52/90

SUPREME COURT OF VICTORIA

ZEV EIZIK CORPORATION PTY LTD v PRO-IMAGE PRODUCTIONS (VIC) PTY LTD

Marks J

26 September 1990

CIVIL PROCEEDINGS – APPLICATION FOR ADJOURNMENT – FIRST RETURN DATE – DEFENDANT'S PRINCIPAL WITNESS OVERSEAS FOR 2 MONTHS – WHETHER ADJOURNMENT APPROPRIATE – WHETHER MERITS OF DEFENCE A RELEVANT CONSIDERATION.

When determining an application for an adjournment, the relevant consideration is not a conclusion about the strength or existence of a defence but whether a fair opportunity has been given to a party to avail itself of the services of the court to determine the validity or strength of the case which that party wishes put before the court. Where, in civil proceedings, a defendant's principal witness was overseas on the first return date but planned to return some 2 months later, a magistrate was in error in refusing an application for an adjournment on the ground that the defendant did not have a defence to the claim.

MARKS J: [1] This is the return of an order nisi granted by Master Barker on 26 May 1989 to review the decision and order of the Magistrates' Court at Melbourne on 28 April 1989 refusing an application on behalf of the plaintiff for an adjournment of the hearing of a default summons and ordering on that summons that the plaintiff pay $9,829.22, $1,922.76 interest, and $1,990.20 costs. There were three grounds of the order nisi. Ground 1 has been amended without objection to read:

> "The Magistrate misdirected himself and thereby failed to exercise his discretion properly or at all in ruling that he could not grant an adjournment of the hearing of the complaint on the basis that the plaintiff did not have a defence, notwithstanding that the plaintiff had not been heard, that its principal witness was overseas, and that its legal representatives were not fully instructed."

Grounds 2 and 3 are as follows:

> 2. The Magistrate misdirected himself and thereby failed to exercise his discretion properly or at all in ruling that he would not grant an adjournment of the hearing of the Complaint whereas:
> (a) the refusal would result, and in the circumstances did result, in serious injustice to the Plaintiff;
> (b) the refusal of the application for adjournment was not the only way in which justice could be done to the Defendant;
> (c) the refusal of the application for adjournment, the failure of the Defendant having any fair trial of the action.
>
> 3. The learned Magistrate misdirected himself and thereby failed to exercise his discretion properly or at all in ruling that the hearing of the Complaint should proceed without the adjournment as sought on behalf of the Plaintiff herein."

The substance of the error alleged is that the **[2]** Magistrate refused an adjournment for which application was made on behalf of the plaintiff by its legal representatives. Notice had been given to the defendant, who was the complainant in the court below, some two days or so before the hearing, but the application was opposed. The basis of the application was that the principal witness for the plaintiff, a person named Zev Eizik, who was obviously the alter ego of the plaintiff, was overseas and, by virtue of his being a member of the Israeli army, was not free to leave that country until he had completed his service. It was anticipated that he would be back in Australia by the end of June, which was only some two months or so away.

The application for the adjournment was supported by an affidavit and evidence given by the solicitor for the plaintiff, Mr Efron. Mr Efron had put an unsworn copy of an affidavit before

the court and although it had not been sworn its contents were referred to and received by the Magistrate. The Magistrate was told that the plaintiff had a defence to the claim, in substance that it was an agreement pursuant to which the defendant (complainant) had agreed not to charge for the work and labour, the subject of the complaint, on the basis that other work and labour would be ordered involving substantial sums of money.

According to the material in support of the order nisi, the Magistrate refused the application and in doing so expressed himself as follows I refer to paragraph 17 of the affidavit of Mr Stephen Wartski, who **[3]** was counsel for the plaintiff:

> His Worship then said that pursuant to the first affidavit sworn by Efron, Zev Eizik had completed military duty in the Israeli army. However, he was satisfied that this was due to an error of interpretation by Efron and the matter had been cleared up by the second affidavit. He stated, however, that he was not satisfied that the defendant did have a defence and, accordingly, he refused the application for an adjournment."

Mr Shelley of counsel for the plaintiff, submitted on the authority of *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234 that the refusal to grant the adjournment in the circumstances prevented the plaintiff from presenting its defence with the result that an injustice could have occurred. Mr Marantelli, of counsel for the defendant, submitted that the Magistrate was entitled to take into account the strength or existence of any defence and that he committed no error in the exercise of his discretion to refuse the adjournment. Mr Marantelli submitted, and Mr Shelley did not contradict, that the Magistrate was entitled in the proper exercise of his discretion to refuse the adjournment and that the principles governing the exercise of such a discretion are well established. Mr Marantelli referred to the well-known statement of the principle by Kitto J in *Australian Coal and Shale Employees' Federation & Anor v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at p627. The result is that both counsel submitted that the appropriate test resulted in the burden being on the plaintiff to demonstrate some error of law in the exercise of the discretion. The presumption is that the decision is unassailable, but that presumption may be rebutted by demonstration of error. **[4]** In my opinion, error has been demonstrated in this case and the order nisi is to be made absolute. My reasons may be shortly stated. It is common ground that the application was made to the Magistrate on the first return date. It is also clear that the Magistrate was obliged to consider the factors which weighed in favour of and against the adjournment. In my opinion, the Magistrate was not entitled to conclude on the material before him that the plaintiff had no defence or that there was some burden on the plaintiff to establish that he had a defence which either would or was likely to succeed.

Our system of justice entitles a person to have his or her rights determined after a full hearing of the case which he or she, or in the case of a company, it, wishes to present. The Magistrate was informed by the legal representatives of the plaintiff that because of the absence overseas of Mr Eizik, they were not fully instructed as to all the circumstances which would go to support the defence which was outlined. There can be little doubt that the Magistrate did not hear the evidence which the plaintiff wished to present by way of defence to the claim and, accordingly, it was not open to the Magistrate to conclude that there was no defence.

That situation may be contrasted with one where a fair opportunity has been given to a party to present his or her case, and in the light of the conduct of that party not having taken advantage of such fair opportunity, an inference might be drawn that he or she **[5]** has no or no strong defence. The relevant consideration, however, is not the conclusion about the strength or existence of the defence, but whether a fair opportunity has been given to a party to avail itself of the services of the court to determine the validity or strength of the case which that party wishes to put before the court. There can be little doubt that the Magistrate did not approach the application for the adjournment in that way and fell into error. The Magistrate did have open to him many alternatives to ensure that no countervailing injustice was done to the defendant. The Magistrate could have granted an adjournment on terms; for example, terms as to the fixing of a hearing date which would give the plaintiff and its witnesses a fair opportunity to be present, terms as to the payment of costs, and, if necessary, the payment of any other expense to which the defendant might be said to have been put by reason of an adjournment. It was not necessary, of course, that the Magistrate grant successive adjournments to meet any application which the plaintiff might make; it was only necessary to deal with the application in such a way as to avoid injustice to the plaintiff.

In this case it meant that the Magistrate was obliged to consider the application by dealing with it so as to avoid injustice to either party and do justice, as best as the court was able, to both parties. As I have said, the Magistrate, according to the material before me, did not approach the matter in that way and **[6]** fell in error. The order nisi is made absolute with costs. The order of the Magistrates' Court, 28 April 1989, is set aside and the default summons is remitted to the Melbourne Magistrates' Court for hearing and determination according to law by another Magistrate. I will grant a certificate to the defendant under the *Appeal Costs Act*.

APPEARANCES: For the plaintiff Zev Eizik: Mr AV Shelley, counsel. Graeme D Efron, solicitor. For the defendant Pro-Image Productions: Mr S Marantelli, counsel. Donovan & Howard, solicitors.
