APPEARANCES: For the plaintiff Shire of Carnarvon: Mr A Sandbach, counsel. AJH Lawyers, solicitors. For the defendant Klein Corporation Pty Ltd: Mr J Foster, counsel. DKP International Lawyers Pty Ltd.
