20/99; [1999] VSC 325

SUPREME COURT OF VICTORIA

MARTIN v MAGISTRATES' COURT OF VICTORIA and SIBLEY

Byrne J

30 August, 3 September 1999

CIVIL PROCEEDINGS – REHEARING – *INSTRUMENTS ACT* CLAIM - LEAVE TO DEFEND GIVEN – NOTICE OF DEFENCE NOT FILED WITHIN TIME – ORDER MADE IN DEFAULT OF DEFENCE – APPLICATION TO SET ASIDE AND REHEAR FILED – DRAFT NOTICE OF DEFENCE AND COUNTERCLAIM FILED – NO DELAY IN MAKING APPLICATION TO SET ASIDE – NO PREJUDICE TO PLAINTIFF – EXPLANATION GIVEN FOR FAILURE TO FILE NOTICE OF DEFENCE – REFERENCE BY MAGISTRATE TO CASE LAW – APPLICATION TO SET ASIDE AND REHEARD REFUSED – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION: *INSTRUMENTS ACT* 1958, S5.

M. obtained leave from the Magistrates' Court to defend a complaint brought by S. under s5 of the *Instruments Act* 1958. However, M. failed to file a notice of defence within time. S. obtained a summary order in default of defence. Subsequently, M. applied for the order to be set aside and the claim reheard. At the time of filing the application M also filed a draft notice of defence and counterclaim. On the hearing of the application the magistrate found that M's failure to file the notice of defence was not due to a deliberate decision or culpable negligence, the delay in bringing the aplication was not inordinate and any prejudice to S. could be dealt with by an order for costs. During the hearing of the application, the magistrate referred to the decision of Young CJ in *Mobil Oil Australia Ltd v Caulfield Tyre Service Pty Ltd* [1984] VR 440. In that case the defendant applied for leave to defend and relied upon a counterclaim against the plaintiff sounding in unliquidated damages. His Honour held that such a claim did not entitle the defendant to defend. The magistrate, in refusing, M's application, pointed out that the principle in the *Mobil Oil* case was important. Upon application seeking judicial review—

HELD: Magistrate's order set aside. Remitted for further hearing.
The case before the magistrate raised issues other than a counterclaim sounding in unliquidated damages. For example, M's evidence raised the question of determination of the contract under the *Goods Act* 1958 and the issue of fraud. The *Mobil Oil* case was different in that there was no allegation of fraud or of determination of the contract. M. had previously obtained leave to defend. If the magistrate found that there was no defence on the merits upon a misapplication of the principles set out in the *Mobil Oil* case, the magistrate was in error.

BYRNE J:

1. The application before the court is brought by originating motion filed on 22 March 1999 pursuant to Order 56 seeking judicial review of certain orders of the Magistrates' Court sitting at Bendigo made on 27 January 1999. The certified extract of the orders shows that on that date the Magistrates' Court refused an application for rehearing brought by the plaintiff before this Court, Cameron James Martin, against the defendant before this Court, Brad Sibley, and ordered that Mr Martin pay Mr Sibley's costs of $500. The grounds provided pursuant to R 56.01(4) are the following:

> (i) That the Firstnamed Defendant erred in law in not setting aside the judgment in default of defence entered on 10 November 1998.
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> (ii) That the Firstnamed Defendant ought on the evidence, and was obliged on the weight of the evidence, to have found that the Secondnamed Defendant could have been adequately compensated by a suitable award of costs or the giving of security.
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> (iii) That the Firstnamed Defendant erred in law in fact, in giving too much weight to the delay, if any, on the part of the Plaintiff in filing a defence in the proceeding.
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> (iv) That the Firstnamed Defendant ought to have concluded that, and the evidence permitted no other conclusion that, the Plaintiff had a defence on the merits of the case.
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> (v) That the Firstnamed Defendant erred in law in concluding that the Plaintiff was only seeking to set off or counterclaim against the Secondnamed Defendant and had no substantial defence to the proceeding.

(vi) That the Firstnamed Defendant erred in law by not giving any or any sufficient weight to the prejudice suffered by the Plaintiff, in refusing to set aside the judgment in default of defence.

(vii) That the Firstnamed Defendant erred in law by giving undue weight to the fact that leave to defend the proceeding pursuant to Section 5 of the *Instruments Act* 1958, had been previously granted to the Plaintiff on 16 October 1998.

(viii) That the Firstnamed Defendant erred in law by failing to give sufficient weight to the fact that at all material times the Plaintiff intended to defend the proceeding and had, to the knowledge of the Secondnamed Defendant, engaged solicitors to prepare his defence and counterclaim.

2. The circumstances in which the order was made may be shortly summarised. On 14 August 1998 Mr Martin agreed with Mr Sibley to purchase a Chevrolet Camaro motor car for $17,440. He paid a deposit of $400 and agreed to pay the balance by transfer of funds from CBC Finance to Mr Sibley's account with the Westpac Bank in Bendigo. He was, however, permitted to take delivery of the car immediately on the basis that he left a personal cheque for the balance, namely, $17,040 drawn on his account with a Queensland branch of the ANZ Bank. On 17 August Mr Martin telephoned Mr Sibley from Queensland complaining about the condition of the car. On 19 August he telephoned again to say that he definitely did not want the vehicle and would return it. He arranged for the car to be transported on 21 August back to Bendigo with an expected arrival date of 24 August. He stopped the cheque and, presumably, did not authorise CBC Finance to make the direct payment. The events of 17 August and thereafter with the exception of the non-payment of the cheque are in issue.

3. On 10 September Mr Sibley commenced Magistrates' Court proceeding L02142189 by complaint in the form prescribed by Part 1 of the *Instruments Act* 1958. It was served on 28 September and on 16 October leave to defend was granted to Mr Martin. This order was made upon his affidavit sworn on 14 October 1998 from which I have taken the summary in the preceding paragraph.

4. Pursuant to the *Magistrates' Court Civil Procedure Rules*, a defendant is required to give notice of defence within 21 days after service of the complaint: R 9.01. It was accepted before me that, where the complaint is brought under the *Instruments Act*, this time runs from the date of the order granting leave to defend, in this case expiring on Friday, 6 November 1998. No notice of defence was given by that date.

5. On Tuesday, 10 November 1998 Mr Sibley applied for and obtained from the Magistrates' Court a summary order in default of notice of defence for payment of the sum of $17,040 with interest of $350.28 and costs of $606.50.

6. On 9 December 1998 the solicitors for Mr Sibley wrote to the solicitors for Mr Martin advising that the orders had been made and seeking payment.

7. On 18 December 1998 the solicitors for Mr Martin filed an application seeking a rehearing of the application which had been determined by the Registrar on 10 November. This was the application heard by the magistrate on 27 January 1999. The applicant, Mr Martin, on this occasion relied again upon his affidavit of 14 October 1998 and an affidavit of his solicitor, Rhett Peters, sworn on 16 December 1998. Mr Peters' affidavit sets out an explanation for the failure to give notice of defence and exhibits a draft notice of defence and a counterclaim upon which his client would rely as the basis of a defended proceeding.

8. In the draft notice of defence Mr Martin alleges that the sale was procured by a number of representations regarding the condition of the car and in reliance upon which he agreed to purchase it: paras. 5, 6. It is alleged that these representations were false and fraudulently so: para. 8, and made in breach of a duty of care: paras. 10, 11. The consequence of this is that the car was returned: para. 13, and presumably, that the contract was rescinded. Mr Martin seeks damages being his expenses thrown away in pursuance of this contract: paras. 8, 12. Furthermore, it is put that Mr Sibley was not entitled to present the cheque: para. 13. Again, this must be on the basis that it was provided as security for performance by Mr Martin of his obligations under the rescinded contract. In the alternative, it is alleged that the representations were express terms of the contract and that there was a further term that the cheque might be presented only if the car

was registered in Queensland, the direct payment was not made and the car was not returned: para. 14.

9. As I have mentioned, the magistrate refused the application with costs. His reasons for this are set out in para. 6 of the affidavit of Stephen Mark Edward sworn 20 May 1999 which is in these terms:

> "The learned Magistrate after adjourning for consideration of the arguments found against the Defendant for reasons which to the best of my recollection went as follows:
> (a) That he had considered the Affidavit material.
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> b) That the first matter that had to be considered was that the power to set aside the Judgment and allow a re-hearing was discretionary.
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> (c) That looking at the order of events there was the letter of Rhett Francis Peters of 21 October 1998 to the Plaintiff's solicitors advising of an intention to file a Defence and Counter-claim but that a delay in preparation of the Defence and Counter-claim was caused by the Defendant moving, trouble in locating documents in relation to the Defendant's expenses and then time taken by the Defendant's solicitors to prepare a Notice of Defence.
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> (d) That, assuming the Plaintiff had complied with all relevant time requirements there was a question as to why he should be put to the expense of a re-hearing, although on the other side the Defendant had always wished to contest matters.
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> (e) That the authorities show that the court has to look at a delay between the Judgment and the Re-hearing Application. Here there was not a long delay. The court also has to have regard to possible prejudice to the Plaintiff and also merits of any proposed Defence.
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> (f) That the *Mobil Oil* Judgment relied on was not "on all fours" with the facts in this case as in this case there had been an Application for Leave to Defend. There was no such an application in the *Mobil Oil* case, however the principle in the *Mobil Oil* case was important.
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> (g) That a Notice of Defence had to be filed by 6 November 1998, that there had been delay in preparation of the Notice of Defence and he was satisfied that the result of the delay falls at the Defendant's or his solicitor's feet."

10. The *Mobil Oil* judgment referred to is the decision of Young CJ in *Mobil Oil Australia Ltd v Caulfield Tyre Service Pty Ltd* [1984] VicRp 35; [1984] VR 440. In that case the plaintiff brought an *Instruments Act* proceeding on three bills of exchange and obtained judgment after the defendant failed to obtain leave to defend. The application before the court was to set aside this judgment and for leave to defend. The defendant relied upon a claim which it asserted against the plaintiff sounding in unliquidated damages. The question whether such a claim might entitle the defendant to defend was decided in the negative. His Honour followed a long line of cases to the conclusion that the only possible defence to a claim on a bill of exchange could be that its acceptance had been procured by fraud, duress or for a consideration which had failed. Absent such a defence, the plaintiff should have judgment on the bill with no stay of execution pending determination of the counterclaim.

11. As the magistrate observed, this case was not on all fours as the defendant in the case before him had already obtained leave to defend. This was not simply a procedural difference as the magistrate appeared to think. Mr Martin had obtained leave to defend by satisfying the Magistrates' Court that he had a defence to the claim. This is a significant difference from the facts of the *Mobil Oil* case on a number of different levels. First, there is an embarrassing inconsistency where a defendant shows a defence in October and fails to do so in January when he relies upon exactly the same material. I do not say that a magistrate who, after hearing argument on behalf of a plaintiff, considers that an earlier decision is wrong should stubbornly adhere to error on some basis of consistency. It simply means that the magistrate in such a case should provide reasons for the change. In this respect the reasons of the magistrate before me are deficient. It is, of course, true that the *Mobil Oil* case is important and may even be determinative. But it is necessary that this be demonstrated. A second point of distinction with that case is that the defence and the counterclaim here raise issues other than a cross-claim sounding in unliquidated damages.

12. I turn now to the affidavit of October 1998 in which the merits of Mr Martin's defence, if there be any, appear. Before I do, I mention an argument put before me that the magistrate paid

no regard to this affidavit. His Worship was certainly asked by counsel for Mr Sibley not to act upon the affidavit because it had been filed in the earlier *ex parte* application and had not been served on his solicitors. It does not appear that the magistrate accepted this submission. Indeed, paragraphs (a) and (f) of his reasons suggest that he did not. This was, if I may say so, perfectly proper. If he had been persuaded that counsel for Mr Sibley was disadvantaged by not having had a copy of the affidavit his proper course would have been to grant time to consider it. I proceed on the basis that the affidavit material relied on by the magistrate included the October affidavit of Mr Martin.

13. Mr Martin deposes in this affidavit that representations were made by Mr Sibley by telephone on 5 August and that he made the purchase on 14 August 1998 at Bendigo in reliance upon them. He signed a receipt on that day which is exhibited to his affidavit. This receipt shows that the purchase was of specific goods so that title may have passed at the time of purchase: *Goods Act* 1958 s23. A number of other relevant matters appear from this document. It says that no warranty is given. It is likely that the magistrate did not see this as fatal to the claims based on breach of express terms, for "warranty" in this context may have referred to the familiar warranty given by sellers of cars. It stipulates that the car is to be registered in Queensland and the plates returned on 17 August. This confirms the suggested representation that the car was in a condition fit to be registered by that date in that State. The mode of payment by direct credit is also indicated. The cheque, the subject matter of the claim, is dealt with in this way:

> "Cheque for payment of above vehicle will be held until CBFC credits account if this does not happen car must be returned in the same condition or a summons for fraud will be sought."

14. The date for the presentation of the cheque is not given, but it might be that it is tied to the date for registration in Queensland, 17 August.

15. The affidavit shows that complaint was made on two occasions on 17 August, first, that the car could not be registered in Queensland without some repair work and, later, that the car would be returned. If this evidence is accepted, it may be that there has been a determination of the contract under the *Goods Act* or for fraud. I emphasise that it is not for me to express any final view on these matters which are, for the most part, in dispute. I do not do so. It is sufficient that I record my agreement with the magistrate that the case which Mr Martin placed before him was different from that dealt with in the *Mobil Oil* case. That case did not contain an allegation of fraud nor did it contain an allegation of determination of the contract nor did it contain an allegation that it was a term of the contract that the cheque would not be presented at the time when it was. Insofar as the magistrate's further reference to that case as being important should be taken as a statement by him that it pointed to the absence of a defence to the claim on the cheque, I must conclude that he fell into error. Insofar as he did not intend this, then I am left in the unsatisfactory position of not knowing whether or why he concluded that there was no defence to the claim.

16. I am mindful of the limitations of the Order 56 procedure. I must have regard only to the pleadings including the defence and counterclaim, the order and the magistrate's reasons. I have ventured beyond these only in order to do justice to the important paragraph (f) of the magistrate's reasons. It is clear that the magistrate had in mind the proper considerations which he must have regard to in an application of this kind, namely, whether there is a defence shown; what is the reason for the default; and whether there has been delay in bringing the application and any prejudice caused to the plaintiff as a result. Having formed a view upon these matters the magistrate must, as his Worship noted, apply his discretion. I am confident, too, that he had regard to the fundamental requirement that a litigant who wants to contest a claim should not, without good reason, be turned away from the court without a trial.

17. My difficulty with the present order is this. In his reasons, the magistrate mentions these considerations but does not show how the facts established before him bear upon them. His account of the reason for the failure to give notice shows that he was aware that it was not due to deliberate decision or culpable negligence. He says that the delay in bringing the application was not inordinate. The prejudice to the plaintiff is said to be the expense of a rehearing. This is a matter which is capable of being dealt with by an order for costs. The only remaining factor is the existence or not of a defence on the merits. This must have been the determining factor. I infer

that the magistrate reached a conclusion that no such defence was shown upon a misapplication of the principles set out in the *Mobil Oil* case. I conclude that he must have fallen into error.

18. The relief which I am asked to grant is likewise discretionary. To my mind, having found error, the circumstances of this case demand that the order be set aside and the application returned to the magistrate. I propose, therefore, the following orders:

(a) The orders of the Magistrates' Court of Victoria at Bendigo made on 27 January 1999 be set aside.

(b) The application of the plaintiff, Cameron James Martin, for rehearing be remitted to the Magistrates' Court to be determined in accordance with law.

(c) The costs of this application including reserve costs be paid by the defendant.

(d) Certificate under the *Appeals Costs Act*.

APPEARANCES: For the plaintiff Martin: Ms C Kirton, counsel. Tress Cocks Maddox, solicitors. For the second defendant Sibley: Mr GA Davies, counsel. Cohen Kirby & Iser, solicitors.
