48/92

SUPREME COURT OF VICTORIA

CITY OF WARRAGUL v KAVALEE

Hayne J

26 November 1992

PROCEDURE – CIVIL PROCEEDING – ADJOURNMENT OF – PLAINTIFF AWARE OF DEFENCE – INTERLOCUTORY STEPS COMPLETED – APPLICATION BY PLAINTIFF FOR ADJOURNMENT TO FURTHER PREPARE CASE – APPLICATION REFUSED – WHETHER APPROPRIATE.

Where, in a civil proceeding, a plaintiff was well aware of the defendant's defence, interlocutory steps had been completed and sufficient notice given by the defendant of an intention to call expert evidence, a magistrate was not in error in refusing the plaintiff's application for an adjournment to further prepare its case.

HAYNE J: **[1]** On 11 January 1991, a motor car owned by the City of Warragul was struck from the rear by a vehicle driven by Joseph Kavalee, referred to in these proceedings as Joseph Kavalee. The City began a proceeding in the Magistrates' Court at Broadmeadows, claiming damages for the property damage it suffered as a result of that collision. That proceeding came on for a pre-hearing conference before a magistrate on 11 February 1992. At that hearing the defendant said, through his solicitor, that he would seek to rely on certain records from the Western General Hospital to support the defendant's contention that he had suffered a blackout while driving his motor vehicle and that it was while he was unconscious that the collision had occurred.

In the course of the pre-hearing conference, the plaintiff applied for an order that the defendant make discovery of documents, and that order was granted. The plaintiff also sought an order that the defendant submit to a medical examination, but no such order was made, it being said in the affidavit filed on behalf of the plaintiff in the present proceeding, that "it was agreed that the matter be left between the parties to arrange a medical examination." On 18 February 1992, a week after the pre-hearing conference, the plaintiff's solicitors wrote to the solicitor for the defendant asking the defendant to attend a medical examination. It is said that the defendant refused. On 5 March 1992 the plaintiff's solicitors wrote to the defendant asserting that the discovery that had been **[2]** made was inadequate because the discovery did not make satisfactory disclosure of all relevant medical records. The day before this letter, the defendant's solicitors had indicated that they reserved their rights to seek an adjournment for other, now extraneous, reasons. Also on 5 March 1992, the defendant gave to the plaintiff notice that he intended to rely upon the expert evidence of a Dr Leung. This was the first notice of intention to rely upon the evidence of that particular doctor, but from as early as July 1991 the defendant had made plain to the then representatives of the plaintiff that it would contend, in answer to any proceedings instituted by the plaintiff, that the accident had happened at a time when the defendant was unconscious, and that the accident had occurred without any negligence on the part of the defendant because he had had no prior warning of the unconsciousness that overcame him.

The proceeding came on for hearing on 18 March 1992. Thus the notice of intention to rely on expert evidence that the defendant had given the plaintiff was given within the time prescribed by the rules of the Magistrates' Court. Upon the matter being called on for hearing, counsel for the plaintiff applied for an adjournment of the hearing, alleging that the defendant had not made sufficient discovery and asserting that it was necessary to have the defendant medically examined in order that the plaintiff might present its case properly. The Magistrate refused that adjournment, and the only description that is given in the material in the proceeding of the reasons given by the Magistrate for that refusal is that **[3]** deposed to by the defendant, Joseph Kavalee, who says,

> "The magistrate exercised his discretion and refused to grant the adjournment and stated that I had complied with the discovery and the filing of a statement of expert evidence, and that no prejudice arose to the plaintiff."

It is of course clear that Mr Kavalee does not purport to give a verbatim account of the reasons given by the Magistrate for refusing the adjournment, and I think it can safely be inferred that Mr Kavalee gives no more than his summary of what he understood to be the principal points made by the Magistrate in the course of the giving of reasons refusing the adjournment. The hearing of the matter proceeded on 18 March and again on 19 March. The Magistrate reserved his decision and judgment was given on 26 March dismissing the plaintiff City's complaint, with costs. The plaintiff instituted an appeal under s109 of the *Magistrates' Court Act*, and on 25 June 1992 a Master made an order of the kind required by the rules setting out the points of law that were said to be raised on the appeal. At the initial hearing of the application made under rule 58.06, in connection with the proposed appeal, it appears that the Master indicated that there may be some doubt about whether any appeal lay under s109, where the complaint was a complaint founded upon the refusal of an adjournment. Accordingly, on 15 May 1992, the City of Warragul instituted proceedings by originating motion seeking relief in the nature of judicial review.

On the appeal and the originating motion being called on for hearing before me, counsel for the City **[4]** indicated that the appeal was abandoned and that it was the proceeding by way of judicial review that would be prosecuted. I therefore say no more of the appeal which must be dismissed. Since the Court, whose decision was sought to be reviewed, was not named as a party in the proceeding for judicial review and had not been served with the papers, it was necessary to add the Court and adjourn the hearing while service of the papers was made upon it. On the adjourned hearing of the originating motion the Court appeared by its solicitor to submit to jurisdiction and to submit to such order as this Court might make.

By the originating motion the City sought a declaration that the determination of the Magistrates' Court ordering that the plaintiff's claim be dismissed with costs was made without jurisdiction and was invalid, and sought also orders setting aside the Magistrates' Court order and remitting the matter to the Magistrates' Court for re-hearing. The grounds upon which that relief was sought were stated in the form of a short pleading, but the operative part of those grounds was:

> "on the facts found by the Court, [the Magistrates' Court] the Court acted beyond its powers given by the *Magistrates' Court Act* 1989 in that the determination:
>
> (a) was wrong in law;
>
> (b) was beyond the power of the Magistrates' Court;
>
> (c) was *ultra vires*;
>
> (d) was a denial of natural justice."

Now although the originating motion alleged that the order of which complaint was made was the order dismissing the complaint with costs, the principal debate before me focused upon the decision of the Magistrate to refuse the **[5]** adjournment. It may be, that properly characterised, the decision which in fact the City seeks to review is the decision to refuse the adjournment, rather than the final order made in the proceeding, and that may present nice questions of whether judicial review is available in those circumstances. However, I do not think it necessary to pause to examine whether the characterisation that I have just described is right, or if it is, what consequences would flow from such a conclusion. It is enough for present purposes to focus upon the principal point sought to be made on behalf of the plaintiff which was that the decision to refuse the adjournment was wrong, and that that refusal of the adjournment led to the City of Warragul being denied natural justice in the proceeding before the Magistrate.

It was submitted on behalf of the City that the decision to refuse the adjournment was wrong because the Magistrate took into account irrelevant considerations and failed to take into account relevant matters. Given the very brief account that is available of the reasons given by the Magistrate for his decision that the adjournment should be refused, the applicant City faces a very substantial hurdle in showing that irrelevant matters were taken into account or that there was a failure to take account of relevant matters. In the end it may be that the City could fall back only on saying, in effect, that no reasonable Magistrate properly instructed could have arrived at the conclusion that was reached in this matter.

The principles which govern the judicial discretion to adjourn a case and the attitude of appellate or supervisory Courts to the review of an exercise are to be **[6]** found conveniently in two decisions of Kaye J, in *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234, and *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, as well also as the unreported decision of Fullagar J given on 24 January 1991 in *Bullmore v Zurich Australian Life Insurance Ltd*. It is clear, I think, from those decisions, that the question whether to accede to or refuse an application for adjournment of a hearing is a matter within the discretion of the Magistrate to whom the trial of the proceeding is committed. Equally, it is clear that an appellate Court will rarely interfere with a trial judge's exercise of discretion upon such an application. [See *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701 at 703, per Wilson J; *Maxwell v Keun* (1928) 1 KB 645 at 653 per Atkin LJ; [1927] All ER 335.]. It is clear, however, that if the result of refusal to grant an adjournment may be to prevent the party seeking it, from presenting his case or defence in circumstances where that result could constitute an injustice an appellate Court may interfere with the trial judge's discretion. I leave to one side whether some different and narrower test should be applied when the proceeding is by way of judicial review, for it seems to me that on judicial review no wider test could be applied were appeal open.

Here, it is apparent from the laconic description given in the affidavit of Mr Kavalee as well also from the description given of the argument that preceded the decision of the Magistrate, that it was open to the Magistrate to say that the plaintiff was in the position of seeking an adjournment because it had not taken steps sufficiently early to get itself ready for trial. Even if **[7]** that were not so, in my view it is clear that it was open to the Magistrate to conclude firstly that sufficient discovery had been made by the defendant, secondly that due and sufficient notice had been given by the defendant of its intention to call expert evidence (for after all notice had been given within the time prescribed by the rules for that purpose) and that in circumstances where it had been apparent for well nigh 12 months that the issue of the medical condition of the defendant at the time of the accident was a live one, that in those circumstances the plaintiff should not be entitled to adjournment and that the proceeding should go on. Refusing the adjournment would not, and in my view did not, prevent the party seeking adjournment from presenting his case or defence. The position that the plaintiff found itself in, if it was embarrassed in the conduct of the trial, was a position that it found itself in, not by reason of the refusal to grant an adjournment, but by reason of its own conduct.

The City submitted that it was implicit in the Magistrate's findings in connection with the application for adjournment that the Magistrate had pre-judged the merits of the evidence which the plaintiff said it wanted the adjournment to gather. It is enough for me to say that I do not read the description of the reasons that is given as mounting to any pre-judgment by the Magistrate on those matters. All that is said there is that the defendant had complied with discovery and the filing of a statement of expert evidence, and that no prejudice arose to the plaintiff, by which I understand the Magistrate to be saying that there was no prejudice to the plaintiff **[8]** occasioned by the matters of which the plaintiff complained, namely deficiencies of discovery or provision of expert evidence.

In my view it is not shown that there was any error of principle by the Magistrate in his determination of the application for adjournment. It is not shown that he took into account irrelevant matters, or that he failed to take account of relevant matters. It is not shown that no reasonable Magistrate could have reached the conclusion that an adjournment should be refused.

That being so, I am of the view that the principal ground advanced on behalf of the applicant fails and that it is accordingly unnecessary to reach any conclusion upon the several points made on behalf of the defendant concerning the availability of judicial review in this particular case. In my opinion the appeal and the notice of motion should both be dismissed.
