55/08; [2008] VSC 559

SUPREME COURT OF VICTORIA

SLEIMAN v MELTON CITY COUNCIL

Hansen J

4 December 2008

INFRINGEMENT OFFENCE – FAILURE TO COMPLY WITH A FIRE PREVENTION NOTICE ISSUED BY LOCAL COUNCIL – SUMMONS ADDRESSED TO OWNER/OCCUPIER – WHETHER SUCH SUMMONS IN THE NATURE OF A CHARGE – SUMMONS REQUIRED TO CONTAIN PRESCRIBED INFORMATION – WHETHER SUMMONS COMPLIED WITH THAT REQUIREMENT – OWNER/OCCUPIER FOUND GUILTY – WHETHER MAGISTRATE IN ERROR: *INFRINGEMENTS ACT* 2006, S40(1); *INFRINGEMENT (GENERAL) REGULATIONS* 2006, R13; *COUNTRY FIRE AUTHORITY* 1958, S41D.

1. In the present case the question of law raised on the appeal was whether the summons contained "all the essential elements of the offence." However, the procedure that the summons brought against the appellant was not brought by way of "charge" as provided for and described in the *Magistrates' Court Act* 1989. The charge was brought under and pursuant to the provisions of the *Infringements Act* 2006 ('Act') and is an entirely new manner and type of proceeding. In order to ascertain what must be stated in the summons, attention must be directed to s40(1) of the Act and the Regulations made thereunder.

2. Having regard to the matters stated in the summons, it was sufficient to satisfy the requirements of the Act and it was open to the Magistrate to find the offence proved.

HANSEN J:

1. This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989 from orders made in the Magistrates' Court at Sunshine on 26 February 2008 by which without conviction the appellant, who was the defendant below, was fined $500 and ordered to pay costs in the amount of $4,894 with a stay until 25 May 2008. As I understand it that stay has continued by order of a master.

2. The proceeding below was brought on summons by Melton City Council, as it was referred to in the summons, for an infringement offence committed by the appellant, namely the offence of failing to comply with a fire prevention notice served upon him pursuant to s41(1) of the *Country Fire Authority Act* 1958. Section 41(1) of the *Country Fire Authority Act* provides that, "the fire prevention officer of a municipal council may serve a fire prevention notice on the owner or occupier of land in the municipal district of that council … in respect of anything— (a) on that land … that by its nature, composition, condition or location constitutes or may constitute a danger to life or property from the threat of fire."

3. The notice, dated 30 October 2006 and signed by the municipal fire prevention officer for the Shire of Melton, was addressed to the appellant "being the owner or occupier of" 42 License Road, Diggers Rest to do the work specified below, which was to "cut all grass and undergrowth on whole of block to a height of not more than 8 centimetres including the fence lines and reservations/ nature strips." The notice required that all work be completed no later than 15 November 2006.

4. The appellant took the matter up with the Country Fire Authority which, by letter dated 30 November 2006, extended the time for completing the works specified in the notice to no later than 15 December 2006.

5. The case of the Melton City Council was that the appellant did not comply with the notice in that he did not complete the specified works. A failure to comply with a fire prevention notice is made an offence by s41D of the *Country Fire Authority Act* which provides that:

> "Subject to sections 41B and 41C, a person on whom a fire prevention notice has been served must comply with the notice."

6. So there is the legislative background in the sense that the subject case concerns a proceeding taken against the appellant by the local authority for the offence of failing to comply with a fire prevention notice served upon him. The appellant appeared for himself before the magistrate and the orders that I have referred to were made following a hearing that ran over two days. It is apparent that the appellant put a range of points to the magistrate who nevertheless concluded that the offence was established.

7. The appellant filed a notice of appeal which set out three questions of law. The first question was in the following terms: "The magistrate erred in law in failing to hold the summons which purported to issue pursuant to section 40(1) of the *Infringements Act* 2006 was invalid or failed to comply with the *Infringements Act* 2006, the summons having failed to allege all the essential elements of the offence and having failed to provide the necessary prescribed information pursuant to section 40(1) of the *Infringements Act* 2006."

8. The notice contained two further questions of law. It is not necessary to set them out. That is because on 20 May 2008 a master ruled that the questions of law numbered 2 and 3 in the notice of appeal did not constitute questions of law and that the appeal be allowed to proceed only in relation to question 1. I should say that I agree with the master's conclusion that, as formulated, questions 2 and 3 did not raise questions of law.

9. I was told that on a subsequent occasion when the matter was before the Listing Master the appellant sought to amend the questions, but the master refused to allow the amendment that was suggested. There is no affidavit material as to what was then sought and what the master said, but I was told that the appellant sought to raise the point that the council was incorrectly named in the summons, it being referred to as Melton City Council rather than Melton Shire Council in accordance with s5A(c) of the *Local Government Act* 1989. I was told that this particular point was not raised before the magistrate. If it had been it must surely have been the case that the appropriate amendment would have been made. It was a point of utter technicality and entirely lacking in merit, and it is not surprising that the master refused to permit the amendment. After discussion, when it was raised with me again this morning, counsel for the appellant withdrew reliance on the point.

10. I should say too that much of the time taken on the hearing today, indeed by far the greater part, was taken up by counsel for the appellant seeking to identify further grounds which might be appropriate to allow by amendment to the notice of appeal. It is unnecessary to set these out, there were seven or so; each came to nothing. The transcript of the hearing is a sufficient record of what was suggested and what was discussed and of the reasons why I refused to allow any amendment. In most cases I think it is fair to say that at the end of discussion counsel did not press the matter. In some instances I indicated that I would not allow the amendment for the essential reason that there was no utility in what was proposed. None of the amendments could have advantaged the appellant.

11. In the end then there is but one question of law raised on the appeal and as will be apparent it concerns the sufficiency of the summons in the sense of whether, as stated in the question, it does or does not contain "all the essential elements of the offence." It is important to understand at the outset that the procedure that the summons brought against the appellant was not brought by way of "charge" as provided for and described in the *Magistrates' Court Act* 1989[1], in particular s27(1) which prescribes that:

> "A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient."

12. Of course in some cases questions may arise as to whether or not a charge is defective because it has omitted an essential element of the offence charged and whether any gap may be cured by amendment or the provision of particulars, but that is not this case.

13. This case does not concern a charge brought on summons filed under the *Magistrates' Court Act* 1989 and which is by definition a charge as referred to in s27. Rather, the charge was brought under and pursuant to the provisions of the *Infringements Act* 2006. The provisions

of that Act operate in tandem, as it were, with the *Magistrates' Court Act* 1989 for s4(1) of the *Infringements Act* 2006 provides that the *Infringements Act* is to be read and construed as one with the *Magistrates' Court Act* 1989. It is further to be noted that s1(a) of the *Infringements Act* states that a main purpose of the Act is "to provide for a new framework for the issuing and serving of infringement notices for offences and the enforcement of infringement notices."

14. What one has in the *Infringements Act* is an entirely new manner and type of proceeding and in the case of a proceeding that is taken in accordance with that Act, it is that Act to which attention must be directed at least in the first instance. Plainly enough the intention is that a proceeding instituted under the *Infringements Act*, being dealt with in the Magistrates' Court, is amenable to such processes of that court as with appropriate adaptation and application may apply. Nevertheless, when it is said in the question in the notice of appeal that the Magistrate erred in failing to hold that the summons which was issued pursuant to s40(1) of the *Infringements Act* failed to allege all the essential elements of the offence, one does not move from a preconceived position, but rather, it is first necessary to direct attention to s40(1) to see what it is that the *Infringements Act* required be stated in the summons. It is to that Act with its new provisions that attention must be directed. Section 40(1) provides that:

> "If a person elects under this Part to have the matter of a lodgeable infringement offence heard and determined in the Court or an enforcement agency refers a matter in respect of a lodgeable infringement offence to the Court under this Part—
> (a) the enforcement agency must lodge with the Court the prescribed information in respect of—
> (i) the offender; and
> (ii) the infringement offence; and
> (iii) the enforcement agency; and
> (b) the prescribed information lodged under paragraph (a) is deemed to be a charge in relation to the offence in respect of which the infringement notice was served; and
> (c) the Court must—
> (i) allocate a time and place of the hearing of the offence; and
> (ii) return the hearing details referred to in subparagraph (i) to the enforcement agency for service on the person who was served with the infringement notice; and
> (d) at least 14 days prior to the hearing date, the enforcement agency must serve the details referred to in paragraphs (a) and (c)(i) on the person who was served with the infringement notice."

15. So the process here is that in the first instance information is to be lodged by the enforcement agency with the Magistrates' Court which allocates a time and place for the hearing and returns the details to the enforcement agency who is then able to serve the summons for an infringement offence upon the defendant. That is what has happened in this case. There is no issue that the Melton Shire Council, or Melton City Council as it is referred to in the summons, is an enforcement agency for this purpose.

16. The question then is what is the prescribed information referred to in s40(1)(a). This is stated in regulation 13 of the *Infringement (General) Regulations* 2006 made pursuant to the Act. Regulation 13 provides that:

> "For the purposes of section 40(1)(a) of the Act, the prescribed information that an enforcement agency must lodge with the Court is—
> (a) in respect of the offender, the offender's name and address; and
>
> (b) in respect of the infringement offence alleged to have been committed—
> (i) the date, approximate place and, if available, approximate time of the infringement offence; and
> (ii) the relevant provision of the Act or other instrument that creates the infringement offence; and
> (iii) a brief description of the infringement offence; and
>
> (c) in respect of the enforcement agency—
> (i) the name of the enforcement agency; and
> (ii) either the name of the issuing officer or the agency identifying reference of the issuing officer (if any)."

17. The question then is whether the summons which was served upon the appellant complied with the requirements of the Act and the regulations.

18. The summons set out the details of the charge against the defendant in the following way, namely "You did fail to comply with a fire prevention notice served upon you in relation to land

at 42 License Road, Diggers Rest". It then stated that the relevant law was a State Act being the *Country Fire Authority Act* 1958, s41D, that it was a summary offence being a lodgeable infringement offence, that the charge was lodged by Melton City Council with its address being given and the infringement details were that the date of the offence was 16 November 2006 and the place being 42 License Road, Diggers Rest. It was stated that no infringement notice was issued, and details were then set out of the date, time and place of hearing and it was duly issued and signed by the issuer on 26 June 2007.

19. It is submitted by counsel for the appellant that the summons did not contain all the essential elements of the offence as contended in the question of law by reason of the following matters, namely it did not state (a) whether the appellant was the owner or occupier of the land, (b) it did not state the date of issue or service of the fire prevention notice upon the defendant, (c) it did not state the manner in which compliance with the fire prevention notice was required, and (d) it did not allege the way or extent to which there had been non-compliance.

20. Now when these submissions were put and developed to the extent they were in argument, it was rather by way of assertion that these various matters were required to be stated by s40(1) of the *Infringements Act* and regulation 13. I think that was because the underlying approach of the appellant's submissions did not focus upon the fact that the relevant question is whether the information in the summons satisfied those requirements. Of course on the hearing the enforcement agency was required to establish that the defendant was the “owner or occupier” of the subject land, among other matters. But it does not necessarily follow that that was required to be stated in the summons so as to constitute it a proper “charge”. Rather, the issue is whether what was stated in the summons satisfied the requirements of the *Infringements Act* 2006.

21. It seems to me that if one considers the various requirements stated in s40(1) of the *Infringements Act* 2006 and regulation 13, that which was stated in the summons is in accordance with and satisfies those provisions. There is plainly satisfaction of the requirement to provide the offender's name and address, the relevant provisions of the Act that creates the offence, the name of the enforcement agency, and the relevant officer was identified by reference to his initials in the limited space provided. As to the date, approximate place and, if available, time of the infringement offence, the date of the offence is specified as 16 November 2006. It is true that the time for compliance was extended to 15 December 2006, but that is a matter that was discussed with counsel this morning.

22. All that I am concerned with at the moment is a matter of form and what is seen is that the date of the offence and the place is stated. All that is left out is an approximate time, but bearing in mind that what one is concerned with is a failure to comply with a requirement to complete fire prevention works by no later than a stipulated date, in my view what was stated was sufficient.

23. Then what is required lastly, is a brief description of the infringement offence. The offence in s41D is failure by a person on whom a fire prevention notice has been served to comply with the notice. The summons refers to s41D as the relevant law and briefly describes the offence as failure to comply with a fire prevention notice served upon the defendant in relation to land at 42 License Road, Diggers Rest. It seems to me that that is an ample and appropriate description of the offence. What is required is a brief description of the offence in order, doubtless, to bring it to the attention of the defendant so that he or she is aware of that with which he or she is charged. I would agree with counsel for the respondent that if there truly had been any omission in the sense of sufficiency it would have been readily cured by amendment if the point had been raised, there having been no prejudice to the defendant. It seems to me that the matter was perfectly plain and evident on its face.

24. As to the matters referred to, or relied upon, by counsel for the appellant, I would merely say the following. The first matter concerned the failure to state that the appellant was the owner or occupier of the subject land. As I have said, that status is a requirement of s41(1) of the *Country Fire Authority Act* 1958 but I do not consider that it was necessary for the purpose of giving a brief description of the infringement offence to state that in this case the appellant was the owner or occupier of the land. The offence under s41D(1) was constituted by a person on whom a fire prevention notice had been served not complying with the notice. That was how the offence was described.

25. As I have said, it was certainly a matter that was an issue to be established by evidence at the trial and on the evidence the magistrate was satisfied beyond reasonable doubt that the appellant was the owner or occupier for the purpose of complying with the notice. The present question however is whether what was stated in the summons was a brief description of the infringement offence, and I consider that it was.

26. The next suggested matter was that the date of issue or service of the fire prevention notice was not stated. Certainly the summons referred to service of the notice but it did not give a date of either that or of the issue. It seems to me that neither was an element in any common law sense of the offence but rather was, if anything, a matter for particulars. It was not necessary to state these details in order to provide a brief description of the infringement offence.

27. The third matter was a statement of the manner in which compliance was required. What was required, in my view, was stated in the notice and the offence that was described was failure to comply with that notice. I do not think that "a brief description of the infringement offence" directed a repetition of the requirements of the notice. Finally, it was said that there was no allegation of the manner or extent of non-compliance. It was said that the summons suggested a total failure to comply with the notice. I do not accept that that is so. The failure to comply may have been constituted by a greater or lesser failure to carry out the work that was required. I consider that the offence was properly described as being a failure to comply because if at the end of the day there was non-compliance in total, then that represented the fact. In any event I consider that what was stated was sufficient to satisfy the requirements of the *Infringements Act* 2006.

28. For these reasons, the appeal will be dismissed with costs including reserved costs.

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[1] Part 4, Division 2, Subdivision 1.

APPEARANCES: For the appellant Sleiman: Mr EJ Remer, counsel. JP Capsanis & Co, solicitors. For the respondent: Mr B Stafford, solicitor. Elliott Stafford & Associates, solicitors.
