22/88

SUPREME COURT OF VICTORIA

MATHESON v GREY and EC LIBBIS (VIC.) PTY LTD

Ormiston J

18, 22 April 1985

PRACTICE AND PROCEDURE – CIVIL JURISDICTION – SPECIAL SUMMONS ISSUED – DEFENDANT ADDED – NOT SERVED WITH AMENDED SUMMONS NOR DATE OF HEARING – ORDER MADE IN DEFENDANT'S ABSENCE – WHETHER ORDER MADE IRREGULARLY – DELAY IN MAKING APPLICATION FOR REHEARING – WHETHER IRREGULAR ORDER SHOULD BE SET ASIDE AS OF COURSE: *MAGISTRATES' COURTS RULES* 1980, R58.

G. claimed damages from ECL arising out of the negligent driving of a motor vehicle. In its particulars of defence ECL claimed that the collision was caused by M.'s negligence. Subsequently, an application in chambers seeking to join M. as a defendant was granted; however, no directions were given by the magistrate in chambers concerning amendment of the summons and the particulars of demand. At a later date, M. received a third-party notice, but when the matter came on for hearing, no certified extract of the order made in chambers, nor amended summons and particulars nor notice of hearing had been served on M. At the hearing in M.'s absence, an order was made against him in favour of G., and further that M. indemnify G. in respect of ECL's costs. Approximately 3 months later, execution of the order against M. was attempted without success, and about 12 months later, M. applied for a rehearing which was refused. Upon order nisi to review the refusal of the application—

HELD: Order absolute. Refusal set aside. Order against M. set aside. Remitted for further hearing.
1. An order should be made against a party only when it can be seen that the party has been properly served with the proceedings. Where an order is made in the absence of proper proof, the order is irregular and, subject to the residual discretion in a magistrate upon a rehearing application, should be set aside as of course or *ex debito justitiae*.
***Daly v Silley* [1960] VicRp 57; (1960) VR 353, applied.**

2. As M. had not been properly served with the process nor had notice of the hearing, the order made against him was irregular and should have been set aside as of course.

ORMISTON J: *[After setting out some preliminary facts, His Honour continued]* … **[3]** The particulars of demand claimed damages arising out of the negligent driving of a motor vehicle on the part of E.C. Libbis but the particulars of defence, dated 31 August 1982, allege the collision was caused by the negligence of the applicant. Accordingly, a chamber summons was taken out by the complainant on 28 September 1982, seeking an order that Mr Matheson be joined as a defendant in the proceedings. Since he was not yet a party, the summons was wrongly addressed to, and served upon, him. He attended Court on the return date, 26 October 1982, reported to the Clerk of Courts and was told to wait. He waited for some four hours and then made further enquiries, only to be told that the summons was adjourned to an unstated date.

In his absence, about which no objection could be, or was, taken, an order was made on, or at least dated, 2 December 1982 by Mr Lynch SM, simply to the effect that the applicant be joined as defendant in the action. Wrongly, in my opinion, no further directions were given, either as to the amendment of the summons or as **[4]** to the amendment of the particulars of demand. Arguably, by reason of Rule 181 of the *Magistrates' Courts Rules*, Order 16, Rule 13 of the *Rules of the Supreme Court* apply to require the summons to be amended or an amended summons filed, neither of which was done. Preferably, the Magistrate should have given appropriate directions and this may have obviated some of the later difficulties.

Not long afterwards, on 21 December 1982, amended particulars of demand were filed, without leave, technically pursuant to Rule 72, but, in the absence of directions, they were not delivered at the same time to the applicant, nor, so far as the evidence before the Magistrate on 25 July 1984 was concerned, was it ever delivered to, or served upon, the applicant.

In any event, the amended particulars of demand are unintelligible for, after adding Mr Matheson's name as second defendant, they read:

> "(1) On or about the 2nd day of March 1982, a motor vehicle driven by the (first) Defendant came into collision with a motor car driven by one David Wilson, causing that vehicle to collide with a vehicle owned by the Complainant, on Murray Road, Preston;
>
> (2) The said collision was caused solely by the negligence of the Defendant."

The word "(first)" in para. 1 does not appear upon the dated copy on the Magistrates' Court file but does appear on an undated copy which appears later on that file. Neither bears any filing date stamp, as one might reasonably expect to find on a Court file. After para. 2 appear "Particulars of negligence of **[5]** the defendant" (*sic*) in identical terms to the original particulars directed to the first defendant. Apart from a paragraph alleging resulting loss and damage, nothing more appears to identify the defendants, or defendant, against whom the claim is made. Although it was not relied upon, I cannot see that any cause of action has been alleged against the second defendant, Mr Matheson.

The first notice the applicant received of his joinder was indirectly by a notice of contribution or indemnity served on 15 January 1983, which, before the service of the amended particulars of demand, must have been only slightly more intelligible to the applicant than if he had had the opportunity of reading them together. The next step to be deduced from the file was the sending, on 3 March 1983, by the Clerk of Courts of a notice of hearing, pursuant to s9D(2) of the Act, to the complainant and first defendant's solicitors, which fixed 28 April 1983 as the date for hearing. Apparently no attempt had been made up to this time to serve the applicant with the order or any amended summons or particulars.

When the matter came on for hearing before the 'hearing magistrate' at the Heidelberg Magistrates' Court on 28 April 1983, an attempt had been made to serve some further document or documents on the applicant but the only further affidavits of service then on the file and thus before the Court were two affidavits by a licensed process server, Kevin Leslie Bernard Ryan, and about even that **[6]** there is some doubt. The first, dated 15 March 1982, refers to the applicant as the only defendant but states that a "true copy of the summons in this matter with particulars of demand endorsed thereon and two notices of defence" were served personally on him on 21 October 1982, before he had been joined as a party.

Apparently, before Mr Lynch SM, in July 1984, some point was raised as to this, and another affidavit was either produced or found on the Court file, sworn 25 March 1983, by the same process server, again with a heading naming the defendant as the only defendant, and stating that the same documents referred to in the affidavit of 15 March had been served personally on the applicant on 23 March 1983.

Pursuant to the grounds of the order to review, the applicant claimed before me that the requirements of Rule 58 of the *Magistrates' Courts Rules* had not been complied with, as no certified extract of the order and no notice of the day fixed for hearing had been served, nor was there any evidence before the hearing magistrate on 28 April 1983 that they had been served. It is also apparent, from the absence of any amended copy of the original summons, that the applicant had not been served with any amended special summons, nor was there any evidence that he had been served with the amended particulars of demand, and this should have been apparent to the Magistrate on 28 April.

However, the defendant did not file any notice of defence and foolishly forwarded all papers to his employer, the Popsy Popcorn Company, although what "matter of the complaint" he would wish to defend, in terms of the prescribed Notice **[7]** of Defence, is not clear in the light of his being served with an unamended summons and particulars.

I should add that, before me, the respondent, Mrs Grey, attempted to rely upon a further affidavit of Mr Ryan, sworn only on 1 February 1985, which alleged that he had also served the applicant with the order made on 2 December 1982, amended particulars of demand and a letter which, however, did not tell him of the date fixed for hearing. Service took place, it was alleged, at the same time and on the same day as had been referred to in the affidavit of 25 March 1983

but at a quite different address. Counsel for the applicant did not object, in the first place, to the admission of this affidavit but, apart from its obvious inconsistencies, it is clearly irrelevant to the issue whether the orders made on 28 April 1983 were irregular, as it formed no part of the material considered by the Magistrate, Mr Lynch, on 25 July 1984.

Returning then to evidence before Mr Lynch as to the hearing on 28 April 1983, it is clear that orders were made against the applicant for both damages and costs in his absence. Execution was attempted in about July 1983 and later in the year some correspondence took place between his solicitors and those of the complainant and there was some discussion between Mr Matheson and the complainant's solicitors. Eventually application for a re-hearing was made pursuant to s152 of the Act by notice dated 4 June 1984, which was eventually heard by Mr Lynch SM, on 25 July that year.

[8] Most of the evidence put before the Magistrate on that application consisted of materials on the Court file, although the applicant gave oral evidence and was cross-examined. It appeared that he had kept none of the papers served upon him and he was uncertain which of the documents were in fact served on him. He asserted, without any particularisation, that the other driver was partly responsible for the accident. It was argued, on his behalf, that these assertions were sufficient evidence of a *prima facie* defence. I do not agree and, in my opinion, the evidence amounted to a bare assertion that his co-defendant was to blame. No defence on the merits was established and the three related grounds of the order nisi therefore fail. It was only faintly argued that a re-hearing should have been granted without any *prima facie* defence being made out, if no prejudice had been suffered.

Again, no error in exercising the Magistrate's discretion on this basis has been made out, and the applicant's delay was a not unreasonable ground for denying the re-hearing. It is quite another matter when considering the application based on the irregularity of the order of the hearing magistrate. Although the application was made under s152 of the Act to set aside the orders and to seek a rehearing of the summons, it seemed to me the same principles as to irregularities in obtaining judgments and orders as apply in superior Courts also apply to this application. In other words, if the order is shown to the Magistrate to have been irregularly obtained, then he ought to have set aside the original orders as of course **[9]** or *ex debito justitiae*, as it is described in applications to set aside the Court judgments in the Supreme Court; cf. *Anlaby v Pretorius*, (1888) 20 QBD 764; 58 LT 671; 57 LJQB 287; 4 TLR 439 and *Daly v Silley* [1960] VicRp 57; (1960) VR 353. For this purpose, the issue before Mr Lynch, SM, was whether the orders made in April 1983 were regularly made.

The hearing magistrate could only have made orders against the applicant if he had been properly satisfied that the applicant had been served. It is fundamental to a Court system that orders shall be made only when it can be seen that a party has been properly served with the proceedings. As was stated by Lord Greene MR, in *Craig v Kanssen* [1943] 1 KB 256 at p262; [1943] 1 All ER 108, a passage later cited by Sachs LJ, in *White vWeston* (1968) 2 QB 647 at p660; [1968] 2 All ER 842; [1968] 2 WLR 1459.

> "In my opinion, it is beyond question that failure to serve process, when service of process is required, goes to the root of our conception of the proper procedure in litigation."

See also *R v London County Quarter Sessions, ex parte Rossi* (1956) 1 QB 682; [1956] 1 All ER 670; *Thomas Bishop Ltd v Helmville Ltd* (1972) 1 QB 464; [1972] 1 All ER 365; [1972] 2 WLR 149. If the Magistrate is not satisfied that notice of the proceedings has been properly brought to the attention of a defendant, he should not make any order until he is so satisfied. In the present case, there was no material before the hearing magistrate which satisfied the requirements of the Act or the Rules. Some confusion may exist because Rule 58 was re-passed when the *Magistrates' Courts Rules* were revised in 1980, after the insertion of ss9A to 9D in the *Magistrates (Summary Proceedings) Act*. Rule 58 reads:

> **[10]** "Where a defendant is ordered to be added or substituted, except where a defendant is substituted under Rule 54, a certified extract from the register of the order, together with a copy of the summons and a notice of the day on which he is to attend the Court, shall be served upon the defendant, in the manner appropriate to service of the summons and at the same time before that day as the summons would have to be served if that day were the return day."

Notwithstanding the change to the Act, omitting the mention of a return day in a special and default summons, I consider Rule 58 still applies to cases of joinder of new defendants. In the present case, that Rule was not observed and there was no evidence before the hearing magistrate that it had been observed. The effect of not serving the documents prescribed under the Rule was that Mr Matheson was not properly joined and, in particular, was not served with the appropriate documents to enable that joinder to be effectuated. The evidence before the hearing magistrate showed only service of an unamended, special summons on two occasions, service of a Chamber summons, not required by the Act or the Rules, and service of a notice of contribution by the other defendant. There was no evidence of service of the order of 2 December 1982 or an extract thereof nor of notice of the day on which he was required to attend Court, that is, the date of hearing fixed on 3 March 1983 for 28 April 1983.

In my opinion, it is also implicit in the Rule that an amended summons should be served, not the original summons, to enable the new defendant to know what is alleged against him. Of course, that should have been directed by the order made by Mr Lynch on 2 December 1982, so that both summons and particulars should have been **[11]** amended or leave given to effect those matters and dates fixed for service of the documents prescribed under Rule 58. None of these matters were dealt with, so the summons was not amended and no order for service of the amended particulars of demand was given. In the absence of proper proof to the hearing magistrate of those matters, he ought not to have proceeded to make any order against the applicant.

It was suggested that the applicant should have filed a notice of defence to the unamended special summons but Rule 58 does not require service of a notice of defence which is separately prescribed in Form 9 of the Rules. In any event, the requirements of s9(e) were not complied with, as there was no cause of action claimed against the second defendant in the served special summons. Moreover, nothing was claimed against the second defendant in the original special summons nor was any intelligible claim made against him under the amended particulars. For this purpose, I ignore Mr Ryan's affidavit before this Court for it does not relate to any evidence before either the hearing magistrate or Mr Lynch at the relevant hearing. Even if I could consider it and even if the evidence was satisfactory, there was still no allegation that notice of the date fixed for hearing was given, according to Rule 58. That directly either led or was likely to lead to his absence before the Court on 28 April 1983 and the Magistrate ought to have realised that absence of proof of such a notice would have that consequence. In my opinion, the proceedings against Mr Matheson on 28 April 1983 were irregular and the orders made against him were likewise irregular.

[12] It remains to see whether Mr Lynch SM properly determined the application before him, pursuant to s152 of the Act. In my opinion, he did not. On the evidence before him, he could not have reached any other conclusion than that the orders of 28 April 1983 were irregularly obtained. In such a case, he was obliged to set aside the orders as of course. I will concede that the right to have an irregular judgment or order set aside *ex debito justitiae* leaves a residual discretion in the judge or magistrate. That discretion should only be exercised in favour of a judgment creditor in most exceptional circumstances. As Sir Owen Dixon CJ said, in *RT Co Pty Ltd v Minister of State for the Interior* [1957] HCA 39; (1957) 98 CLR 168 at p170; [1957] ALR (CN) 1204,

> "It is an irregular judgment and ought not to be on the records of the Court."

In that case, His Honour held that both delay and arguable waiver were not sufficient to deny an applicant his right to have a judgment set aside. He was willing only to make the order setting aside the judgment subject to conditions, but was not prepared to refuse such order. I consider the cases of *Nevill v Hanley* [1888] VicLawRp 66; (1888) 14 VLR 270 and *Osborne & Co v Anderson* [1905] VicLawRp 64; [1905] VLR 427; 11 ALR 239; 26 ALT 225 ought now not to be followed if they suggest that delay can ordinarily deny the applicant the right to set aside an irregular judgment. They were made at a time when I doubt that the rules as to irregular judgments were fully worked out.

I would not decide, and do not have to decide, whether exceptional delay or delay causing substantial **[13]** prejudice might not, on some occasion, provide an answer to an application to set aside a judgment or order but the consequences would have to be of an exceptional character. In the present case, no prejudice was alleged and the delay was approximately 14 months. No

Magistrate properly considering his powers under s152 could refuse to make an order setting aside the orders made by the hearing magistrate. There was no evidence before him of a kind which would entitle him to exercise a discretion to decline to make the order sought.

For these reasons, I consider the Magistrate erred in making the order refusing to set aside the orders made by the hearing magistrate. Although his reasons are barely set out in the affidavit material and although I am obliged to make all reasonable allowances in favour of upholding the order, there seems no basis upon which Mr Lynch could correctly have refused to make the orders sought, except insofar as the alternative ground was based on a defence on the merits, he could properly have refused to make an order on that ground. For these reasons, I propose to make an order absolute and to set aside the order of Mr Lynch, made on 25 July 1984.
