40/94

SUPREME COURT OF VICTORIA

SMITH v SEABRIDGE and ORS

McDonald J

5, 6 July 1994

PROCEDURE – SUMMONS TO PRODUCE DOCUMENTS – OBJECTION TO PRODUCTION – TESTS TO BE APPLIED – DOCUMENTS ORDERED TO BE PRODUCED – PROCEDURE TO BE FOLLOWED BY COURT: *MAGISTRATES' COURT ACT* 1989, S43.

1. Where a stranger to the proceedings before the Court has been summonsed to produce documents, the person must produce the documents unless the summons is set aside.

2. If documents sought to be produced are not identified with a sufficient degree of particularity or it appears that the party issuing the summons is engaged in a "fishing" exercise or a form of non-party discovery, the Court should set the summons aside as an abuse of process.

3. If the summons is not set aside and any objection such as a claim of privilege is rejected, the documents are in the control of the Court. If the witness objects to the parties inspecting the documents, the Court should be first satisfied that the documents have relevance to the issues in the proceedings. If the Court allows inspection and copies of the documents be taken, care should be taken to control the use of such copies.

4. Where, prior to the commencement of committal proceedings against a medical practitioner alleged to have indecently assaulted a number of women, a sub-poena required the Secretary of the Medical Board of Victoria to produce all documentation associated with an enquiry held by the Board, a Magistrate was in error in failing to set the sub-poena aside on the grounds that it was too wide and lacked sufficient particularity to show relevance to the committal proceeding.

***Rochfort v Trade Practices Commission* [1982] HCA 66; (1982) 153 CLR 134; (1982) 43 ALR 659; (1983) 57 ALJR 31; [1982] ATPR 40-322; 2 TPR 171;**

***The Comm'r for Railways v Small* [1983] 38 SR (NSW) 564; 55 WN (NSW) 215; and**

***Waind v Hill* [1978] 1 NSWLR 372, referred to.**

McDONALD J: *[After setting out the details of the witness summons, the relevant provisions of s43 of the* Magistrates' Court Act *1989, the proceedings before the Court upon the return of the witness summons and the arguments for judicial review of the Magistrate's order, His Honour continued]...* **[10]** A good starting point, when considering the process of summonsing a stranger to proceedings before the court to produce a document of which he or she has possession, is the statement of Mason J in *Rochfort v Trade Practices Commission* [1982] HCA 66; (1982) 153 CLR 134 at 143; (1982) 43 ALR 659; (1983) 57 ALJR 31; [1982] ATPR 40-322; 2 TPR 171 where he said:-

> "A party to litigation can compel a stranger to produce documents by serving on him a subpoena *duces tecum*. Once served with the subpoena and provided with the proper conduct money, he must obey it and bring to court the documents described in the subpoena if he has them, unless the writ is set aside on the ground that it is oppressive, and produce them to the court, unless he can establish some good reason why they should not be produced. A person called on by a subpoena *duces tecum* may be asked, without being sworn, whether he has brought the documents, and if so, whether he produces them. If he objects to produce them, he should state the ground of his objection on oath so that the court may determine their sufficiency".

It is significant to observe that at p145, His Honour further said:

> "The obligation to produce documents pursuant to a subpoena *duces tecum* is a qualification upon, or an intrusion into, the citizen's right to keep his documents to himself".

This last statement by the present Chief Justice is well to be kept in mind by courts when a stranger to a proceeding is compelled by process of a court to bring to and produce to a court his or her documents. Care should **[11]** be exercised by a court before a party to the proceedings

is permitted to inspect such documents. Further, it should not be considered to be an entitlement of a party to a proceeding who has been allowed to inspect the documents that he or she or it will be permitted to copy documents of a stranger so produced to the court. If this is permitted, care should be taken to control the use of such copies.

A necessary step for the court to undertake before permitting inspection is for it to be satisfied that that which is being required to be produced has relevance to the issues in the proceedings before the court. In this respect, the summons should be sufficiently narrowly worded to ensure that the process of the court is not being abused.

The process of the court whereby a stranger to proceedings before the court is compelled to produce documents to the court in answer to a subpoena *duces tecum* or a summons in the nature of those relevant in these proceedings is not a procedure by which a party to the proceeding can undertake non-party discovery or engage in a "fishing exercise" to see if the stranger may have a document helpful or relevant to their cause.

In the frequently cited authority, *The Commissioner for Railways v Small* 55 WN (NSW) 215; [1938] 38 SR (NSW) 564, Jordan CJ at 573, said:-

> "A writ of subpoena *duces tecum* may be addressed to a stranger to the cause or to a party. If it be addressed to a stranger, it must specify with reasonable particularity the documents which are required to be produced. A subpoena *duces tecum* ought not to be issued to such a person requiring him to search for and produce all such documents as he may have in his possession or power relating to a particular subject matter. It is not legitimate to use a subpoena for the purpose of **[12]** endeavouring to obtain what would be in effect discovery of documents against a person who, being stranger, is not liable to make discovery. A stranger to the cause ought not be required to go to trouble and perhaps to expense in ransacking his records and endeavouring to form a judgement as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant ... if a subpoena *duces tecum* is issued to such a person in an objectionable form, the witness may apply to the Court to have it set aside".

It is to be noted that it is necessary for this statement to be qualified in respect of procedures which are now available in some jurisdictions whereby non-party discovery can be had from a stranger to the proceedings. However, that is not this case and the statement otherwise remains applicable to summonses of the nature, the subject of these proceedings. Later, at p575, when dealing with a subpoena addressed to a party to a proceeding, Jordan CJ further said:- "Even if the documents are specified, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant"

See also *Waind v Hill* [1978] 1 NSWLR 372; *Finnie v Dalglish* [1982] 1 NSWLR at p400; (1981) 1 ANZ Insurance Cases 60-438; *Purnell Bros v Transport Engineers Pty Ltd* (1984) 73 FLR 160 at 174-5.

Although not directly on point to the matter under consideration, that is whether the Magistrate was in error in not setting aside the summonses, while reference is had to *Waind* it is worthwhile to note what was said by Moffitt P at p382 as to the procedure to be followed by a court once documents are produced to the court in answer to a subpoena. He said:-

> **[13]** "... when the documents are produced to the court by the witness, the subpoena not having been set aside, and any other objection to their production, such as on the ground they were privileged, having been rejected, at this point documents are in the control of the court, pursuant to the valid order of the subpoena. As pointed out in *Small's case* at this time the witness may state he objects to their being handed to the parties for inspection. If he states he does not object to the parties inspecting the documents, or by lack of objection taken to have no objection, no doubt normally there would be little reason not to permit inspection by either party. However, the documents are under the control of the judge and, even if the witness has not objected, there may be good reason in the elucidation of the truth why the judge may e.g. defer inspection by one party or the other. Indeed, no doubt, he will normally defer inspection by a party who has not issued the subpoena until his opponent has an opportunity to use the document in cross-examination. There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other party who is neither a party nor the witness. It may well be that the documents are the property of some institution, but relate to private matters concerning some person and the officers of the institution do not take objection on the basis that the responsibility for disclosure rests with the court. The documents are in its control and are used on its responsibility so far as properly required the purpose of the proceedings."

If it is apparent from the face of the summons to produce documents that the documents sought to be produced are not identified with a sufficient degree of particularity, or from the summons and the circumstances existing, that that which the party causing the summons to be issued was engaging in is a "fishing exercise" or a form of non-party discovery, the court should set aside the summons on application. To not do so would be to permit a party to engage in an abuse of the process of the court and it would be wrong in law. In this case by reference to each summons it is to be seen that the documents sought to be produced were **[14]** described in the widest terms and without sufficient necessary particularity with respect to the subject of the committal proceedings before the court, so as to show that the documents sought to be produced had relevance to issues in those proceedings.

On the facts, it would appear that each of Seabridge and the informant was engaging in a process, by use of the summons issued by the court and directed to the plaintiff to inspect documents which related to proceedings before the Medical Board, in order to see if any of those documents would be of relevance to issues in proceedings before the court, and would be of assistance to either of them. Such process is not permissible. The Magistrate was in error in rejecting the plaintiff's application to set aside each summons. Accordingly, I order that the ruling of the Magistrate that "Both subpoenae ruled valid and NOT set aside as an abuse of process", be set aside.

Having so ordered, it is appropriate, in the circumstances of this case, and in exercise of my supervisory jurisdiction I should and do order that the summons of the second defendant issued on 2 May 1994 and directed to the plaintiff to produce documents to the Magistrates' Court at Geelong on 10 May 1994, be set aside. I further order that the summons issued on behalf of the first defendant on 9 May 1994 and directed to the plaintiff to produce documents to the Magistrates' Court at Geelong on 10 May 1994, be set aside. As a necessary consequence of those orders it is appropriate and necessary that I further order, which I do, that the further orders made by the Magistrates' Court at Geelong on 10 May 1994 in the proceeding constituted by the summons the subject of these proceedings, be quashed.

During the course of the hearing of these proceedings I was informed by counsel for the plaintiff that the documents produced by the plaintiff into the custody of the Magistrates' Court had, in fact, been returned to the plaintiff for his safe-keeping, pending the hearing and determination of these proceedings. It was indicated to the court by counsel for the plaintiff that the subject documents were at the court during the course of this hearing.

In such circumstances, it is not necessary for me to make any further order with respect to those documents. (Discussion ensued as to costs). I order that the first defendant and second defendant pay the plaintiff's costs of these proceedings, including reserved costs.

APPEARANCES: For the plaintiff Smith: Mr PC Golombek, counsel. Victorian Government Solicitor. For the defendants: Mr G Silbert, counsel. Director of Public Prosecutions.
