50/76

SUPREME COURT OF VICTORIA

CONCRETE INDUSTRIES (MONIER) LTD v GALAXY CONSTRUCTIONS

Dunn J

22 June 1976

CIVIL PROCEEDINGS – CLAIM FOR $600 – PARTICULARS FURNISHED SHOWED CLAIM TO BE $725.56 WHICH WAS IN EXCESS OF THE COURT'S JURISDICTION – "AMOUNT SOUGHT TO BE RECOVERED" – MEANING OF – CLAIM STRUCK OUT FOR WANT OF JURISDICTION – RULING BY MAGISTRATE THAT HE HAD NO POWER TO ALLOW AN AMENDMENT – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S68(1)(a).

The particulars of demand endorsed on the default summons demanded payment of the sum of $600.00 being the amount owing under an agreement to sell and deliver goods (bricks) between February 1973 and March 1973. Before the hearing the defendant sought further and better particulars. The particulars furnished by the complainant detailed the quantities and prices charged for each delivery of bricks – no total price being stated, but the total of all the prices given was $725.56 (i.e. in excess of the jurisdiction of $600.00: *Justices Act* 1958 s68(1)(a)). The complainant did not file the further particulars.

At the hearing, after an unsuccessful opposition to an adjournment on behalf of the defendant, Counsel for the defendant objected to jurisdiction on the ground that the further particulars disclosed that the claim was beyond its jurisdiction – leave being given to file the further particulars. Complainant argued there was jurisdiction on the face of the summons and that was all that was necessary, alternatively, leave was sought to amend the further particulars by abandoning the excess. The summons was struck out for want of jurisdiction and the complainant ordered to pay costs. Upon Order Nisi to Review—

HELD: Order absolute. Magistrate in error in making ruling.

1. The phrase 'The amount sought to be recovered' in s68(1)(a) of the *Justices Act* 1958 refers to the amount expressed in the plaint or originating process, either as originally framed or as formally amended during the proceedings'.

***Donelan v Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490, and on appeal in the High Court (1973) ALJR 138; (1972/73) ALR 1139; and**

***Domenicos v Mead* [1975] VicRp 23; (1975) VR 225, followed.**

2. Accordingly, the magistrate was in error in holding that the claim was beyond the jurisdiction of the Court.

3. In ruling that the Magistrate had no power to allow an amendment to the summons or alternatively to the further particulars delivered by the complainant so as to bring the cause of action within the jurisdiction of the Court, there was no evidence that the Magistrate ruled that he had no power to amend the summons. No application was made to him to amend the summons.

4. Before a summons can be struck out for want of jurisdiction without any evidence being called, it must appear unambiguously from the summons and the particulars forming part of the summons, that the 'amount sought to be recovered' is beyond the jurisdiction of the Court. Assuming that the further particulars formed part of the summons, the further particulars, read with the request, did not make that appear. It was the duty of the Court, therefore, to investigate the matter by evidence to determine the question of jurisdiction. In this case, this was particularly so, since the complainant's legal advisor refused to file the further particulars and asserted they had been delivered inadvertently to the defendant.

5. Accordingly, the Magistrate was in error in giving any ruling at that stage that he had no power to amend the particulars.

DUNN J: The first ground is:

> '1. That the learned Stipendiary Magistrate was wrong in law ruling that the complainant's course of action was in excess of the jurisdiction of the Court.'

That ground is based on the argument that the jurisdiction of the Court is to be determined by what appears on the face of the summons, and nothing else. The further particulars are therefore irrelevant to that question. Alternatively, if the further particulars may be considered, they must be read in the light of the request. In this case, in the light of the particulars sought, those supplied did not necessarily involve any excess of jurisdiction. There might have been some payment or set-off which reduced the amount owing to that claimed. No particulars under such a head were sought.

This problem has been the subject of considerable consideration over the years. Fortunately for me, the principles have been recently considered by the Full Court of this Court in *Donelan v Incorporated Nominal Defendant* [1973] VicRp 49; (1973) VR 490, and on appeal in the High Court (1973) ALJR 138; (1972/73) ALR 1139, where the majority judgments in the Supreme Court were approved. The test was stated by Smith ACJ in VR at p495 in these words:

> 'If the claim is stated in the summons and particulars as being one within the relevant limit of jurisdiction, then jurisdiction continues unless and until the Judge determines that the amount owing exceeds the relevant limit.'

In the High Court, Barwick CJ at pp1139/40 of the ALR said this: 'The amount sought to be recovered' – to use the words of the section, 'in my opinion, refers to the amount expressed in the plaint or originating process, either as originally framed or as formally amended during the proceedings'. The same words, 'the amount sought to be recovered' are in s68(1)(a) of the *Justices Act* 1958.

Applying these principles to the facts of this case, the learned Stipendiary Magistrate erred in holding that the claim was beyond the jurisdiction of the Court. This conclusion is amply supported by the decision of Adam J in *Domenicos v Mead* [1975] VicRp 23; (1975) VR 225. At p227 this passage appears –

> 'In the next place – and this is a more fundamental objection – the expression "the amount sought to be recovered" as the critical jurisdictional fact refers, in my opinion, to the amount claimed which is specified ... in the plaint summons in the action.'

For these reasons, this ground of the order nisi is established.

The second ground on which the order nisi was granted is:

> '2. That the learned Stipendiary Magistrate was wrong in law in ruling that he had no power to allow an amendment to the summons or alternatively to the further particulars delivered by the complainant so as to bring the cause of action within the jurisdiction of the Court.

As to the first part of this ground, there is no evidence, in either the affidavit sworn in support of the order nisi or in the answering affidavit that the learned Stipendiary Magistrate ruled that he had no power to amend the summons. No application was made to him to amend the summons.

Before a summons can be struck out for want of jurisdiction without any evidence being called, it must appear unambiguously from the summons and the particulars forming part of the summons, that the 'amount sought to be recovered' is beyond the jurisdiction of the Court – see *Donelan v Incorporated Nominal Defendants supra* at p496. Assuming that the further particulars formed part of the summons, the further particulars, read with the request, did not make that appear. It was the duty of the Court, therefore, to investigate the matter by evidence to determine the question of jurisdiction. In this case, this was particularly so, since the complainant's legal advisor refused to file the further particulars and asserted they had been delivered inadvertently to the defendant. See *Kelly v Grace* [1973] VicRp 49; (1931) VLR 147 at p151. The learned Stipendiary Magistrate was in error in giving any ruling at that stage that he had no power to amend the particulars.

It may well be, too, that by proposing to ask for an adjournment itself before the rehearing began and then opposing the complainant's application for an adjournment, the defendant had waived any right to contend that the complainant had not abandoned any excess by the form of its claim – see *J Kitchen & Sons & Apollo Co Ltd v Miller* [1973] VicRp 49; (1896) 22 VLR 265 at pp266/7; *Jansen v Dewhurst* [1969] VicRp 53; (1973) VR 421 at p429.

In my opinion, the second ground is established on the basis that the learned Stipendiary Magistrate was in error in making the ruling at the stage of the proceedings at which he did.