2/92

SUPREME COURT OF VICTORIA

GUSS and ANOR v R SOLLNER PTY LTD

Smith J

28 June, 9 July 1991

RE-HEARING – CIVIL PROCEEDINGS – COMPLAINT STRUCK OUT – NOT REINSTATED – MATTER LATER HEARD – DEFENDANT NOT NOTIFIED OF HEARING DATE – ORDER MADE AGAINST DEFENDANT – DELAY IN ENFORCING ORDER – APPLICATION BY DEFENDANT FOR REHEARING – WHETHER ORDER MADE A NULLITY – WHETHER ORDER SHOULD HAVE BEEN SET ASIDE AS OF RIGHT – GIVEN DEFENCE ON MERITS AND PREJUDICE WHETHER ORDER SHOULD HAVE BEEN SET ASIDE.

When a civil proceeding came on for hearing, the plaintiffs (Sollner Pty Ltd) did not appear, the matter was struck out with an order for costs in favour of the defendants (Guss). Subsequently, without the matter having been reinstated or Guss being notified, the case came on for hearing and an order was made in favour of the plaintiff plus costs. By letter dated the following day, Guss was notified that an order had been made. Subsequently, the plaintiff served Guss with an application to set aside the original order striking out the complaint which was granted. Some 12 months later, after being served with a bankruptcy notice, Guss applied to have the order made set aside and the matter reheard. This application was refused by the magistrate mainly on the ground of the delay by the applicant Guss. Upon appeal—

HELD: Appeal allowed. Dismissal of application set aside. Order that judgment in plaintiff's favour be set aside and complaint be re-heard.
1. Proceeding to judgment in a matter which had not been reinstated after being struck out or notice given of its date of hearing is a denial of natural justice and is the sort of irregularity which rendered the judgment obtained a nullity.

2. If this conclusion is incorrect, the judgment was obtained irregularly and should have been set aside as of right unless the defendant had waived the irregularity. In the circumstances, the defendant's behaviour was equivocal and insufficient to show a waiver of objection to the irregularities leading to the judgment.

3. In considering the application to set aside, the magistrate had a discretion involving the question of balancing prejudice. Whilst there was delay on the defendant's part, the plaintiff also contributed to the delay. In view of the prejudice to the defendant, the existence of an arguable defence on the merits and the denial of the opportunity of a trial, the magistrate should have granted the application and set the judgment aside.

SMITH J: [*After setting out the facts, His Honour continued*] ... **[2]** The appeal is brought under s109 *Magistrates' Court Act* 1989. The appellants raise the following questions of law:

> **[3]** (a) Was the learned Magistrate wrong in dismissing the application by failing to consider whether the judgment was regular on the face of the record?
>
> (b) Has the learned Magistrate erred in law in not finding that the judgment was irregular on the face of the record?
>
> (c) Was the learned Magistrate wrong in law in finding that it was proper to refuse the application on the grounds of the Appellants' delay in bringing the application?
>
> (d) Was the learned Magistrate wrong in law by failing to set aside the judgment *ex debito justitiae*?
>
> (e) Was the learned Magistrate wrong in law in taking into account:
> (i) the delay of the Appellants in bringing the application;
> (ii) the reasons for the delay?
>
> (f) Was the learned Magistrate wrong in law in failing to exercise his discretion by considering the question of any prejudice that could be said to be suffered by the Respondent which could not be compensated by an order for costs and interest?

(g) Was the learned Magistrate wrong in law in failing to give any weight to the merits of the defence as disclosed in the material before him?

As to the first question, it is clear on the material before me that the learned Magistrate took the view that he should not consider the alleged irregularities that had occurred in relation to the hearing of the summons. In the reasons that he gave, the learned Magistrate said that he **[4]** did not consider himself to be a "court of review" regarding orders which had been previously issued in the proceedings. He stated that he was entitled to assume that the order of 23rd May 1988 had been validly made. It appears to me that it is open to a person seeking to have a judgment set aside to, *inter alia*, raise issues as to the regularity of the judgment. It would be remarkable if this were not so. Accordingly I am satisfied that the learned Magistrate erred in failing to consider whether the judgment was regularly obtained. Further, I am satisfied that the learned Magistrate erred in the exercise of his discretion of failing to consider that issue in the exercise of that discretion.

I am also satisfied that the learned Magistrate should have found that the judgment was irregularly obtained. The summons had been struck out by order of the Melbourne Magistrates' Court in February 1988. That order did not put an end to the proceeding. It was not a curial determination of the charge alleged. What it did was remove the summons from the list of matters for hearing and determination by the Court. (*R v McGowan* [1984] VicRp 78; [1984] VR 1000, 1002). Having been struck out, a Magistrate could also have subsequently set aside that order, made in the absence of the plaintiff, either through inherent power or pursuant to s152 of the *Magistrates (Summary Proceedings) Act* 1975 and reinstated the summons (*R v McGowan* [1984] VicRp 78; [1984] VR at 1004). This step was not taken in the present case. Instead, without any order countermanding the order striking out the summons and without any order reinstating that summons, the Magistrate at Sandringham proceeded to hear the matter.

[5] The errors might be thought to be technical in the sense that the summons was still alive and had merely been taken out of the list of summonses which were to be heard. It appears to me, however, to be more than a mere technicality because by not properly addressing the orders that struck out the summons, the plaintiff proceeded to its hearing at Sandringham without the defendants having any notice of that hearing. It was as if the defendants had not been served with the proceeding.

Counsel drew my attention to the fact that where a notice of intention to defend was filed under the then Act and Rules, the court would send a notice of hearing to the parties (under s9D(2) of the Act). This notice would give a date, time and place for the hearing. It was also pointed out that the defendants' Rules did not have any such automatic procedure that applied where a plaintiff wished to bring on a summons for hearing which had been struck out. (But query whether s9D(2) does not apply – *R v London County Court Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 QB 682, 691; [1956] 1 All ER 670). It was common ground, however, that the plaintiff could have applied to have the striking out order set aside and the summons reinstated by applying on summons. Such summons would, of course, have been served on the defendants and this would have alerted the defendants to that application. On attending that application, and the case having been reinstated, the defendants would also have had notice of a prospective hearing, or would have been on notice that the summons was to be heard.

[6] In *Craig v Kanssen* [1943] 1 KB 256; [1943] 1 All ER 108, it was held that failure to serve process where service is required renders null and void an order made against the party who should have been served. The effect of a failure to serve proceedings according to Australian authority is unclear. There is an old decision of *Nicholson v Edwards* (1888) 10 ALT 43. In that case a plaintiff issued a writ of summons and proceeded without having served the defendant. The writ was issued under "The Instrument and Securities Statute 1864" and was served on someone other than the defendant. The defendant had no knowledge of the action until the sheriff seized his goods under an execution issued on the judgment. Williams J stated that his first reaction was that "any proceedings taken on a writ of summons which had not been served would be null and void". But he then investigated the matter in Chitty's *Archbold* 12th Ed. p211 where he found a passage that encouraged him to think that proceedings in the absence of personal service without serving a defendant merely amounted to an irregularity. The passage reads:

"If the plaintiff proceed in action as if personal service had been effected without serving the defendant,

> the proceedings may be set aside. And they will not, however, be null, but only irregular; and therefore any application to set them aside must be made within the time limited of taking advantage of any irregularity".

This proposition does not appear to be stated in the 14th Edition. Whatever may have been the correctness of the view of the learned authors of that text in 1866, it would seem **[7]** that by 1943 in England the Court of Appeal had come to the view that proceeding to judgment on proceedings that had not been served resulted in a judgment that was a nullity. The justification for this view was expressed in *Craig v Kanssen* (above) by Lord Greene MR (at KB p262) as follows:

> "In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice".

Similar statements may be found in *R v London County Quarter Sessions Committee, ex parte Rossi* (above, at 691, Denning LJ; cited with approval by Berkeley LJ in *Thomas Bishop Ltd v Helmville Ltd* [1972] 1 QB 464; [1972] 1 All ER 365; [1972] 2 WLR 149, 156; see also Madden CJ in *Curran v Braden* (1895) 17 ALT 33).

It has always been difficult on the authorities to find any clear statement as to when an irregularity will render a proceeding void and as to the precise test to be applied (see Williams *Civil Procedure, Victoria*, Order 2 and the cases there cited). The authorities were discussed by McInerney J in *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; (1970) VR 625 at 636. There is also some doubt as to whether an order obtained in a superior court without due process is a nullity for all purposes (*Posner v Collector for Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461 **[8]** 468, 467, 481, 489-90; [1947] ALR 61, – to that extent qualifying *Craig v Kanssen*, above). So far as deficiencies in service are concerned, the situation for a Court such as the Supreme Court may well be best summed up by the Privy Council in *Chettiar v Chettiar* [1962] UKPC 1; [1962] AC 294; [1962] 2 All ER 238 at 244; [1962] 1 WLR 279:

> "A breach of the rules affecting service of parties does not automatically render void an order made in the proceedings in which it occurs and it is necessary for the Court subsequently passing on it to consider the circumstances and consequences to which it relates. These may vary widely. At the one end of the range is a case such as *Craig v Kanssen* ..., where in effect what had happened was that a defendant found himself the subject of an order for the payment of money without having been given any prior opportunity even of knowing that proceedings to this end were being taken against him. Such a defect of procedure, if uncorrected, is an affront to natural justice. At the other end are many occurrences in which some defect and requirements of service is in substance made good by the action or consent of the party prima facie entitled to object (see *Marsh v Marsh* [1945] AC 271.) No doubt there are many graduations between 'these two extremes."

In *Marsh v Marsh* [1945] AC 271 at 284 the Privy Council stated:

> "No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to enquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v Moore* (1889) 23 QBD 395 there has been a defect in the service but the writ has come to the knowledge of the defendant."

I have come to the conclusion that the irregularity in all the circumstances of this case is the sort of irregularity that should render the judgment obtained a **[9]** nullity. The Court had struck the matter out so that it was not, in the absence of a court order, to proceed to hearing. The fact that it had been struck out was patent on the record, and the plaintiff ought to have realised that the defendants were under the impression that the summons had been struck out. The hearing should not have proceeded in the absence of an application to set aside the striking out order and reinstate the matter. If such an application had been made, the defendants would have been put on notice because such an application would have been served upon them. Instead, the case was moved to Sandringham, brought on for hearing without notice to the defendants, and consequently judgment entered in the absence of the defendants. The irregularities resulted in a denial of natural justice. Applying the above authorities, the judgment is a nullity.

If, on the other hand, I am in error in concluding that the judgment is a nullity, it was clearly obtained irregularly and accordingly should have been set aside *ex debito justitiae* unless, as was argued for the respondent, the defendants had waived the irregularity. Waiver in the relevant sense cannot, in my view, be demonstrated by the respondent. It is true that the defendants were present at a hearing in September of 1988 at which the plaintiff applied to set aside the order striking out the summons. What happened at that proceeding is not entirely clear. At its highest, for the respondent, the attendance of the appellants at that hearing and participation in it is equivocal behaviour and insufficient to demonstrate a waiver of objection to the irregularities leading to the judgment. The **[10]** failure of the defendants to do anything until approximately twelve months later when a bankruptcy notice was served is again at its highest equivocal behaviour. It either points to the defendants occupying the high ground and saying the judgment was a nullity and not enforceable (Mr Guss's stated position), or it may point to a decision to do nothing until the respondents tried to enforce the judgment. It is not conduct which, in my view, would indicate a waiver of the irregularities that led to the judgment.

It follows from the foregoing that I find the questions of law raised in paragraphs (b) and (d) should be answered in the affirmative – in essence that the learned Magistrate erred in that the judgment was obtained irregularly and was either a nullity or voidable on application by the appellants. There remain the questions of law relating to the discretionary aspects of the learned Magistrate's discretion, assuming that the judgment was not a nullity or should not have 'been set aside *ex debito justitiae*. I have come to the conclusion that here the learned Magistrate also erred. The learned Magistrate was not referred to the Full Court decision of *Kostokanellis v Allen* [1974] VicRp 71; [1974] VR 596. In that case the Full Court said that in considering an application to set aside a judgment of the County Court:

> ... what the judge is required to do is to determine what, in his opinion, is the just way in which the court's discretion' should be exercised. To do this must involve weighing up the extent to which the defendant is prejudiced by allowing the order and judgment to stand and the prejudice to the plaintiff in setting them aside. In many cases the situation will be that the plaintiff will not **[11]** suffer any prejudice that cannot be remedied by an appropriate order as to costs. So far as the defendant is concerned, if he is unable to comply with Rule 14(b) (which requires an affidavit disclosing the grounds of defence) the order and judgment cannot be set aside and there would appear to be little purpose in doing so. On the other hand, if the defendant does show on affidavit a *prima facie* defence on the merits it would seem that usually he will be seriously prejudiced if he is debarred from being able to present his defence at a trial of the action. One cannot tell until this has been done whether or not the defendant will succeed in such a defence. While it is undoubtedly relevant to the judge to consider what explanation the defendant has for not appearing on the return of the summons for final judgment, the weight to be attached to his explanation will depend upon the circumstances. Thus, for example, where the explanation shows that his non-appearance was due to some mistake or to his being misled, this may well assist the court in deciding to exercise its discretion in his favour. Again the explanation given may reflect on the question whether the defendant has made out a *prima facie* defence on the merits. However, it does not necessarily follow that if the explanation does not amount to something which can be categorised as 'sufficient reason' the defendant's application should fail. It must all depend on the circumstances".

In his reasons the learned Magistrate did not refer to the question of balancing prejudice. He did not refer to the fact that Mr Guss had disclosed a significant defence on the merits. This was a defence raising a number of issues. The first was that the dispute had been settled in proceedings brought by another person, Johns & Lyng Pty Ltd. He also argued that there was no contractual relationship with the plaintiff. In that regard it is to be noted that the material discloses that the plaintiff was originally paid by Johns & Lyng and it was only after Johns & Lyng demanded refunds of the money from it that it then sued the defendants. This would suggest that for some time all the **[12]** parties had assumed that the plaintiff was a sub-contractor of Johns & Lyng. The other defence raised was that the price charged was excessive, and that the work was defective and there was a counter-claim for several thousand dollars.

The learned Magistrate also did not refer to the material explaining the reason for the original non-attendance. Instead his reasons focus almost entirely upon the question of the delay after the defendants had notice of the judgment in May of 1988. Counsel for the plaintiff says that it is not to be assumed that the learned Magistrate did not consider the above matters. For that proposition the plaintiff relies upon the statement of principle contained in *Yendall v Smith Mitchell & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369; [1953] ALR 724. In that case (at 379) Sholl

J stated the following propositions (edited from the text):

> The true principle, I think, must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked; or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to the matter not having been considered as it should have been, or if the magistrate's observations indicate on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw that inference, and the magistrate will have no cause to complain if it does so."

Counsel points out that the plaintiff had conceded that the material disclosed sufficient material to explain the non-attendance of the defendants and to show a defence on the merits. Counsel's argument had focussed on the delay **[13]** after advice of the judgment. The learned Magistrate, however, adjourned to consider the matter and spent half an hour considering the matter. When he returned, he dealt with the Court's discretion, giving detailed reasons, but did so only in terms of the delay. He stated that he considered the delay in making the application was excessive to the point where it would be unjust to the plaintiff to have the judgment set aside. He also referred to the absence of an adequate explanation for the delay in bringing the application, noting that Mr Guss was a solicitor and had been given clear notice that the striking out order had been set aside.

In all the circumstances, I have come to the conclusion that the proper conclusion to draw is that the learned Magistrate did not consider the matters that I have mentioned above. If he had he would have referred to them. I am encouraged in that view by the fact that the learned Magistrate was not referred to the case of *Kostokanellis v Allen* (above). Alternatively, he did not give proper weight to them.

These conclusions are strengthened by the fact that consideration of all issues that are relevant should have led to the conclusion that the judgment should have been set aside. It is true that the delay to which the plaintiff can point is considerable and there is little explanation of it. It may be justified for the period up until the application to set aside the order striking out the original summons in September of 1988 on the basis that the matter was **[14]** clearly uncertain so far as all parties were concerned. From the date of the order in September 1988, however, it was clearly a situation where the responsibility for action lay primarily with the defendants, I say primarily, because the plaintiff had a judgment to enforce but, on the material did nothing for twelve months. Nothing appears to have been done by the defendants until the bankruptcy notice was received. At that time, however, Mr Guss had undergone surgery for a brain tumour. It seems to me to be reasonable and proper to assume that he would not have been in a state of reasonable health for a reasonable time prior to that. No explanation was given for Mrs Guss's inactivity, but it is reasonable to infer that she was guided by and relied upon Mr Guss.

The proper exercise of discretion required consideration of the question of where the balance of prejudice lay if the judgment is set aside. Counsel for the respondent pointed to the fact that the delay will prejudice the memories of the plaintiff's witnesses, and in that sense prejudice will be suffered which cannot be rectified in any way. This must be acknowledged. Otherwise, however, the potential prejudice to the plaintiff caused by the delay can be met by cost orders and by an order for interest at commercial rates which the learned trial Magistrate would be able to order at any rehearing. The prejudice to the defendants, however, is a grave one, in that they are faced with a judgment for a significant sum of money to which they clearly have an arguable defence and they have been denied the opportunity of a trial. The action that created this **[15]** situation was the bringing on for hearing by the plaintiff of a summons which had been previously struck out. The defendants did not have notice of the hearing and the plaintiff had no reason to believe that they did have notice. While it may be said that the defendants have been guilty of delay, the plaintiff is not free of culpability. It may be said that the problem arose because of irregular acts carried out by the plaintiff and the plaintiff is not entirely blameless so far as delay is concerned.

The situation accordingly appears to me to be one where a proper exercise of the discretion should have resulted in an order setting aside the judgment. Accordingly I find the remaining grounds made out. The appeal will be allowed and the order dismissing the application to set aside the original judgment will be set aside. It would not be appropriate to refer the application

back to the Magistrate. Instead, I propose to exercise the power under s109(6) of the Act to order that the application be granted to set aside the judgment of 23rd May 1988, and to order that that judgment be set aside and that the summons be reheard.

APPEARANCES: For the appellants Guss: Mr S Marantelli, counsel. Rigby & Fielding, solicitors. For the respondent Sollner: Mrs F Millane, counsel. Gorman & Storer, solicitors.
