16/95

SUPREME COURT OF VICTORIA

KLOPPER v IMAGE INSPIRATIONS PTY LTD and ANOR

Nathan J

18 October 1995

CIVIL PROCEEDINGS – REHEARING – NOTICE OF DEFENCE REJECTED – ACCEPTED BY PLAINTIFF – PROPER DEFENCE NOT FILED – ORDER MADE IN DEFAULT OF DEFENCE – APPLICATION TO SET ASIDE – APPLICATION REFUSED – WHETHER APPROPRIATE FOR COURT TO ASCERTAIN DEFENCE ON THE MERITS – APPLICANT NOT GIVEN CHANCE TO VALIDATE DEFENCE – WHETHER DISCRETION MISCARRIED: *MAGISTRATES' COURT* ACT 1989, S110.

K's notice of defence (in which he denied owing a debt) was rejected by the Registrar as it did not contain the date of service. However, IIP/L acknowledged receipt of the copy notice and invited settlement negotiations. The settlement negotiations were not successful, K. failed to file a defence in compliance with the Rules and subsequently, an order was made in default of defence. K. applied to have the order set aside and on the re-hearing, gave evidence that the debt was not owed by him but by a company he was working for at the time. The magistrate declined to accept this evidence, found that there were no grounds for an arguable defence, and refused the application. Upon originating motion seeking declarations and remedies in the nature of *certiorari* and mandamus—

HELD: Relief sought granted. Order quashed. Rehearing application to be heard by another magistrate.
1. On an application to set aside and rehear, the court has a fundamental duty to do justice between the parties and allow them a proper opportunity to put their cases upon the merits.
***Davies v Pagett* [1986] FCA 106; (1986) 10 FCR 226; (1986) 70 ALR 793, applied.**

2. In the present case the magistrate's exercise of discretion failed on two grounds:
(a) Although K. technically failed to comply with the Rules, his notice of defence (which II P/L apparently accepted) set out the very merits of K's defence. This was a matter to which the magistrate failed to give proper attention.

(b) Whilst it was appropriate for K to give evidence on the rehearing as to the merits of his defence, his defence was not a verbal one which the magistrate could accept or reject. It was a defence which rested on documentary material relating to the Company for whom K was employed. K should have been given an opportunity to validate that defence.

NATHAN J: [1] Judicial Reviews conducted under the terms of O.56 of the rules the Supreme Court enable the court to grant relief in the nature of the prerogative writ remedies. In this case, the originating motion seeks declarations and remedies in the nature of *certiorari* and mandamus arising out of Magistrates' Court proceedings at Geelong.

Mr Klopper, the plaintiff, was served with a summons claiming some $15,000 for work and labour done. The complainant was the first defendant, Image Inspirations Pty Ltd (Image). Klopper completed the notice of defence within the relevant time and forwarded one copy to the Magistrates' Court and another to Image. In his defence he said this, "I, Kim Klopper, deny being indebted to the plaintiff. If any debt is owed, it could be owed by Ignition National Classifieds Pty Ltd." The registrar at the Geelong Court rejected the notice of defence because the date upon which the complaint was served upon Klopper had not been endorsed by him. However, the solicitors for Image wrote to Mr Klopper acknowledging receipt of the defence and some settlement negotiations were invited. It is not necessary for me to decide, but those negotiations were either not entered into or failed because the Magistrates' Court at Geelong proceeded to make an order on the original return date, for the full amount claimed and on the basis that a defence had not been filed. Mr Klopper had failed to return to the registrar the **[2]** notice of intention to defend which the Registrar had returned to him, with the appropriate date added to his original document.

Upon learning that judgment had been obtained against him, Mr Klopper returned to the Magistrates' Court at Geelong and appeared in person. What was to be the first of two applications for re-hearing came on before the second defendant on the 21 February 1995. At that hearing the

Magistrate permitted Mr Klopper to appear and because he was unrepresented, allowed him to give evidence both as to the failure to return a properly completed notice of intention to defend and some material as to the merits of the case. The affidavits of Mr Klopper and Mr Epstein, who appeared at that hearing for Image, are not consonant, although there is a great deal of similarity.

Insofar as it is necessary to resolve any conflict between the two narratives, I adopt the approach of Newton J set out in *Buzatu v Vournazos* [1970] VicRp 63; (1970) VR 476, which recites the practice that the version of the respondent, that is, Image, should be preferred, but where there is a direct conflict, further examination of answering affidavits and the like may be had. It is not necessary to go to the qualification to the general principle because the narrative of Mr Epstein is clear and includes statements such as, "Mr Klopper gave evidence to the effect that the debt was not his, but was, in fact, a debt to the company for which he was working for(sic)". When I turn to the affidavit of Mr Klopper, he gives in indirect speech, evidence as to what he actually said, which is in alignment with the phrase adopted by Mr **[3]** Epstein of "being to the effect of" and thus it is not necessary to spell out, or even to find, areas of great conflict.

What is clear is that Mr Klopper did not return the completed notice of intention to defend form to the registrar, because he was of the view as a layman, that as Image's solicitors had accepted his defence, they would not proceed further without notifying him. He did not believe that judgment would be entered in the given circumstances, and was surprised to find that the same had been done. This is the substance of the evidence dealing with the essential matter before the Magistrate in February. That is, the merits or the demerits of permitting Klopper to defend the claim against him, and the reason why he had not complied with the rules of court, setting out the procedures therefor.

However, the Magistrate went further, and having invited Klopper to give evidence on the re-hearing point, proceeded to permit him to detail the merits of his defence, namely, the debt was not his, but that of a company for which he worked. That evidence was cross-examined upon by Mr Epstein, who says as much in his affidavit. In the result, I accept the evidence of Mr Epstein, that the Magistrate tended to disbelieve Mr Klopper about the second issue, that is the merits of his defence. It is a fair conclusion to say the Magistrate refused the application for re-hearing because he found, or felt, that there were no grounds for an arguable defence. On that point, Mr Epstein says this, "He had found, that he had **[4]** not accepted Mr Klopper's evidence and there was no arguable defence. He said further that despite knowing that the defence had been rejected, Mr Klopper had failed to take any steps to seek leave to file a further defence until making the application to set aside judgment."

The decision of the Magistrate not to grant a re-hearing is attacked in the notice of motion on the grounds that it is manifestly unjust, and the Magistrate had taken into account, matters which he should not have, and had exercised his discretion in a wrong or perverse manner. Mr Klopper aggrieved at his failure to obtain a re-hearing on the first occasion, then consulted solicitors. I accept his evidence that he was advised an appeal could not be entertained against an interlocutory order and consequently he instituted a second application for a re-hearing, which came on before the same Magistrate in April of 1995.

On the second occasion, the Magistrate accepted the submissions of Mr Epstein for Image, that the issue had been adjudicated upon on the first occasion and should not, as a matter of fairness, be reventilated. In the face of submissions by counsel for Mr Klopper that there had never, at any time, been an adjudication upon the merits of his defence, the Magistrate refused an application to hear Mr Klopper give evidence as to what had occurred at the first hearing, and apparently said that he must have decided the first application on its merits and accordingly, dismissed the second application.

This second application is again the subject of relief sought in the notice of motion, and so the matter comes before me as an omnibus. **[5]** Under the *Magistrates' Court Act*, s110, a person who did not appear in a civil proceeding may make an application for an order setting it aside and the court may grant such an order upon such terms and conditions as it thinks just and re-hear the proceedings. There is no statutory requirement that the applicant establish a meritorious defence. But that provision has consistently been interpreted in the light of O21 of the *Supreme Court Rules*, which requires in those circumstances where a judgment has been regularly entered,

in order to be set aside, some defence on the merits must be displayed.

In *Davies v Pagett* [1986] FCA 106; (1986) 10 FCR 226; (1986) 70 ALR 793, the Full Court of the Federal Court concluded that when exercising a discretion to set aside a default judgment, the court should balance any injustice to the plaintiff which would result from a refusal to set aside, against the public interest, that a judgment when entered concludes litigation and any relevant injustice to third parties. The requirement to find some plausible defence on the merits as enunciated by Muirhead AJ in that case at the first instance was taken as read, although there were other considerations to be taken into account as well.

In this court, in *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596, the court concluded that where there had been a failure to enter an appearance, or to deliver a defence, due to a mistake, or the defendant being misled, the same amounted to factors favouring the exercise of the discretion to set a judgment aside. Of the general responsibilities of the court, the **[6]** Federal Full Court said in *Davies v Pagett* as follows: (at p799)

> "The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty, that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed."

That succinct enunciation of the principle was pronounced contemporaneously with similar views expressed by the New South Wales Supreme Court in *Adams v Kennick Trading International Ltd* (1986) 4 NSWLR 503; 10 ALN N47. That case was favourably referred to again in a decision of Master Burley in the Supreme Court of South Australia in *Pegasus Leasing Ltd v Villarosa* (1993) 11 ACSR 619 at p625, viz:

> "[I]t is trite law, that on an application to set aside default judgments, the court exercises a discretion which must be exercised judicially and which enables the court to take into account all of the circumstances of the parties and thereby to act fairly between them."

In my view, although there is a strong presumption in favour of the correctness of the Magistrate's decision, when looking at the exercise of the discretion, I must ensure that it was performed in a way which delivered justice and fairness to the parties. As to the presumption of correctness, see the unreported decision in *Murphy v Lamond*, of this court, 16.7.92.

With these principles in mind, I return to the facts in this case. The Magistrate on the first hearing, heard some evidence as to the reason for failing to lodge a proper notice of intention to defend. That was the key and substantial issue before him, namely merits of the re-hearing application. **[7]** Having invited the defendant to appear personally, as was appropriate, he then allowed evidence as to the merits of the defence. Again, an appropriate course of conduct. However, by finding adversely in respect of Mr Klopper's credit, he concluded, and so much is apparent from the affidavit, that no meritorious defence was disclosed.

I find his discretion miscarried in two ways. Firstly, as to the merits of the re-hearing, this was a case where the defendant had notified the court of the very merits of his defence and the plaintiff had apparently accepted it. It was a technical failure to comply on Mr Klopper's part. He did accept and follow the instructions with a notice of intention to defend, by returning it to the court, notifying it of the basis of his defence, but failed to complete the form so far as service was concerned. Therefore, he had apprised the registrar, as he did Image, that he intended to defend, and on what grounds. There was never any doubt that it was his intention to resist the plaintiff's claim. The Magistrate seems to have given little attention to that fact; Klopper was prevented from having his defence ventilated. A result plainly unjust to Mr Klopper.

However, on the second ground, namely, the merits of the defence, the Magistrate resolved the issue, solely on the basis of Klopper's credibility. But, Klopper's defence was not a verbal one. His defence rested upon documentary material relating to the company for which he worked. He was not given the chance, nor did he expect to **[8]** be required at that juncture, to validate that defence before the Magistrate on the re-hearing application. Accordingly, the documentary material upon which it rested, was never before the Magistrate. A proper hearing of the merits of the defence would have required the appearance of the company to which Klopper referred, a

tendering of prior invoices, or invoices to that company. All of which might have displayed that Klopper's defence was dependent upon collateral and far more important material than was before the Magistrate, or could reasonably have been expected to have been before him. The disbelief, if it was that, of Mr Klopper, cut him out from properly establishing his defence and was not a fair examination of it on the merits, let alone as to whether or not a reasonable issue remained to be tried. Accordingly, the Magistrate's exercise of discretion miscarried on both grounds, namely, giving proper attention to the merits for re-hearing, and secondly, as to whether there was a plausible case on the merits.

I then come to the second application. I accept the evidence that the Magistrate when hearing the second application had no recall of the first, and he then proceeded to accept the evidence from Image that the issue, in effect, had already been despatched and should not be recanvassed. What Mr Klopper was seeking to do was to have his original defence heard and adjudicated upon. The Magistrate, by dismissing the second application, just as surely cut out a litigant from the court process as he had on the first, and it is similarly tainted. **[9]** The end result of the Magistrate's findings in this case is to have denied a defendant the opportunity of defending a relatively substantial claim for work and labour done, on the basis that when he returned the notice of intention to defend to the court, he did not insert the date of service of the complaint upon him. That is manifestly and plainly unfair.

It is an affront to the fair principles of justice recited in the authorities to which I have referred. This is so, despite the Magistrate having had the opportunity of seeing and hearing Mr Klopper. Having done so and upon disbelieving him, that disbelief did not provide grounds for denying Mr Klopper his time in court. As was said by the Full Court of the Federal Court, the fundamental duty of the court is to do justice between the parties. The denial of a defendant, of the right to contest a claim, is a very serious step. It cuts out a defendant from the judicial process at its commencement. When it is considered that this rests upon the failure to complete a form, the tenuousness of the justification is displayed.

I shall grant the relief sought in the summons on the originating motion, but as I have ruled, there was no proper adjudication upon the merits or the demerits of the re-hearing application and the discretion miscarried. It is proper that that application, or an application to that effect, be reheard by the Magistrates' Court at Geelong, by a Magistrate other than the second defendant. So I shall declare that the plaintiff's application for re-hearing of proceeding number G2613230 be granted. That the orders of the Magistrates' Court at Geelong, made **[10]** the 25 January 1995, which is the order on the default summons and the orders made in respect of the rehearing applications, which were made on 21 February 1995 and 13 April 1995 be quashed. I shall order that leave be granted to the plaintiff to issue and file an application for the re-hearing of the aforesaid complaint and I shall hear counsel as to costs or any other orders sought so that you have, in effect, obtained the declarations necessary and the orders in the nature of *certiorari* quashing the orders about which you complain. I order that the first defendant pay the plaintiff's costs and I shall grant to the first defendant a certificate under the *Appeal Costs Act*, s13.

APPEARANCES: For the Plaintiff (K): Mr J Gibson, counsel. Solicitors for the Plaintiff: Harwood Andrews. For the Defendant (IIP/L): Mr A McNab, counsel. Solicitors for the Defendant: Holt and McDonald.
