**11/09; [2009] VSC 172**

**SUPREME COURT OF VICTORIA**

# *DAWSON v BETHONGA*

**Cavanough J — 28, 30 April 2009**

**CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE– PLEADINGS – COUNTERCLAIM – CONTRACT CLAIMS IN MAGISTRATES' COURT – FAILURE BY COUNTERCLAIMANT TO PLEAD MATERIAL FACTS – OMISSION OF VITAL CONTRACTUAL TERMS – NUMEROUS OTHER DEFECTS – MAGISTRATE ORDERED FURTHER PARTICULARS RATHER THAN STRIKING OUT PLEADINGS WITH LEAVE TO RE-PLEAD – PRINCIPLES OF PLEADING NOT PROPERLY APPRECIATED AND APPLIED – *CERTIORARI* – NON-JURISDICTIONAL ERROR ON THE FACE OF THE RECORD – MAGISTRATE IN ERROR: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1999 R9A.02(1)(c).**

**COSTS – COSTS SHOULD FOLLOW THE EVENT – NOT APPROPRIATE IN THIS CASE TO DEFER ENTITLEMENT TO RECOVER COSTS IN THE HOPE OF ENCOURAGING SETTLEMENT OF MAGISTRATES' COURT PROCEEDING – APPLICATION FOR INDEMNITY CERTIFICATE – WHETHER PROCEEDING AN "APPEAL" OR "IN THE NATURE OF AN APPEAL" – CERTIFICATE GRANTED: *APPEAL COSTS ACT* 1998 SS3 (DEFINITION OF "APPEAL") AND 4.**

D. entered into arrangements with B. to grow and pack certain kinds of fruit for B. Subsequently, D. claimed the sum of $24,374.39 in the Magistrates' Court for monies allegedly due and owing for contract packing services and purchase of labels. B. filed a notice of defence and a counterclaim. Later, D. filed an application that the defence and counterclaim be struck out on the grounds that B's pleadings and particulars were prejudicing, embarrassing and delaying the fair hearing of the proceedings or D's proper preparation for hearing. On the hearing of the application, the Magistrate, whilst finding that the pleadings were deficient, ordered that B. file and serve further and better particulars of the counterclaim within 28 days. Upon an originating motion to quash the Magistrate's interlocutory order—

**HELD: Application for an order of *certiorari* granted.**
**1. The deficiencies in the pleadings were obvious. The magistrate did not properly appreciate and apply the principles which govern an application for the striking out of pleadings under rule 9A.02(1)(c) of the *Magistrates' Court Civil Procedure Rules* 1999 ('Rules'). It is plain that D. were entitled to an order that the defence and counterclaim be struck out with a right to re-plead. No order for particulars could properly be seen as obviating the need for B. properly to plead the vital terms of the contract in the main body of its defence and in the main body of its counterclaim. Those documents could have been combined into one document and that could still be done.**

**2. Although rule 9A.02(1) of the Rules provides (in part) that if a statement of claim etc may prejudice, embarrass or delay the fair hearing of the proceeding the court "may" order that the whole or part of the statement of claim etc be struck out or amended. It is doubtful, that the word "may" was here intended to confer a discretion. In any event, in this case, in all the circumstances, any such discretion could only lawfully have been exercised in one way, namely by ordering the striking out of the defence and counterclaim with a right to re-plead. Any other exercise of the power would have been manifestly unreasonable in the *Wednesbury* sense.**
***Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635, applied.**

**3. Section 4 of the *Appeal Costs Act* 1998 can apply to an application under Order 56 of the *Supreme Court Rules* for an order in the nature of *certiorari*, and it applies in the present case. The errors below being errors of law and there having been no disentitling conduct on the part of B. this was an appropriate case for the exercise of the discretion in favour of the grant of a certificate. An indemnity certificate under s4 of the *Appeal Costs Act* 1998 was granted to B. in respect of the costs of the proceeding.**

**CAVANOUGH J:**
**28 APRIL 2009**

1. This is a proceeding brought by originating motion under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005. The plaintiff seeks relief in the nature of *certiorari* to quash the interlocutory orders made by the Magistrates' Court at Mildura on 29 October 2008

in proceeding no X00323021. The plaintiff further seeks an order that the matter be remitted to the Magistrates' Court and that the plaintiffs' application to the Magistrates' Court dated 8 July 2008 be considered in accordance with law. The originating motion also seeks such further relief as this Court might think fit.

2. The underlying proceeding in the Magistrates' Court is brought by the plaintiffs for monies allegedly due and owing for contract packing services and purchase of labels. The amount claimed is $24,374.39. The proceeding was commenced on 6 February 2008. The first defendant filed a notice of defence dated 29 February 2008 and a counterclaim dated 19 March 2008.

3. On 8 July 2008 the plaintiffs filed an application in the Magistrates' Court for orders, among others, that the defence and counterclaim of the first defendant be struck out pursuant to rule 9A.02(1)(c) of the *Magistrates' Court Civil Procedure Rules* 1999 on the grounds, among others, that the first defendant's pleadings and particulars were prejudicing, embarrassing and delaying the fair hearing of the proceeding or the plaintiffs' proper preparation for hearing.

4. On 29 October 2008 a magistrate sitting at Mildura heard the plaintiffs' application. In his reasons for decision he said, among other things: "In my opinion, the pleadings in this matter are perhaps open to criticism, certainly are open to criticism, and leave a lot to be desired in that they are not generally in the form that is usually observed by practitioners in this particular State".[1]

5. The magistrate determined that the plaintiffs were entitled to further and better particulars relating to two particular contracts or parts of contracts on which the first defendant relied in support of its defence and counterclaim. It appears from the parties' respective pleadings that it is common ground that arrangements were made between them in 2006 under which the plaintiffs (in northern Victoria) were to pack certain kinds of fruit for the first defendant (a Queensland company) and also to grow certain kinds of fruit for the first defendant.

6. In his oral reasons the magistrate did not elaborate upon the particular deficiencies that he had identified in relation to the pleading of the contracts. It seems to be common ground between the parties that in this application for *certiorari* for non-jurisdictional error of law on the face of the record, I am not permitted to have regard to the transcript of argument before the magistrate in order to elucidate the magistrate's reasons or in order to determine whether or not error occurred otherwise.[2]

7. However, having been taken by the plaintiffs' counsel today to the terms of the various documents which the parties agree are part of the "record" of the Magistrates' Court, I am prepared to infer that the deficiency to which the magistrate was referring was a deficiency in the pleading by the first defendant of the terms of the two agreements on which the first defendant relied in its defence and in its counterclaim. That deficiency is obvious. There was a failure on the part of the first defendant to set out what was alleged in relation to certain fundamental aspects of the terms of the agreements. Without knowing the first defendant's allegations as to those aspects of the terms, the first defendant's allegations of breach cannot be understood. In particular, the first defendant has failed to plead what it alleges against the plaintiffs by way of the extent of their alleged obligations to pack fruit supplied to them by or on behalf of the first defendant and as to the extent of their obligations to grow fruit on behalf of the first defendant. The first defendant has failed and omitted to plead any facts that would indicate what the first defendant alleges by way of the quantity of fruit that the plaintiffs were to pack, the quantity of fruit that the plaintiffs were to grow, or the period of time for which the plaintiffs were to be obliged to pack fruit or to grow fruit. Nor do the pleadings indicate with any clarity what consideration was to move from the first defendant to the plaintiffs in return for fulfilment by the plaintiffs of their contractual obligations.

8. I am also prepared to infer that the magistrate was satisfied that the first defendant had not adequately pleaded or particularised the quantum of its alleged loss and damage or sufficiently indicated the way in which it was alleged that any such loss and damage was caused by a breach or breaches by the plaintiffs of their contractual obligations. The magistrate in his reasons made remarks tending to indicate that that was his view; and, again, the deficiencies of the pleadings and particulars in that regard are obvious.

9. However, a difficulty arises because the remedy which the magistrate saw fit to order is not, in my opinion, a remedy that meets the case. The magistrate ordered that within 28 days the first defendant file and serve further and better particulars of counterclaim pursuant to paragraphs 1, 2, 3 and 5-13 of the plaintiffs' request for further and better particulars dated 28 March 2008. However, upon examination of those paragraphs of that request, it becomes very clear that the giving of particulars pursuant to those paragraphs would not require the first defendant to rectify the deficiencies in the pleading of the vital terms of the contract to which I have referred and to which the magistrate also, in my opinion, referred. Nor would the deficiencies of the pleadings in relation to quantum and causation be required to be rectified, because the paragraphs of the request specified in the order do not relate to those issues.

10. In any event, I am satisfied that the magistrate did not properly appreciate and apply the principles which govern an application for the striking out of pleadings under rule 9A.02(1)(c) of the *Magistrates' Court Civil Procedure Rules* 1999.[3] In my view, it is plain that the plaintiffs were entitled to an order that the defence and the counterclaim be struck out with a right to re-plead. No order for particulars could properly be seen as obviating the need for the first defendant properly to plead the vital terms of the contract in the main body of its defence and in the main body of its counterclaim. Of course, those documents could have been combined into one document and that could still be done.

11. Although rule 9A.02(1) of the Magistrates' Court Rules provides (in part) that if a statement of claim etc may prejudice, embarrass or delay the fair hearing of the proceeding the court "may" order that the whole or part of the statement of claim etc be struck out or amended, it is doubtful, to my mind, that the word "may" was here intended to confer a discretion. In any event, in this case, in all the circumstances, any such discretion could only lawfully have been exercised in one way, namely by ordering the striking out of the defence and of the counterclaim with a right to re-plead. Any other exercise of the power would have been manifestly unreasonable in the *Wednesbury*[4] sense.

12. For completeness I would add that I am satisfied that there are other defects in the defence and the statement of claim which would have made it all the more appropriate that they be struck out and re-pleaded. The plaintiffs took me to a number of alleged deficiencies. I do not necessarily agree with all of the criticisms made by the plaintiffs, but I would accept that there were at least the following defects:

- First, paragraph 17 of the defence is pleaded too cryptically. It does not give sufficient notice of the basis for the first defendant's claim (which may be intended to be referrable to an equitable assignment) that by paying the amount of $19,093.04 to a specified third party the first defendant acquired a right to be paid that sum by the plaintiffs.
- Second, there appear to be irrelevant allegations in the defence, such as in paragraph 9 thereof, which paragraph appears to relate to some agreement concerning the cost of the design of modular cardboard trays and the sharing of that cost, being an allegation that appears to lead nowhere.
- Third, as to the counterclaim, as I have already mentioned, the magistrate was dissatisfied with the first defendant's attempt to particularise its alleged loss and damage, and the causation thereof. The first defendant's counsel acknowledged before me that his client's attempts to cover these aspects by the filing of an affidavit of the financial controller of the first defendant followed by an affidavit and expert report of an independent accountant were inappropriate. Moreover, the claim apparently made by the financial controller's affidavit seems to amount to a claim for something over $800,000 whereas the claim as set out in the expert's report is for about $160,000.[5] Nothing had been said on the record to indicate whether or not the first affidavit had been overtaken by the second or whether any reliance at all was placed on the first affidavit or on any of the lengthy and barely legible and jumbled exhibits to that affidavit.[6]
- Fourth, the first defendant has inappropriately mixed up claims for loss and damage under paragraph 5 of the counterclaim with claims against the plaintiffs apparently based in contract as set forth in sub-paragraphs (b) to (g) of the particulars under paragraph 5.

13. I do not need to examine the plaintiffs' further allegation that the two affidavits are littered with assumptions and further allegations and heads of damage that are not pleaded in either

the defence or the counterclaim. I note though that there does appear to be substance in at least some of these complaints of the plaintiffs.

14. In my view the application for an order of *certiorari* quashing the decision of the magistrate must be granted.

15. I will hear the parties as to any further orders that may be appropriate and as to the particular form that any orders should take and as to costs. [After discussion]

16. It is not appropriate in this case to make an order specifically directing the Magistrates' Court as to how it should now determine the plaintiffs' application of 8 July 2008. That will be a matter to be decided by the Magistrates' Court in accordance with this judgment and in the circumstances prevailing when the matter comes on again before it.[7]

17. I think the usual order for the costs of the proceeding in this Court ought to be made. There has been substantial success on the part of the plaintiffs in the proceeding, and in the ordinary course the principle is that costs follow the event. As to the first defendant's suggestion that any order for costs against it should in effect be held in abeyance or stayed until the end of the Magistrates' Court proceeding with a view to enhancing the prospects of settlement overall, I am not persuaded that there is good reason to depart from the normal approach which is to make the order enforceable as soon as may be. This proceeding is over. It is true that it arises out of a Magistrates' Court proceeding which is not over, but I do not see that it would be appropriate to make the plaintiffs wait in the hope that that might be more conducive to settlement of the proceeding below. Of course, we can all hope that the Magistrates' Court proceeding will settle, but such a consideration would not generally be regarded as a sufficient reason to deprive a party that has succeeded in a proceeding in this Court of the entitlement to be compensated for the costs that they have incurred as soon as may be; and I do not think that the present case is relevantly out of the ordinary. So I would simply make the order that the first defendant pay the plaintiffs' costs of this proceeding.

18. The court's decision on the first defendant's application for a certificate under the *Appeal Costs Act* 1998 is reserved, with liberty to the first defendant to file a submission in support thereof by 4.00 pm tomorrow.

**30 April 2009 (in chambers)**

19. The first defendant has applied under s4 of the *Appeal Costs Act* 1998 for an indemnity certificate in respect of the costs of the proceeding. At the hearing, its counsel, Mr Andersen, very properly drew to my attention that s4 provides, so far as relevant (counsel's emphasis):

> "4(1) If an appeal against a decision of a court in a civil proceeding—
> (a) to the trial division of the Supreme Court; or (b) ... (c) ...
> succeeds, a respondent to that appeal may apply to the Supreme Court for, and the court may grant, an indemnity certificate in respect of costs."
>
> Counsel pointed out that in s3(1) the word "appeal" is defined as follows:
>
> "(1) In this Act —
> appeal includes an appeal by way of re-hearing, an application for a new trial and any proceeding in the nature of an appeal, but does not include a case stated."

20. Counsel acknowledged that an application for an order in the nature of *certiorari* pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 is an invocation of the Supreme Court's original, supervisory jurisdiction and not, strictly speaking, an appeal. However he sought time to research the question whether a proceeding by which such an application is made might properly be characterised as an "appeal" within the meaning of s4(1) of the Act, at least as a "proceeding in the nature of an appeal" within the extended definition of "appeal" in s3(1) of the Act. He sought and was allowed a day to put in a written submission on that point and in relation to the first defendant's application generally. The plaintiffs did not oppose the first defendant's application and did not seek to be heard further in relation to it.

21. In his written submission Mr Andersen relies on the judgment of Hedigan J in *Aboriginal*

*Hostels Ltd v Fisher and Kefford*[8] as effectively deciding the construction point in his client's favour. He submits:

> "5. In that case a motion for *certiorari* had been brought pursuant to O56 seeking to quash a decision of the Residential Tenancies Tribunal. There, as here, the error asserted was one of law (albeit one concerning the jurisdiction to make the orders sought). The plaintiff succeeded and the first defendant (the second defendant being the Tribunal which had elected to abide the result) was ordered to pay the plaintiff's costs. The first defendant sought an indemnity certificate citing s13 of the 1964 Act. The question there too was whether the proceedings were an appeal for the purposes of the Act.
>
> 6. It was determined that it was on the basis '*The proceeding instituted by Aboriginal Hostels Ltd was clearly directed to having the formal order of the Tribunal set aside. It sought a review of that decision and, in effect, 'appealed' by way of another proceeding on a question of law'*. It was added however that '*Furthermore, it is hard to resist the argument advanced by counsel that it is at least an 'other proceeding in the nature of an appeal'.'*
>
> 7. Any difference in the language used in the two definitions is an immaterial one for present purposes having regard to that reasoning and to the fact that 'appeals' not only on questions of law, but as to all kinds, are now potentially the subject of the grant of a certificate under the Act.[9]"

22. In substance I accept Mr Andersen's submission. The definition of "appeal" in the *Appeal Costs Fund Act* 1964 Act (as amended) as at the time of the decision in *Aboriginal Hostels* was set out in the judgment of Hedigan J. It was as follows:

> "'Appeal' includes an appeal on a question of law, an order to review, a case stated for the opinion or determination of a superior court on a question of law and a question of law reserved in the form of a special case for the opinion of a superior court, a motion for a new trial and any other proceeding in the nature of an appeal."

It will be noted that the expression "order to review" no longer appears in the corresponding definition, and also that the current definition excludes a "case stated". At first glance I was concerned that one or other or both of these differences might undermine the significance of the judgment of Hedigan J for present purposes. However, further consideration has satisfied me that neither does.

23. The reference to an "order to review" was included in the 1964 Act from the outset. Having researched the matter, I am satisfied that this was a reference to, only, the statutory procedure for review of the decisions of Victorian justices and magistrates which went by that name and which, in 1964, was long established and commonly used. It provided for a broad-ranging review of matters of fact and law.[10] It was not a reference to the then applicable procedure for obtaining a prerogative writ (such as a writ of *certiorari*), namely the procedure prescribed by Order 53 of the *Supreme Court Rules* as they stood in 1964. (Order 53 was the Order corresponding to Order 56 of the current Rules). Nor, in my view, was it a reference to an "order for review" (so called) under the *Administrative Law Act* 1978.[11] The *Appeals Costs Fund Act* 1964 was, of course, enacted some 12 years before the *Administrative Law Act* 1978. Hedigan J made no reference to the expression "order to review" contained in the 1964 Act (as amended). Presumably his Honour did not regard it as significant for the purposes of the question before him. He did not proceed on what would have been an erroneous basis, namely that it was the very reference to "an order to review" that brought in applications for orders in the nature of *certiorari*. Rather, he went directly to the question whether an application for *certiorari* was an "appeal" or a "proceeding in the nature of an appeal" within the meaning of the 1964 Act, and held that it fell within the latter expression, at least.

24. Given that the reference to "an order to review" was not a reference to relief in the form of, or in the nature of, the prerogative writs, the absence of any corresponding reference in the current definition of "appeal" does not suggest that Parliament intended to exclude proceedings under Order 56 from the scope of the *Appeal Costs Act* 1998.

25. Turning to the express exclusion of "a case stated", it might have been thought, at first glance, that, instead of expanding the remedy beyond proceedings which succeed on a question of law, Parliament actually intended to confine the scope of the Act by excluding challenges of such a kind. Alternatively, it might have been thought that Parliament at least intended to exclude challenges to interlocutory decisions. However, Part 4 of the *Appeal Costs Act* 1998 immediately

gives the lie to both views. Cases stated remain covered by the Act, but are now separately provided for in Part 4.

26. Further support for the first defendant's legal submission comes from the judgment of Gillard J in *Kirsch v Dolman*[12] given on 19 July 2001. In that case, like this, an application for an order in the nature of *certiorari* was made. His Honour expressly held, albeit *obiter*, that a proceeding by way of judicial review is a proceeding "in the nature of an appeal" within the meaning of s3 of the *Appeal Costs Act* 1998 for the purposes of s4 thereof. His Honour cited in support another case which had been decided under the 1964 Act, namely *R v Marshall; ex parte Baronor Nominees*[13]. That case in turn had been relied on by Hedigan J in *Aboriginal Hostels*.[14]

27. I propose to follow the (uniform) approach adopted in these cases. I am satisfied that s4 of the *Appeal Costs Act* 1998 can apply to an application under Order 56 of the *Supreme Court Rules* for an order in the nature of *certiorari*, and that it applies in the present case.

28. I agree with Mr Andersen that, the errors below being errors of law and there having been no disentitling conduct on the part of the first defendant, this is an appropriate case for the exercise of the discretion in favour of the grant of a certificate.[15]

29. An indemnity certificate under s4 of the *Appeal Costs Act* 1998 is granted to the first defendant in respect of the costs of the proceeding, and I direct that the granting of the certificate be recorded in the Court's order under "Other Matters".

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[1] The defendant has been principally represented by Queensland-based practitioners at all relevant times. However counsel who appeared for the defendant before me (Mr Andersen of the Queensland Bar) was engaged only recently and was not involved in the preparation of the Magistrates' Court pleadings or otherwise in relation to the proceeding in the Magistrates' Court.

[2] I proceed on that basis without determining whether it is correct. Compare *Tural v Potter* [2000] VSC 80; (2000) 110 A Crim R 475 at 481 [18]; 16 VAR 381 (Eames J); *Wilson v County Court of Victoria* [2006] VSC 322; (2006) 14 VR 461 at 469-470 [34]- [35]; (2006) 164 A Crim R 525; (2006) 46 MVR 117.

[3] See *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712; [1936] 1 All ER 287; 52 TLR 224; 154 LT 423; 105 LJKB 318; *Gunns Ltd v Marr* [2005] VSC 251 at [18]; *Australian Automotive Repairers Association (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568 at [13]-[17].

[4] *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.

[5] I was told that the defendant had abandoned the excess over $100,000, as it was required to do in order to keep within the monetary jurisdiction of the Magistrates' Court.

[6] The defendant's counsel frankly informed me that he did not have instructions as to whether, even now, that matter had been clarified.

[7] In particular, in relation to the costs of the proceedings in the Magistrates' Court, the parties may well wish to rely on a range of matters not canvassed in this judgment.

[8] 12 VAR 373, Supreme Court of Victoria, Hedigan J, 27 November 1997, BC 9706288.

[9] Here counsel cites *DPP v Sher (No. 2)* [2002] VSC 350 at [22]; (2002) 12 ANZ Insurance Cases 61-534 and *Eureka Funds Management Ltd v Freehills Services Pty Ltd (No. 2)* [2008] VSCA 177.

[10] See *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485 at 496; 13 ALR 352; 29 ALT 23 (Cussen J); *Engebretson v Bartlett* [2007] VSC 163 at [97]; (2007) 16 VR 417; (2007) 172 A Crim R 304.

[11] For present purposes one may ignore the confusing heading ("Order *to* review") to r1.12 of the *Supreme Court (General Civil Procedure) Rules* 2005. Rule 1.12 itself refers in terms to an "order *for* review" under the *Administrative Law Act* 1978.

[12] [2001] VSC 234 at [41]-[46]; 123 A Crim R 331.

[13] [1984] VicRp 17 [1984] VR 211 at 227-228.

[14] See also, more generally, the decision of Hedigan J in *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Association Inc* [2000] VSC 336 esp at [4]-[7].

[15] See *Eureka Funds Management Ltd v Freehills Services Pty Ltd (No 2)* [2008] VSCA 177.

**APPEARANCES:** For the plaintiffs Dawson: Mr E Wheelahan, counsel. Martin Irwin & Richards Lawyers. For the first defendant Bethonga: Mr RJ Anderson, counsel. Kliger Partners, solicitors.

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