36/94

SUPREME COURT OF VICTORIA

BIRRELL v IOOF and ORS

Harper J

18 October 1994

CIVIL PROCEEDINGS – DISCOVERY – APPLICATION FOR – TEST TO BE APPLIED – NATURAL JUSTICE – BIAS – RULING GIVEN BY MAGISTRATE – DISSENT SHOWN BY LEGAL PRACTITIONER – CONDUCT DISAPPROVED OF BY MAGISTRATE – WHETHER PROPER IN THE CIRCUMSTANCES – WHETHER REASONABLE APPREHENSION OF BIAS BY MAGISTRATE.

1. Where an application for discovery is made, the test to be applied is whether the document or documents in question contain information which may, but not necessarily must, enable the party requiring discovery to advance the party's case or to impugn the opponent's case.

2. A member of the legal profession who exhibits open dissatisfaction with a ruling of a court in the court's presence and immediately after the ruling is handed down exhibits extreme discourtesy which may well constitute an act of contempt. In such circumstances, the court has a duty to indicate plainly that such behaviour is unacceptable.

3. Where a legal practitioner visibly and audibly dissented from a ruling of a Magistrate, it was appropriate for the Magistrate to express disapproval of such behaviour. Further, the Magistrate's action was not such as to cause the impartial observer to believe that the Magistrate was unable to deal with the application impartially.

HARPER J: **[1]** This is an application for judicial review pursuant to order 56 of the *Rules of the Supreme Court*. By his amended statement of claim in a proceeding in the Magistrates' Court at Melbourne, the plaintiff alleges that on 12 May 1983 he agreed with the IOOF Victoria Friendly Society, or whatever name the Society was then known by, that he would invest with it the sum of $20,000. There were terms of the agreement, according to the plaintiff's amended pleading, that there would be a once only 3.6 per cent management fee payable on each contribution made and that this was to cover the management costs of the Society. The plaintiff further alleges that in breach of this agreement the Society, the first defendant, has charged management fees over and above those agreed.

The claim is pleaded in various ways, and includes an allegation that in making the representations which formed that part of the agreement upon which the plaintiff relies the defendant or its predecessor in title was in breach of the *Trade Practices Act*; and there are other like causes of action pleaded from the same basic fact situation. As I apprehend it, the plaintiff seeks a judgment for in effect the difference between the amount in credit with the Society at the time that the proceeding was issued and the amount which would have been in credit in his account with the Society had management fees in excess of the 3.6 per cent initial fee not been deducted from the plaintiff's entitlement.

The proceeding has given risen to a number **[2]** of interlocutory applications before different Magistrates. One of these came before His Worship, Mr Patrick Street, on 26 August 1994. The application before His Worship on that day was made by summons filed 25 August. By that summons the plaintiff sought the following relief:

1. that the defendants make, file and deliver further and better discovery of documents;

2. directions as to inspection and interrogation;

3. that the proceeding be taken out of the list of cases fixed for hearing on 29 August 1994, the date on which the matter was fixed for trial; and

4. such further orders as the court might think appropriate.

The application was supplemented by a document in the form of a letter dated 25 August 1994 from Isaac Brott & Co, the solicitors for the plaintiff, to Messrs Higgins & Teale, the solicitors for the defendants. By that letter the plaintiff gave notice of his intention to apply to amend the summons of 25 August so as to seek the following additional orders:

> "4A. That the defendants make, file and serve an affidavit stating whether any documents of the classes of documents set out in the schedule hereto is or has been in their possession and, if it has been but is no longer in their possession, when they parted with it and their belief as to what has become of it.
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> 4B. That the witness summons for production issued on 24 August 1994 and served on the plaintiff be set aside."

I am not presently concerned with the application foreshadowed by paragraph 4B of the letter. The letter **[3]** went on, however, under the heading "Schedule" to refer to certain documents in respect of which the plaintiff sought further discovery. These were described as follows:

> "A. Documents relating to actual management expenses referable to the defendant's Super Saving fund for the years ended 30 June 1983 to 30 June 1993 inclusive;
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> B. Documents concerning responsibility for the liabilities of the second to seventh defendants following the incorporation of the first defendant and concerning recourse to the funds of the first defendant in respect of such liabilities including any assignments of leases or any other documents reflecting an assumption of the liabilities of the second to seventh defendants by the first defendant following its incorporation."

The application by the plaintiff was dealt with as if his summons had been amended to incorporate paragraphs 4A and 4B, although, as I understand it, the formal amendment to the summons was never made. His Worship allowed the application under paragraph 4B but refused the other relief sought by the plaintiff. It is that refusal which has led to the present application for judicial review.

This application is supported on a number of bases. The first is that His Worship exhibited such bias during the hearing of the applications before him on 26 August as to warrant the grant of relief in the nature of *certiorari* on the ground that there has been here a breach of the rules of natural justice. The application is also supported on the basis that in reaching his conclusions as to the application for further discovery His Worship made errors of sufficient magnitude to amount to a jurisdictional error or **[4]** jurisdictional errors of a kind which attract a right to relief in the nature of *certiorari* in the party which has been adversely affected by the error or errors in question.

The facts upon which the application is based are in the main set out in an affidavit of Mark Andrew Robins sworn on 31 August 1994. Mr Robins appeared as counsel for the plaintiff before Mr Street. His affidavit deals with the question of bias as follows:

> "28. I then commenced to take the Learned Magistrate to item 1(b) of the draft orders when I heard the sound of a movement of papers occurring behind me where Mr Brott was sitting in the body of the Court. I was facing the Learned Magistrate with my back to Mr Brott and I did not observe the actual movement by Mr Brott save for my discerning an audible sound of papers being placed into a briefcase. I would not describe the noise made by the papers to have been excessive although it was distinct.
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> 29. At this point the Learned Magistrate raised his voice and said to Mr Brott in an angry tone, "I've told you before this, Mr Brott, not to express your dissent from my rulings, leave the Court now." Mr Brott rose to his feet and said, "Your Worship, I was merely placing my papers in my bag. I did no harm. There was no crime. But this treatment always happens when my matters are before you." Mr Brott then made a comment that the Learned Magistrate was biased towards him and to this the Learned Magistrate replied, "Do you have an application to make?" I asked for the matter to be stood down whilst I sought instructions and the Learned Magistrate gave me leave to depart from the Bar Table and to leave the Court.
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> 30. Mr Brott informed me outside the Court that he had been involved in an incident with the Learned Magistrate about six to twelve months earlier in which whilst instructing in a matter at Heidelberg Magistrates' Court he was alleged to have made a noise expressing dissatisfaction with ruling of the

Learned Magistrate which had resulted in a heated exchange of words between Mr Brott and the Learned Magistrate **[5]** as a result of which the Learned magistrate indicated in very strong terms that if the problem continued Mr Brott would be cited for contempt. Mr Brott instructed me that he thought there was antipathy between himself and the Learned Magistrate which was the product of this exchange. I asked Mr Brott if he wanted me to make an application to the Learned Magistrate to disqualify himself on this basis, and Mr Brott said yes.

31. I returned to Court and informed the Learned Magistrate of my instructions and informed the Learned Magistrate of the past incident of which I had been instructed. I submitted to the Learned Magistrate that the relevant test as to whether the Learned Magistrate should disqualify himself was not necessarily whether there was bias, but it was a question of whether or not there was a reasonable apprehension of bias. I submitted that justice had to be seen to be done as well as simply being done. I said to His Worship that whilst I had not seen the movement that brought about the comments made by the Learned Magistrate, I had heard a movement behind me but was greatly surprised by the Learned Magistrate's response to what I had heard and I submitted that the response had not been proximate to the audible movement. I submitted that the order that my instructor leave the Court which the Learned Magistrate had commenced to make was an unfortunate over reaction and constituted a basis for a reasonable apprehension of concern sufficient for an application to disqualify to be made. I said that this sort of application was a very difficult one to make and was one not to be made by Counsel lightly, but in the circumstances I made the application with some force.

32. The Learned Magistrate said that all he had done was to ask Mr Brott to leave if he wanted to express dissent but that I should have made the application immediately upon the matter being called on before him. I replied that in my submission I could not have done that properly at that stage because there was then no basis for such an application but that the application was one which should only be made with care in circumstances once a basis for an apprehension of bias had arisen but that as soon as it should fairly be said that a manifestation of potential bias had occurred, the application could be made. His Worship called on Mr Fitzpatrick who said that he was unaware of the incident **[6]** which had occurred in the past but in his submission there had been no bias."

In my opinion the facts as set out in those paragraphs do not show a case of real or perceived bias in his Worship. Indeed, it was not submitted before me that any actual bias was shown. In submissions made with his usual care and thoroughness, Mr Vassie for the plaintiff argued that a reasonable apprehension of bias would be entertained by an impartial and unprejudiced observer of the exchanges which took place between His Worship, Mr Brott and counsel for the plaintiff because in those exchanges His Worship, as Mr Vassie submitted, demonstrated that he was no longer in a position to deal impartially with the application which the plaintiff was then making.

The position, it seems to me, however, is that His Worship did no more than to appropriately express his anger at Mr Brott's evident dissension from a ruling made by His Worship. Any member of the legal profession who exhibits open dissatisfaction with a ruling of a court and does so in the presence of the court and immediately after the ruling is handed down exhibits behaviour which in almost, if not in every, case could be properly characterised as at the very least of extreme discourtesy and which may well constitute an act of contempt. Certainly in almost every case, if not every case, such behaviour would warrant the intervention of the court in terms which made it quite plain that such behaviour was unacceptable.

In my opinion the Magistrate did no more than was open to him, indeed was his duty given the circumstance **[7]** which had then arisen. Because he was sitting behind Mr Robins, Mr Brott could not have been instructing at the time. The order that he leave the court was therefore not one which would prejudice the plaintiff; and His Worship's remarks were directed to Mr Brott, not to the plaintiff. This being the case, the impartial observer would not, in my opinion, apprehend bias in the Magistrate. Moreover, the circumstances here cannot, in my opinion, be appropriately related to those which obtained in an authority upon which Mr Vassie relied. That authority was the case of *Livesey v The New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420. There the two members of the Court of Appeal in New South Wales refused to disqualify themselves from hearing proceedings between a barrister (Livesey) and the New South Wales Bar Association despite the fact that one of the witnesses which it was anticipated would be called on behalf of the barrister had been the subject of a severely adverse finding by those two members in an earlier proceeding. The High Court held that in the circumstances which there obtained the judges in question ought to have disqualified themselves because the impartial observer might reasonably have apprehended bias in the court

when dealing for a second time with a witness who on an earlier occasion had been the subject of adverse criticism.

In this case, however, the question was not whether the court was in a position to deal appropriately with evidence given by Mr Brott; Mr Brott was not a witness. The question was not whether the **[8]** court could deal appropriately with a claim made by Mr Brott; Mr Brott was not a claimant. The question was, rather, whether the court could deal appropriately with an application made by a client of Mr Brott's supported by counsel engaged by Mr Brott and in that sense instructed by him. The behaviour of Mr Brott to which the magistrate took exception was not behaviour in which the plaintiff was implicated, and therefore was not behaviour which, in my opinion, was such as to cause the impartial observer to believe that the Magistrate, after appropriately expressing his disapproval of it, would be unable to deal impartially with the applications then before him. Accordingly, in my opinion the first basis for the application for judicial review is not made out.

The second basis is that His Worship fell into jurisdictional error. It is submitted by Mr Vassie that His Worship in dismissing the application for further discovery failed to take into account relevant considerations. In particular, as I understand him, Mr Vassie submits that His Worship failed to apply the test which in such authorities as *Compagnie Financiere du Pacifique v Peruvian Guano* (1882) 11 QBD 55 and in such texts as Simpson Bailey and Evans*, Discovery and Interrogatories* is established as the appropriate test when questions of relevance of documents for the purpose of discovery is in issue.

The test is whether the document or documents in question contain information which may, but not necessarily must, enable the party requiring discovery to advance his case or to impugn the case of his **[9]** opponent. Mr Vassie submits that on the basis of this test no Magistrate properly directing himself could have found that the documents which were sought by the application were not relevant. Mr Vassie also referred in his submissions to the description in His Worship's reasons for his decision, of the application for further discovery as "oppressive".

Mr Vassie submitted that there could be no oppression if the documents in question were relevant and that in any event His Worship did not and could not point to any aspect of the application for discovery which, if granted, would result in the defendants or any of them being oppressed thereby.

In my opinion the documents sought are not relevant to the issues between the plaintiff and the defendants. As I have indicated, under paragraph A of the schedule the application sought discovery of documents relating to actual management expenses referable to the relevant saving fund maintained by the Society. But the plaintiff says that no management expenses (save for the initial 3.6 per cent) should have been deducted. The actual management expenses, therefore, are not relevant to the plaintiff's claim. For the purpose of assessing the amount to which the plaintiff if otherwise successful will be entitled, amounts deducted from what would otherwise be the credit balance in his account are irrelevant. What is relevant is the difference between that credit balance and the amount to which he would be entitled had the Society not made any deductions. In any event I am not persuaded that the **[10]** information presently available to the plaintiff would not be sufficient for appropriate calculations to be made without recourse to further discovery. No evidence has been put before me to indicate that a person with the appropriate mathematical skills could not, on the material presently available, make the calculations which the plaintiff would contend must be made in order to ascertain his loss.

The second category of documents concern the "responsibility for the liabilities of the second to seventh defendants following the incorporation of the first defendant". At the time the agreement upon which the plaintiff relies was made, the Society was an unincorporated friendly society. It was incorporated on or about 1 September 1987. The plaintiff seeks to establish that if the unincorporated society was in breach of its obligation to the plaintiff pursuant to the relevant agreement, then that breach is one which can be visited upon the incorporated society. The plaintiff seeks to establish that link through the discovery of the documents described in paragraph B of the relevant schedule. Nothing has been put before me, however, to incline me to think that documents of the description there set out would assist the plaintiff in this aspect of his case.

The liability of the incorporated society to the plaintiff, if liability there otherwise be, would rest upon the terms of the statute by which incorporation was effected, namely the *Friendly Societies Act* 1986. It may be that the plaintiff can also rely upon other means to establish liability in the incorporated society but **[11]** nothing has been put to me that would indicate that the documents described in paragraph B of the schedule to the letter of 25 August would assist the plaintiff in this regard. Even if I am wrong in my assessment of the relevance of the documents sought in the applications made before His Worship, nevertheless it seems to me that His Worship in refusing those applications did not fall into such error as would enable an application for judicial review to be successful. As Mr Vassie very fairly put in his submissions, it is jurisdictional error which is required before judicial review will be available. This, it seems to me, is a particularly pertinent observation given that an appeal only lies from a final order of the Magistrates' Court. So much appears from section 109 of the *Magistrates' Court Act* 1989 which provides by subsection (1) that: "A party to a civil proceeding in the court—" that is in the Magistrates' Court "may appeal to the Supreme Court on a question of law from a final order of the court in that proceeding."

As I understand it, it is common ground that the orders to which the plaintiff presently takes exception were not final orders. Accordingly, they are not appealable; and if any relief is available to the plaintiff at all in relation to them, it would only be on the basis that in making those orders His Worship fell into jurisdictional error. In my opinion if there be any error it is not **[12]** of the kind properly described as "jurisdictional". Precisely what errors are properly described as "jurisdictional" is not presently entirely clear. Nevertheless, it seems to me that the error must be of some substance over and above a mere failure to appreciate the relevance of documents sought by the process of discovery. There must, it seems to me, be something more than that before it can be said that a Magistrate faced with an application of the present kind fell into jurisdictional error in dealing with it.

For these reasons it seems to me that the application for judicial review should be refused.

APPEARANCES: For the plaintiff Birrell: Mr A Vassie, counsel. Isaac Brott & Co, solicitors. For the first and second defendants: Mr M Garantziotis, counsel. Higgins Teale, solicitors.
