09/03; [2003] VSC 208

SUPREME COURT OF VICTORIA

VICTORIA PRE-CAST PTY LTD v PAPAZISIS & ANOR

Teague J

10, 18 June 2003

CIVIL PROCEEDINGS – APPLICATION FOR AN INSTALMENT ORDER – APPLICATION REFUSED BY REGISTRAR – APPEAL TO MAGISTRATE – INSTALMENT ORDER MADE BY MAGISTRATE – ORDER CONTAINED ERRORS AS TO CALCULATIONS AND OTHER ERRORS – WHETHER MATERIAL ERRORS OF LAW ON THE FACE OF THE RECORD – WHETHER MAGISTRATE LIMITED AS TO THE ORDER FOR INSTALMENTS – WHETHER MAGISTRATE HAS A DISCRETION TO MAKE AN ORDER HE/SHE THINKS FIT IN THE CIRCUMSTANCES: *JUDGMENT DEBT RECOVERY ACT* 1984, S6.

1. Whilst a court's order may be found to contain errors on the face of the record, the question is whether it amounts to a material error of law. Where a court's instalment order contained several punctuation errors, a spelling inconsistency, questionable abbreviations and mathematical errors, the errors were not, either as to law or materiality, such errors as a remedy in the nature of *certiorari* was properly available to address.

2. When a magistrate is determining an appeal against a Registrar's refusal to make an instalment order under the *Judgment Debt Recovery Act* 1984 (Act), the magistrate is not limited to making an order in the terms specified in the original application for an instalment order. Having regard to the provisions of the Act, the magistrate has a wide discretion as to the terms of the order. Accordingly, where a magistrate made an instalment order which was different from the order sought in the original application, the magistrate did not act beyond power.

TEAGUE J:

1. These are my reasons for dismissing with costs an application for relief under Order 56 in the nature of *certiorari*. The application was made on the grounds that an order made in the Magistrates' court had been made in excess of jurisdiction and that there had been an error in the face of the record. The plaintiff in this court was the judgment creditor in the Magistrates' court. The first defendant was the judgment debtor. On 27 June 2002, judgment was entered against the judgment debtor for $28,231.17 in the Magistrates' Court at Melbourne. On 20 July 2002, the judgment debtor lodged an application in the Magistrates' Court at Melbourne under Section 6 of the *Judgment Debt Recovery Act* 1984 ("the Act").

2. I have set out Section 6 below. I have underlined certain words. I will later refer back to them.

> 6. **Judgment creditor or debtor may apply for instalment order**
> (1) A judgment creditor or judgment debtor may at any time after judgment is given apply to the proper officer of the court—
> (a) where an instalment order has not been made under section 5, for an order that the judgment debt or the balance of the judgment debt then owing to the judgment creditor be paid by instalments; or
> (b) where an instalment order has been made under section 5, for another instalment order in substitution for the order under section 5.
>
> (2) An application under sub-section (1) shall—
> (a) be in or to the effect of the prescribed form;
> (b) specify the amount of the judgment debt then owing to the judgment creditor; and
> (c) specify the amount of each instalment proposed to be paid and the times at which instalments are proposed to be paid.
>
> (3) Subject to and in accordance with the rules, the proper officer of the court may without notice to the judgment creditor or judgment debtor and whether or not the judgment creditor or judgment debtor is before the proper officer—
> (a) order that the judgment debt or the balance of the judgment debt then owing to the judgment

creditor be paid by the instalments and at the times specified ***in the application***; or
(b) refuse to make such an order.

(4) The proper officer of the court shall cause the judgment debtor and judgment creditor to be notified of an order or refusal to make an order under sub-section (3).

(5) A judgment creditor or judgment debtor may within the prescribed period after receiving notice under sub-section (4) file with the proper officer of the court notice of objection and the proper officer shall set the matter down for hearing by the court.

(6) The proper officer of the court shall cause the judgment debtor and judgment creditor to be notified of the time and place of the hearing.

(7) The court may—
(a) where the proper officer has refused to make an order under sub-section (3)—
(i) ***order*** that the judgment debt or the balance of the judgment debt then owing to the judgment creditor be paid by the instalments and at the times specified ***in the order***; or
(ii) refuse to make such an order; or
(b) where notice of objection to the order under sub-section (3) (a) has been filed under sub-section (5), confirm ***vary*** or cancel the order of the proper officer of the court—
and shall cause the judgment creditor and the judgment debtor to be notified accordingly.

(8) Where an application under sub-section (1) is made—
(a) the applicant shall serve a copy of the application on the judgment creditor or judgment debtor (as the case may be); and
(b) from the time of service the application shall operate as a stay of enforcement or execution of the judgment in respect of which the application is made until the proper officer of the court or the court (as the case requires) deals with the matter.

(9) Where a judgment debtor has applied under this section for an instalment order and the proper officer of the court or the court (as the case may be) has refused to make the instalment order, the judgment debtor may not make another application under this section within three months after that refusal.

3. The judgment debtor proposed that he would pay monthly instalments of $800 as from 1 August 2002. On 9 August 2002, the Registrar of the Magistrates' Court at Melbourne, as the proper officer, refused, under s6(3)(b), to make an order. The judgment debtor took the objection option open to him under s6(5). On 6 September 2002, there was a hearing before a magistrate under s6(5). What actually took place at the hearing is not clear. I am not in a position to know how the magistrate came to make the order that was made. The Register records the order made by the Magistrate on 6 September 2002. The record, as per a certified extract from the Magistrates' Court, is as set out below. It is typed with its various imperfections:

"S PAPAZISIS - V - VICTORIA PRECAST PTY LTD
NOTICE OF OBJECTION (JDRA)
Application order : GRANTED
Order that the judgment debtor pay to the judgement creditor
the sum of $28231.17 due under the judgment entered on
27/06/2002 together with costs of this application fixed at $0.00
by instalments:
Amount of each instalment $800.00 to be paid each: month
First instalment due by: 06/11/2002 Instalment to be paid to:
WILKENS & ROCHE OF PO BOX 18 WILLIAMSTOWN, VIC, 3016
Number of instalments: 36 Date of final instalment: 06/11/2005
Amount of final instalment: $568.83
OTH order :
1. INSTALMENT ORDER SUBJECT TO PAYMENT BY DEFENDANT OF $14,000
WITHIN 2 MONTHS"

4. The form of the order as set out in the Register is scarcely satisfactory. There are: several punctuation errors; a spelling inconsistency; questionable abbreviations; and mathematical errors. As to the latter, 36 times $800 equals $28,800. That figure does not take account of $14,000 and $568.83. Nevertheless, it is sufficiently clear that the order requires the judgment debtor to make an initial payment of $14,000 before 6 November 2002, and thereafter by monthly instalments of $800 with one final smaller amount until the judgment debt is paid.

5. After the making of the order, various steps were taken. Those steps included: the exchange of correspondence; the proffering and dishonouring of a cheque; the serving of a bankruptcy notice; and the bringing of this proceeding. Those steps did not include an application to the Magistrates' Court to have the record of the order corrected. As to that option, see *Hunter v Magistrates' Court & Aulich* [2002] VSC 362.

6. Mr Holzer appeared before me for the plaintiff. He put to me that there was error on the face of the record, and that the Magistrate lacked the power to make the order which was made. As to the former, that was apparent from the errors that I have referred to, most obviously those of mathematics. As to the latter, he argued that the magistrate had acted beyond power in that he had misconstrued s6(5). in that he had no power to make an order for payments to be made other than those specified in the application.

7. I turn to the second of Mr Holzer's bases. There is an issue as to the proper construction of s6(7)(a)(i). Is the Magistrate limited to making an order for payment of instalments only by the instalments and at the times specified in the application? If so, he has acted beyond power. I was referred to decisions on s6(5). by other judges in this court, namely *Cahill and another v Howe* [1986] VicRp 62; [1986] VR 630, *GFT Australia Pty Ltd v Moore* (unreported 2 November 1992), and *Lewis and another v Leslie* [2001] VSC 110. In each case, application had been made first to a Master of this Court as the proper officer, and later to a Judge. In *GFT* and *Lewis*, attention was focused on the dilemma posed where the proposal of the judgment debtor to the Judge as to how payment by instalments might be made was different from the proposal made by the judgment debtor in the application brought before the Master. In *Lewis*, McDonald J noted what Gobbo J had said in *GFT* to the effect that the court would decide whether it was being called on to hear an objection to an earlier application or to embark on a quite new matter. His decision not to order payment by instalments was not based on the distinction.

I see nothing in those cases which warrants my treating the decision of the magistrate in the instant case as being beyond power. In short, in those cases, the making of a later proposal was seen as going to the exercise of discretion. As a matter of construction, it seems clear to me that that must be so. I refer back to my underlining in s6 as set out above. The words "specified in the order" in s6(7)(a)(i) are different from the words "specified in the application" in s6(3)(a). It seems clear to me that, in s6(3)(a) an order other than for payments as specified in the application would be beyond power, but that that would not be so where the order is made under s6(7)(a)(i). I would also note that other provisions in the Act support the appropriateness of not taking a narrow construction. I refer to the use of the word "vary" in s6(7)(b) and in s6(5). As the cases make clear, there is a wide discretion left with the court. I cannot think that Parliament would have intended that the discretion would be fettered by limiting all orders to what was originally applied for. I am satisfied that the magistrate was not inappropriately exceeding his powers.

8. I turn to the first of Mr Holzer's bases. There are clearly errors on the face of the record. However, I am not satisfied that there was a material error of law on the face of the record. Again, the underlining is mine. It is probably overly broadly stating the position as to what must be shown to state that only a material error of law will suffice. I say therefore, that, in the circumstances of this case, the absence of a material error of law is the principal factor warranting my exercising a discretion not to grant relief. An application could relatively readily and cheaply be made to the Magistrates' Court to correct the errors, if for some reason, that really appeared to matter. Reverting back to the question of what must be shown, I am conscious of differences in the approach of the Australian and English courts. I take as the leading authority: *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. It provides only limited guidance as to the scope of "an error of law on the face of the record". The mere fact that the reference is to the error being one "of law" is a pointer. There are English decisions, going to the materiality of errors of law, listed in *Certiorari and Error on the Face of the Record* Shaw and Gwynne (1997) 71 ALJ 356 at 365 and in *Judicial Review Handbook* Fordham 3rd Edn. at 722. It is clear to me that the errors in this case are not, either as to law or as to materiality, such errors as a remedy in the nature of *certiorari* is properly available to address.

APPEARANCES: For the plaintiff Victoria Pre Cast Pty Ltd: Mr FJ Holzer, counsel. Wilckens & Roche, solicitors. For the defendant Papazisis: Mr R Shepherd, counsel. Allan McMonnies, solicitors.