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SUPREME COURT OF VICTORIA

HO and ANOR v BMW AUSTRALIA FINANCE LTD

Smith J

3 April, 3 May 1995

CIVIL PROCEEDINGS – APPLICATION BY DEFENDANTS FOR ADJOURNMENT – MEDICAL EVIDENCE NOT ACTED UPON – ADJOURNMENT REFUSED – FURTHER APPLICATION NEXT DAY TO A DIFFERENT MAGISTRATE – APPLICATION BASED ON SAME EVIDENCE - WHETHER OPEN TO SECOND MAGISTRATE TO ENTERTAIN APPLICATION – WHETHER APPLICATION SHOULD HAVE BEEN REFUSED AS AN ABUSE OF PROCESS.

Where, in civil proceedings, an application for an adjournment was refused and subsequently, a second application was made to another magistrate based on identical material to that presented to the first magistrate, the second magistrate had jurisdiction to entertain the further application but should have refused it as an abuse of process.

SMITH J: [1] By originating motion dated 8 September 1994, the plaintiffs Bob Ho and Lucy Ho seek orders pursuant to s11 of the *Administrative Law Act* (Vic) 1978, Chapter 1, Rule 56.01 or, alternatively, the inherent jurisdiction of the court in the nature of *certiorari* in relation to several decisions. The first is a decision by his Worship Mr Street in proceeding No.FO2618068 made in the Magistrates' Court at Melbourne on 31 August 1994 refusing an application for an adjournment of the trial of the proceeding. The others are "the decision and judgment" of his Worship Mr Braun made in the proceeding on 1 September 1994 whereby he refused to adjourn the hearing of the proceeding and gave judgment against Mr and Mrs Ho in the sum of $10,785.24 with interest of $1154.52 and cost of $3,086.50. The motion seeks orders that the decisions and the judgment be quashed. The motion also seeks an order in the nature of mandamus referring the original proceeding back to the Magistrates Court at Melbourne for re-hearing.

The relevant background facts are that in the abovementioned proceeding, BMW sued Mr and Mrs Ho who were directors of a company called Geelong Land and Holdings Pty. Ltd (the Company). The proceedings against them were brought in respect of two guarantees they had given in favour of BMW in relation to a hire purchase agreement between the company and BMW. The Company had gone into liquidation. The case was listed for hearing on 2 January 1994 but was not reached. It was relisted for hearing on 1 September 1994. **[2]** On 31 August 1994 counsel appeared on behalf of the Hos on an application for an adjournment of the hearing of the proceeding. Counsel for BMW indicated that the application was opposed "in part" on the basis of the lateness of the application and the fact that the doctor's report relied upon was a little ambiguous as to Mrs Ho's ability to give creditable evidence. It should be noted that at no time was it suggested that Mr Ho needed the adjournment. It was Mrs Ho who sought the adjournment on medical grounds.

The matter has proceeded before me, as it did before the magistrate, on the basis that Mr Ho was relying in the original proceedings on defences of the nature of *non est factum* and that Mrs Ho was relying on an *Amadio* defence. The application was made by the Hos on the basis that Mrs Ho was not in a position to give creditable evidence due to the fact that she had been on medication. Reliance was placed upon an affidavit sworn by their solicitor and a medical report obtained from a medical practitioner. The affidavit, sworn by Ian Robert Knox on 30 August 1994, deposed to the fact that he had spoken by telephone that day to the third-named defendant Lucy Ho. The affidavit stated that she advised him that in other proceedings earlier that year (in March 1994 in fact) in which she gave evidence in the Supreme Court, counsel had advised her that the fact that she was then taking Valium, because of the stress she was suffering appeared to have prevented her from giving evidence as a creditable witness. The affidavit stated that she told Mr Knox that, as the **[3]** proceeding in the Magistrates' Court was also causing her stress, she had arranged to see her doctor about the problem late the previous week. Mr Knox then deposed to

attempts to contact Mrs Ho's doctor, a Dr Roberts, from the Corio Community Health Centre. In response to an urgent message left for him Dr Roberts telephoned Mr Knox's home at about 2.15 p.m. on Tuesday 30 August 1994. He discussed Mrs Ho's condition with the doctor and sought his advice about whether she would be in a fit condition to give evidence on the return day of the proceeding on 1 September 1994. Mr Knox deposed that Dr Roberts advised him that Lucy Ho had now been withdrawn from taking calmatives but would need to have other non-sedating treatment in the meantime to which he was attending. He expressed the opinion to Mr Knox that the proceeding should be postponed for approximately four weeks to enable him to monitor and stabilise the new therapy and in his opinion she ought to be able to give evidence properly after the expiration of that time. Dr Roberts arranged for a report to the foregoing effect and it was sent to Mr Knox by facsimile transmission. Mr Knox then contacted Ms. Annesley, the solicitor for BMW, to advise of an intended application for an adjournment for four weeks requesting that BMW consent to such an adjournment. The solicitor said that she would not seek the plaintiff's consent and accordingly the application would have to be made. Shortly after that conversation Ms. Annesley telephoned Mr Knox and asked that the application be made on 1 September 1994 as counsel had been briefed for the hearing on that day. Mr Knox deposed, however, that it would be in the interest of the court and of **[4]** his client to make the application at the earliest opportunity because the matter had been set down as a special fixture for 1 September 1994 and the court might be able to reallocate the time.

The application was issued with supporting affidavits including an affidavit annexing the report of Dr Roberts. It was dated 30 August 1994 and stated the following:

> "Mrs Ho has been and is under considerable mental duress at present, with the making of the Supreme Court order for her to give up possession of the family home together with the imminent perceived breakdown of her family. I am instructed that at her recent Supreme Court attendance the giving of her evidence was marred by her having taken calmatives that resulted in a poor performance as a credible witness. She has now been withdrawn from this medication but will need to have other non-sedating treatment in the meantime, which I am prescribing for her. In my opinion, the proceeding scheduled for this coming Thursday should be postponed for a period of not less than four weeks to facilitate the monitoring and stabilisation of this new therapy, by which time I am of the view that she ought to be able to give evidence properly and in a manner which I believe will be fair to her and in the interest of the court."

In an affidavit sworn by counsel who appeared on the application on 7 September 1994, counsel deposed that Mr Street read the affidavit which had the medical report annexed to it as an exhibit and that then, without asking for a copy of the first affidavit or giving counsel the opportunity to continue, asked counsel for BMW what he had to say in response. Counsel for BMW said that he understood the Supreme Court matter referred to was in May 1994 (it was in fact in March) and that Mrs Ho was aware of the problem that **[5]** her medication would give her from that date. He submitted that, notwithstanding that, she had only gone to see her doctor late the previous week. He repeated his complaint that the report was ambiguous and gave no direct evidence that Mrs Ho was not then capable of giving credible evidence. The magistrate then asked counsel for Mr and Mrs Ho whether he had anything to say in reply. Counsel referred him to the last paragraph of the medical report. The magistrate commented that the report did not say why Mrs Ho could not give credible evidence now that she has been taken off the Valium. It also did not say that she was then on medication which would affect her ability to give evidence. Counsel for Mr and Mrs Ho submitted that the doctor had stated that he was prescribing other non-sedating treatment and that he assumed that the doctor had formed the view that in light of this and the fact that she had just come off the Valium her ability to give evidence would have been affected. Counsel for Mr and Mrs Ho has deposed that, without inviting further submissions either on the facts or the law, Mr Street announced that the application was refused. It is deposed that he gave three reasons:

> "(a) A delay would be caused if the hearing was adjourned.
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> (b) The matter had been set down for hearing in June 1994 for two days but had not been reached and that it had been fixed for hearing on 1 September 1994. Given the nature of the court list, the system was not designed to adjourn the matter for four weeks. If the hearing date was vacated it would be unlikely **[6]** that the matter would be heard before the following year and that was too long.
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> (c) He was not satisfied based on Dr Roberts' report, that Mrs Ho could not give credible evidence

now that she was no longer taking the calmatives and that all Dr Roberts' report said was that she "ought to be able to give evidence" in 4 weeks' time."

The magistrate also ordered Mr and Mrs Ho to pay BMW's costs of the application.

Counsel appeared for Mr and Mrs Ho on the date fixed for the hearing of 1 September 1994 with instructions to make a second oral application for adjournment of the hearing. The same counsel represented the parties. On this occasion the application was heard before his Worship Mr Braun. A fresh affidavit was filed in support which exhibited previous affidavits and material indicating that BMW had been put on notice of the intention to make an oral application to adjourn the hearing. In substance, therefore, no fresh material was filed on the merits and the ground of the application was again that Mrs Ho was unfit to give evidence. Mr Braun asked counsel for Mr and Mrs Ho whether this was the same application that had been made before Mr Street on the preceding day to which Mr Harris replied in the affirmative. He stated that the application on 1 September 1994 was made pursuant to Rule 23.04 of the *Magistrates Courts Civil Procedure Rules* 1989. Asked expressly if there was any new material other than that which was before Mr Street, counsel for Mr and Mrs Ho replied in **[7]** the negative. Counsel was asked by Mr Braun as to whether there was any authority to show how a court could re-deliberate on an application heard and decided already between the same parties. Mr Harris said there was no authority and that he relied on the language of the rules – in particular, that of Rule 23.04. He submitted that this gave the magistrate a broad and unfettered discretion to order an adjournment if the interests of justice required it. It was submitted that this discretion was not spent merely because Mr Street considered the same material. It was submitted that if, in the circumstances, he formed the view that an adjournment should be granted in the interests of justice, he was entitled to so order.

In the course of the submissions made for Mr and Mrs Ho, Mr Braun asked counsel whether he sought to make his application on the basis that Mrs Ho intended to appeal the decision of Mr Street. Counsel replied in the negative and repeated that the application was the same as that made before Mr Street on the previous day, that is, an application on the grounds that Mrs Ho was unfit to give evidence. During the course of the submissions of counsel for Mr and Mrs Ho in relation to Mrs Ho's medical condition, Mr Braun noted that the affidavit in support of the application before Mr Street and before him was not an affidavit from the doctor but exhibited the doctor's report and in those circumstances was hearsay. Mr Braun also enquired of counsel for Mr and Mrs Ho whether Mr Ho was present in court when counsel responded in the negative, the magistrate enquired as to why this was so. Counsel replied **[8]** that he had no instructions on the point and that he had made the application on behalf of the plaintiffs. No affidavit material was filed to explain the fact that Mr Ho was not present. Counsel for Mr and Mrs Ho explained the issues in the proceedings to the magistrate. The fact was that the Amadio defence to be relied upon by Mrs Ho was raised in a further amended defence which had been served on 25 May 1994, nine days prior to the original hearing date of 2 June 1994. As at 1 September 1994 no formal application had been made to so amend the defence.

Counsel for BMW submitted, *inter alia*, that the magistrate had no jurisdiction to hear the application as the decision had been made on a previous day and where there was no fresh material his Worship was *"functus officio"*. He also submitted that the nature of the application before the magistrate Mr Braun was that of an appeal from a decision of Mr Street and that Mr Braun had no jurisdiction to hear an appeal from another magistrate's decision. He submitted that the plaintiffs were forum shopping. On this aspect the magistrate commented that the issue of forum shopping would only be relevant if he had jurisdiction to entertain the application and he saw the latter as the real issue. Assuming the Court had jurisdiction, counsel for BMW submitted that the authorities that had been referred to required that the Court be satisfied of the medical fact of the applicant's condition before granting the adjournment. He submitted that Mr Street had not been satisfied on the evidence before him of the medical facts and that Mr Braun should draw the same conclusion because there was no fresh **[9]** material. Counsel also commented on the fact that the application before Mr Street had concluded at 11.30 a.m. the previous day and Mrs Ho had had at least six to eight hours available to her and her solicitors to prepare further affidavit material. He stated that the application had not been made to adjourn the application before Mr Street to obtain further material despite the fact that the magistrate had made his concerns clear in relation to its adequacy. He submitted that 24 hours later in the application before Mr Braun no further material had been provided and no explanation as to why it had not

been and no explanation as to why the doctor had not sworn an affidavit. It was submitted that an adverse inference should be drawn from the absence of further affidavit material since the first application.

After referring to his submissions to Mr Street about the ambiguity and vagueness of the report, counsel for BMW submitted that the ambiguity and vagueness of the report meant that the Court was being asked to interpret the report as best it could. The Court should not be put into such position. He submitted that there was no direct evidence in the report that Mrs Ho could not give evidence on 1 September 1994. It seems that counsel for BMW also informed the magistrate from the Bar table without objection that in the Magistrates' Court on 2 June 1994 both plaintiffs had appeared at court to defend the proceeding and at no time was it suggested to the solicitor for BMW through counsel, or directly, that Mrs Ho was suffering from mental duress and that she did not then seek an adjournment on the basis of her **[10]** alleged illness. Counsel submitted that Mrs Ho had allegedly been ill since March 1994 and yet had not seen a doctor until three days before the adjourned hearing some nine months later. He submitted also that stress was the common side effect of litigation and it was nothing special. As to the question of whether costs would provide an adequate remedy, counsel submitted to Mr Braun that there was no guarantee that the costs would ever be paid if ordered. The company of the plaintiffs was in liquidation and an order had been made by the Supreme Court for possession of the plaintiffs' home. In the proceedings before the Magistrates' Court an amount of $10,000 was being pursued. Mr Braun took this matter up commenting that it was too easy for a party to say that it would compensate any injustice that might be suffered by an opposing party by an order of costs unless the costs were satisfied and said that he would be satisfied if some form of security was provided by Mr and Mrs Ho. After counsel for Mr and Mrs Ho replied, Mr Braun delivered his reasons and judgment on the application.

Mr Braun gave lengthy reasons in the course of which he referred to the task of balancing the principle of finality of proceedings and the injustice done to a party who is unable to attend the court due to a medical condition. He accepted that the availability of a defendant to give evidence was at the very heart of the justice system and that it was well founded in the authorities that Courts should exercise a discretion to uphold that principle. He stated that the same principle was before Mr Street on the preceding day. He stated, however, that it was a fundamental **[11]** principle that Courts should hear and decide cases finally and that community faith in the justice system would be undermined if the finality of decisions was to lose its status. He acknowledged that if the action proceeded in the absence of Mrs Ho that would catastrophic for her. He stated that that did not mean that the only defence available to her was that based on her evidence in that there were or may be technical flaws and weaknesses in the BMW case that could be exploited despite her absence. Mr Braun stated that he had no doubt that these matters would have been matters that Mr Street had taken into account on the previous day. He also found that, on the evidence before him, Mr Street had referred to the medical evidence on a number of occasions in the course of submissions prior to the adjournment.

His Worship then stated that where fresh circumstances exist the Court will entertain a fresh application under the various rules of courts. Otherwise he said a court would be sitting in review of its own decision and a court of the Magistrates' Court standing could not do that. His Worship also stated that counsel for Mr and Mrs Ho had purposely avoided making any application or adjournment on the ground that the decision of Mr Street would be appealed to the Supreme Court. His Worship said that if the basis of the application was an appeal to the Supreme Court from Mr Street's decision then it may have been possible to grant the adjournment. However, the application being made was on the same material as had been **[12]** relied upon before Mr Street. He ruled that he had no jurisdiction to hear the application. Accordingly, he refused the application and made no finding in relation to the merits of it.

The application having been refused counsel for Mr and Mrs Ho made an application for an adjournment on the ground that the decision of Mr Street was to be appealed to the Supreme Court. His Worship refused this application on the ground that it was belated and there were no proper documents before the court. He stated that he had concerns about the authenticity of the application and was not satisfied that Mr Harris had instructions to make such application. He ordered that Mr and Mrs Ho pay BMW's costs of the application and referred the matter for hearing. Judgment was later entered.

The application challenges the refusal by the magistrate, Mr Braun, of both adjournment applications made to him and the judgment entered. No issue is taken by the respondent on such issues as what constituted the record and the matter proceeded before me on the basis that it was proper for me to consider the affidavit material filed and exhibits to those affidavits.

Several grounds are raised in the originating motion as the basis upon which the decision of Mr Street is challenged. I do not propose to set the grounds out in detail. The reasons pronounced by Mr Street referred to several matters but his decision turned on a critical finding of fact that he was not satisfied that Mrs Ho could not give credible evidence now that she was no longer taking **[13]** calmatives. That conclusion involved a rejection of the basis for the application for the adjournment and it was therefore, strictly speaking, of no relevance to his Worship's decision to go on to consider other matters relevant to the exercise of the discretion. The issue to be resolved, therefore, is whether the magistrate erred in making that finding. The issue is probably raised by Grounds 1, 2, 3 and 6.

It was submitted on behalf of Mr and Mrs Ho that the report from Dr Roberts made it clear that Mrs Ho was not able to give evidence adequately. While the report did not expressly state that she was not able then to give credible evidence that conclusion was implicit in what was stated in the report.

The magistrate was not confined in his determination of the question of fact to the report and the solicitor's evidence of the doctor's opinions. Such evidence was to be considered in the context of other evidence. The difficulty facing the Hos was that the report did not contain a statement by the doctor that Mrs Ho was at that time unable to give credible evidence. In ordinary circumstances and in the absence of other evidence, a magistrate might well have been prepared to give them the benefit of the doubt rather than cause the incurring of further costs but there were circumstances that raised doubts about the *bona fides* of the application. There was evidence before his Worship that the question of whether the drug treatment was affecting Mrs Ho's ability to give evidence was brought to her attention during the Supreme Court hearing which occurred several **[14]** months earlier. There was also evidence that the Hos had appeared on the first hearing date in June 1994 and had apparently been prepared to proceed at that time notwithstanding that Mrs Ho was still taking the medication which had allegedly affected her ability to give evidence. It also appeared that she did not take any action to have the problem addressed until the week prior to the adjourned hearing on 1 September 1994.

Having regard to those circumstances the ambiguities in the report took on a significance they might not otherwise have had. It cannot be said, therefore, that it was not reasonably open to the magistrate to find as he did that he was not satisfied that Mrs Ho could not give credible evidence. That being so no error of law can be demonstrated in his decision.

As to the two decisions of Mr Braun, the grounds raised are:

> 1. That he erred in finding that he had no jurisdiction to entertain the application for adjournment on the day of the hearing.
> 2. That he erred in refusing to grant leave to counsel to make a second oral application for an djournment pending determination of any appeal.
> 3. That the refusal to grant an adjournment based on the evidence before him and the submissions made resulted in a miscarriage of justice.

Strictly speaking, it appears to me that the magistrate did err in saying he had no jurisdiction but while the magistrate may have wrongly characterised the problem **[15]** which faced Mr and Mrs Ho, nonetheless relief of the kind sought should not be granted because his decision was correct in any event. The magistrate was faced initially with an application for an adjournment based on identical material to that which had been presented to Mr Street. The application before Mr Street had been refused on the ground that he was not satisfied that Mrs Ho was prevented from giving credible evidence by reason of ill health. That decision did not prevent Mr and Mrs Ho from making a further application on the day of the hearing. Thus there was jurisdiction to entertain a further application. The application mounted, however, was an abuse of process because it sought effectively to challenge the first decision and sought a re-hearing when none was provided for by the courts procedures and it was based on the identical material that had been relied on previously (*Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR

485; (1993) 177 CLR 378, 393; *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462; *Stephenson v Garnett* (1898) 1 QB 677; *Duncan v Lowenthal* [1969] VicRp 21; [1969] VR 180, 182). Thus it appears to me that this is a case where the remedy of *certiorari* should be refused in the exercise of the court's discretion on the grounds that the decision would have been the same if the correct approach had been taken and that the issue raised is, therefore, without merit and refusal of the relief sought will cause no real injustice (cf. *R v O'Sullivan* (1967) WAR 168, 171; *R v Knightsbridge Crown Court* [1983] 1 All ER 1148; [1983] 1 WLR 300 at 313; *Commissioner of Police v Gordon* [1981] 1 NSWLR 675, 690).

[16] As to the application for an adjournment following the refusal of the initial application before Mr Braun, it appears that his Worship rejected the application on the grounds that it was belated and made without proper documents before the court and he stated that he had concerns about the authenticity of the application and Mr Harris's instructions to make it. In submissions to this Court, it was put that the magistrate had no basis for saying that he was not satisfied that counsel had instructions in that if the magistrate had any doubts about that he should have invited counsel to clarify the situation.

I note that in Mr Harris's affidavit it is stated that he sought leave to make an oral application. Whether that was required or not, the situation was that the magistrate was asked to exercise a discretion in favour of Mr and Mrs Ho in circumstances where, not long before, when asked if they sought an adjournment on the grounds that they wished to appeal the earlier decision, counsel had indicated that they did not seek an adjournment on that ground. Mr and Mrs Ho were not in court. They had already applied that day for an adjournment based on material which the previous magistrate had found insufficient and had not sought to augment that material. It was within the magistrate's discretion to decline to give leave to bring the second application on 1 September 1994 and, further, to refuse it in the absence of direct evidence that Mr and Mrs Ho did in fact wish to appeal, he having been told that they did not seek an adjournment on that basis only a short time earlier. **[17]** Counsel did not seek an opportunity to make an application on further material and accordingly Mr and Mrs Ho cannot, in my view, now complain.

For the above reasons I am not persuaded that any error of law has been shown on the part of Mr Street and the application in relation to his decision should be dismissed. As to the decisions of Mr Braun, I am satisfied that an error was made in relation to his refusal of the first application but that the relief sought in relation to it should be refused. As to his refusal of the second application I am satisfied that no error has been shown. The judgment also should stand.

APPEARANCES: For the plaintiffs Ho: Mr G Parncutt, counsel. Bowman Knox Payne, solicitors. For the defendant BMW: Mr J Forrest, counsel. Mills Oakley McKay, solicitors.
