40/08; [2008] VSC 342

SUPREME COURT OF VICTORIA

WILLIAMS v BEVERIDGE

Cavanough J

21 August 2008

CIVIL PROCEEDINGS – CLAIM IN RELATION TO WATER EASEMENTS AND CONSTRUCTION OF A FENCE – PLAINTIFFS INDICATED THAT THEY WISHED TO JOIN A FURTHER DEFENDANT – IN JULY MATTER FIXED FOR TWO-DAY HEARING IN LATE NOVEMBER – APPLICATION IN EARLY NOVEMBER BY PLAINTIFFS FOR AN ADJOURNMENT IN ORDER TO JOIN A FURTHER DEFENDANT – ADJOURNMENT NOT AGREED TO BY DEFENDANTS – APPLICATION ADJOURNED TO DATE FIXED FOR HEARING OF CLAIM – ON DATE OF HEARING DEFENDANTS READY TO PROCEED – APPLICATION BY PLAINTIFFS' COUNSEL FOR ADJOURNMENT – AFFIDAVIT FILED UNINFORMATIVE AS TO REASONS FOR ADJOURNMENT – APPLICATION REFUSED – APPLICATION THEN MADE FOR ADJOURNMENT UNTIL FOLLOWING DAY – APPLICATION GRANTED UNTIL 12 NOON ON FIRST DAY – WHETHER MAGISTRATE IN ERROR IN REFUSING ADJOURNMENT – MATTERS TO CONSIDER WHEN ADJOURNMENT SOUGHT.

1. The failure of a tribunal to adjourn a matter may conceivably constitute a failure to allow a party the opportunity of properly presenting his or her case even though the party in question has not expressly sought an adjournment. In this regard however it is important to remember that the relevant duty of the tribunal is to ensure that a party is given a reasonable opportunity to present his case.
***Adams v Wendt* 30 ALD 877, VSC, Fullagar J, 26 February 1993, applied.**

2. It was necessary for the party complaining about the refusal of an adjournment to persuade the court that the refusal amounted to an injustice against that party in all of the circumstances of the case.
***Opeka Pty Ltd v Mackie Group Pty Ltd* [2003] VSC 183, applied.**

3. In the present case, it was open to the magistrate to consider that little or nothing had been said on behalf of the plaintiffs that was in any way convincing with respect to the steps that had been taken up until the date of hearing and that the plaintiffs had not been denied a reasonable opportunity to present their case. Accordingly, the magistrate was not in error in refusing the application for an adjournment.

CAVANOUGH J:

1. I have formed a clear view that this appeal from the Magistrates' Court should be dismissed, and I think it is as well that I say so now and do the best I can to explain my reasons. They are probably fairly apparent already from my discussions with counsel. In my view there ought to be a swift end now to the underlying litigation between the appellants, the Williamses, and the respondents, the Beveridges.

2. A proceeding was issued by Mr and Mrs Williams against Mr and Mrs Beveridge in the Magistrates' Court at Echuca on 27 March 2007. The Williamses' claim apparently related to an agreement concerning water easements and the construction of a fence on the property of the Beveridges. It came on for interlocutory proceedings in the Magistrates' Court in May and June 2007. These proceedings resulted in an order by consent giving the Williamses, the then plaintiffs, until a date in mid July 2007 to do what they had previously said they wished to do, namely join a further defendant or defendants, the Cedenco group of companies, which had apparently been a party to the agreement on which the claim was brought against the Beveridges.

3. The Williamses' stated desire to claim against Cedenco had been foreshadowed as long before as July 2006 in a letter from their solicitor to the solicitors for the Cedenco group. Nevertheless Cedenco was not originally joined as a party when the proceedings were eventually issued on 27 March 2007 and it had not been joined prior to the period of interlocutory activity to which I have referred. In effect a last chance was given to the Williamses to join Cedenco by mid July 2007 pursuant to the consent order, but even then it was not done. Later in July the matter was specially fixed for a two day hearing commencing 28 November 2007.

4. From July 1997 the matter proceeded only against the Williamses in the Magistrates' Court and for all that appeared (at least to the Beveridges) there was no longer any intention by the Williamses to join the Cedenco group. The foreshadowed application to join the Cedenco group had lapsed.

5. However on 5 November 2007 the Williamses, by their solicitor, contacted the Magistrates' Court by facsimile, seeking an adjournment of the 28 November hearing date (which had been fixed some four months previously). The basis which was advanced on behalf of the Williamses for that application was the now apparently revived, or perhaps continuing, intention on the part of the Williamses to join the Cedenco group as a further defendant. That was communicated to the Beveridges' solicitors on 12 November when they belatedly received in the mail a copy of the Williamses' solicitor's facsimile to the Court dated 5 November 2007. The Beveridges' solicitors wrote back indicating firm opposition to the course that was proposed, and indeed they repeated this in subsequent correspondence. Ultimately, on Friday 23 November 2007, the solicitor for the Williamses approached the Magistrates' Court again, seeking to obtain an opportunity to apply for an adjournment in a more formal way, but at that stage was told that no application could be entertained until Wednesday 28 November, the date set for the substantive hearing.

6. On 28 November 2007 Mr Triaca of counsel appeared for the Williamses to seek the adjournment. Mr Richardson of counsel appeared for the Beveridges, who were present in Court with their witnesses and their expert on call.

7. An affidavit had been prepared by the solicitor for the Williamses, and it was put before the magistrate when the application for adjournment came on. There was also an opposing affidavit from the solicitor for the Beveridges. The affidavit of the solicitor for the Williamses was singularly lacking in detail or particulars or cogency. In my view, in all the circumstances as they were at that time, and as they must have been apparent to the Williamses' lawyers, there was a crying and obvious need for material that would convince the magistrate that circumstances beyond the reasonable control of the Williamses had intervened, such as to make it just to order that the two day fixture that had been specially set aside for this matter should go off, notwithstanding that the Beveridges were ready[1], and notwithstanding that two hearing days that would otherwise have been available to other parties waiting in the lists of the Magistrates' Court would thereby have been lost. But that level of particularity or detail or cogency simply was not shown in the material in the solicitor's affidavit. Nor did Mr Triaca's submissions take those matters any further. There is no need for me to go through the detail of the affidavit now. I have discussed this in argument with counsel today, and I regard the affidavit as singularly uninformative and unpersuasive and I am not in the slightest bit surprised that the magistrate apparently took the same view.

8. The magistrate also had the affidavit of Mr Cosgriff, the solicitor for the Beveridges, in front of him and it outlined the history of the matter in a way that was not contested at all by counsel for the Williamses at the Magistrates' Court hearing. That affidavit was in accordance with the summary that I have already given of the proceedings in the Magistrates' Court. I am satisfied that it is more likely than not that the magistrate read both of the affidavits. In any event the essence of what had happened was certainly conveyed to him by counsel for each party.

9. In refusing the adjournment the magistrate said, at first, the following:

> "The Court has allocated two days for this hearing. It's blocked out. It means that people in other venues of this Court don't get on. We're pretty pressed in terms of criminal work, *et cetera*, which can't be handled. You had advised to the Court – gave advice to the Court in mid this year that you were going to join. Nothing seems to have been done. You've had your chance. We're on today so we're progressing. You're the plaintiff; over to you".

10. That ruling having been made, counsel for the Williamses, who had only been briefed to apply for the adjournment, then sought an opportunity to make a different application, not relying on the failure to join Cedenco but rather, apparently, on the need to allow some time for Mr Clark of counsel, who had been engaged in the substantive matter, to get to court to run the case. At least, Mr Triaca foreshadowed that such an application might be made. He said:

> "Would Your Honour be minded to adjourn then for a short period of time? It's set down for two days. At least till tomorrow to enable some opportunity for Mr Clark to be here to run the case".

And His Honour replied:

> "I'll adjourn till 12 o'clock and then we'll make any orders that are relevant then. There's some criminal work I can do in the meantime, but it was ready to go at nine o'clock today or ten o'clock today. You're not ready to go. It seems to me the only outcome is the outcome that Mr Richardson's asked for, but in the meantime 12 o'clock".

11. The matter was then stood down, but Mr Triaca did not reappear at 12 o'clock. In the meantime, a fax had come in from his instructors, the Williamses' solicitors, asking for reasons for the magistrate's decision to refuse the adjournment. In those circumstances the magistrate said this:

> "The court has dismissed the plaintiff's application for adjournment and a facsimile has been received from the plaintiff's solicitor asking for reasons for this decision. The reasons, to reiterate, for my decision are that this matter has been booked in for hearing since July 2007. If the matter was to be adjourned today, it would not be able to be relisted before mid 2008. The reasons for the proposed adjournment was a difficulty in joining a party. No particulars of the nature of the difficulty have been advanced. The intention to join the party was advanced by the plaintiff at the prehearing conference in July this year. The following five months would have been adequate time, in my view, for the necessary action to be taken. The solicitors for the plaintiff waited until 5 November to advise the court of the problem. The defendants have attended today with their witnesses and expert on call but the plaintiffs are represented by counsel alone. The presumption that the business of the court can be interrupted at such short notice is misplaced. The court has a duty to dispatch its duties expeditiously and at as low cost as possible. In all the circumstances of this matter the application has been refused".

12. His Honour then went on to discuss the forms of order that were appropriate and decided in the end to dismiss the substantive proceeding and to order the Williamses to pay the Beveridges' costs of the proceeding.

13. In this appeal under s109 of the *Magistrates' Court Act* 1989, which has been brought before this Court today, Mr Harris of counsel, for the appellants (the Williamses), has criticised his Honour's reasons as omitting to give any or any sufficient weight to the matters on which the Williamses had relied in their application for an adjournment, and as not adverting specifically to the matters that the solicitor had mentioned in his affidavit, such as the alleged difficulty of obtaining the file from a prior solicitor, the alleged difficulty caused by the geographical distance between the Williamses and their Melbourne legal representatives and the alleged difficulty of complying with the requirements for further work that had been apparently laid down by Mr Clark, counsel briefed in the substantive matter.

14. But, as I have already said, the problem from the Williamses' point of view was that those matters were advanced in the vaguest of terms in the affidavit. There was no appropriate specification of the dates of the events concerned. There was no specification, for instance, of the date on which the file was eventually obtained from the prior solicitors. There was no detail about why there could not have been at least an amended statement of claim prepared in the five month period from June to November 2007 or even in the period between 15 October 2007 (on which date apparently there was a conference with counsel) and 28 November 2007 (when the matter came on before the Magistrates' Court). Even today, there has still been nothing formulated by way of a draft amended statement of claim of the kind that the Williamses assert that they wish to bring against Cedenco.

15. As I have already said, it was as long ago as July 2006 that there was a letter of demand sent by or on behalf of the Williamses to the solicitors for Cedenco, and in those circumstances it seems to me that the magistrate's lack of satisfaction with the case that had been brought before him for an adjournment is fully understandable and is sufficiently expressed and explained by what he said in his oral reasons.

16. Mr Harris also complains that the magistrate gave undue weight to principles of case management as compared with the loss that would be suffered by his clients by the refusal of the adjournment and the making of an order against them in the proceeding. I do not agree with that characterisation of the magistrate's approach. It is true that he gave some weight to considerations of case management. But he was fully entitled to do so, having regard to the authorities, including *Queensland v JL Holdings Pty Ltd*[2], *Sali v SPC*[3] and other cases.

17. It is a very difficult task for a party confined to appealing on questions of law alone to succeed in overturning a discretionary judgment of a magistrate to refuse an adjournment, especially where the appeal is based on grounds that are really a complaint about weight rather than about an alleged misunderstanding of the law or of relevant principle. In any event, I do not perceive any misunderstanding of relevant principle or of the law on the part of the magistrate in viewing the matter the way he did.

18. The magistrate gave principal weight to the fact that, in his view, little or nothing had been said on behalf of the Williamses that was in any way convincing with respect to the steps that had been taken up until 28 November, and he was simply unpersuaded, as I myself am unpersuaded, that the Williamses had been denied a reasonable opportunity to present their case.

19. After all, that is the appropriate way in which to consider situations like the present. As I mentioned to counsel in argument, I think the law is appropriately stated for present purposes in the decision of Fullagar J in *Adams v Wendt*[4], which is briefly reported at (1993) 30 ALD 877. His Honour referred to what Deane J, sitting as a judge of the Full Federal Court, had said in *Sullivan v Department of Transport*[5], namely:

> "The failure of a tribunal to adjourn a matter may conceivably constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment. In this regard however it is important to remember that the relevant duty of the tribunal is to ensure that a party is given a reasonable *opportunity* to present his case. Neither the Act nor the common law imposes upon the tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled."

That passage was duly applied in *Adams v Wendt* and has been applied or referred to in many other cases since.[6] In my view it aptly applies in the circumstances of the present case. To look at the matter in different language but essentially in the same way, the Williamses simply have not suffered any injustice in this case. They chose to put all of their eggs in the one basket. They did so with their eyes open. They chose to take the risk that their application for an adjournment would fail.[7] They chose not to be ready to run a case that they themselves had initiated, and in circumstances where they did not even suggest to the magistrate that they could not have run the case *against the Beveridges* had they so wished. There were no external circumstances that they demonstrated that would have prevented it, and indeed that is confirmed by what happened in the Magistrates' Court when Mr Triaca, having received the first ruling of the magistrate, then asked for the matter to be stood down with a view to seeing whether Mr Clark could come to run the case the next day. The magistrate did sound somewhat discouraging about that but nonetheless kept that option open. But when he came back on to the bench at 12 o'clock, he found that Mr Triaca wasn't there and that the plaintiffs had apparently abandoned any intention of proceeding in that way.

20. Therefore I think that one may apply to the circumstances of this case what was said by Basten J in *Dekkan v Picciau*[8], a case that related to the refusal by a District Court Judge to grant an adjournment in circumstances where the litigant concerned had been taken to hospital during the running of the case and then withdrew his lawyer's instructions. It was a case where the medical evidence did not seem to persuade the District Court Judge or the New South Wales Court of Appeal that the case could not have gone on satisfactorily with counsel alone as distinct from counsel and the client. Basten J said[9]:

> "So far as the background circumstances are concerned, his Honour appeared to share the applicant's view that Mr Johnson was hopelessly unprepared and not in a position to provide competent representation. The reason for that appears to have been his belief that the adjournment application based on the applicant's medical state would be granted. However that cannot be a satisfactory explanation. If solicitors who are briefed to appear generally in proceedings act on such a basis and can then successfully abort the hearing by withdrawing because they are ill prepared, the administration of justice in a busy court could readily be manipulated by the party in whose interests it is to cause delay. As between the applicant and the respondent the applicant must generally bear responsibility for the conduct of his solicitors. Were it otherwise, a trial judge would need to engage in the invidious task of apportioning blame between one party and his solicitors, in the course of a trial. That may need to be left to subsequent dispute resolution between them on a different occasion or in a different forum".

21. I have also had regard to *Opeka Pty Ltd v Mackie Group Pty Ltd*[10], a decision of Nettle J (as his Honour then was), to which both parties referred me and in which the authorities, particularly the authorities in this court, are surveyed. In my view those authorities do not tend to any different result. Each of them indicates that it is necessary for a party complaining about the refusal of an adjournment to persuade the court that the refusal amounted to an injustice against that party in all of the circumstances of the case.[11] In the present case the magistrate saw no injustice to the Williamses in refusing the adjournment and likewise I see no injustice to the Williamses in the decision that the magistrate made.

22. For those reasons the appeal will be dismissed.

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[1] It is well recognised that litigation imposes strains on litigants, especially for personal litigants, and that orders for costs are not necessarily a sufficient remedy for the added strain that an adjournment may occasion: see, eg *Ketteman v Hansil Properties Ltd* [1987] AC 189 at 220; [1988] 1 All ER 38; [1987] 2 WLR 312; *Geelong Building Society v Encel* [1996] VicRp 44; [1996] 1 VR 594, at 610-611; [1996] ANZ Conv R 180; *Queensland v JL Holdings* [1997] HCA 1; (1997) 189 CLR 146 at 154-155; (1997) 141 ALR 353; 71 ALJR 294.
[2] [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294.
[3] [1993] HCA 47; (1993) 67 ALJR 841; 116 ALR 625.
[4] Supreme Court of Victoria, 26 February 1993, BC9300638.
[5] (1978) 20 ALR 323; (1978) 1 ALD 383 at 403 (emphasis in the original).
[6] See, eg, *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 at [42], [44]; *Dekkan v Picciau* [2008] NSWCA 18 at [35]; compare *Hallett v SLA Partners Pty Ltd* [2005] VSCA 318 at [18] ("reasonable" notice and "reasonable" opportunity to prepare case).
[7] Compare *CBFC Limited v Charitopoulos* [2008] SASC 86 at [10].
[8] [2008] NSWCA 18.
[9] At [41].
[10] [2003] VSC 183.
[11] See, eg, *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503 at 506-508; (1986) 24 A Crim R 234 and cases there cited. And see now *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 at [44] and cases there cited.

APPEARANCES: For the plaintiffs Williams: Mr P Harris, counsel. Gleeson & Co, solicitors. For the defendants Beveridge: Mr M Stirling, counsel. Cosgriff Orchard Legal.
