31/87

SUPREME COURT OF VICTORIA

STREET v SWEETENHAM

Murray J

7 September 1987

PRACTICE AND PROCEDURE – RE-HEARING APPLICATION – CIVIL CLAIM – DEFENDANT SERVED WITH SUMMONS – NOTICE OF DEFENCE LODGED LATE – NOTIFIED OF CONSEQUENCES – JUDGMENT ENTERED – DEFENDANT AWARE OF RIGHT TO APPLY FOR REHEARING – SIX MONTHS' DELAY BEFORE APPLICATION MADE – REFUSED – WHETHER ERROR IN EXERCISE OF DISCRETION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, PART XVII.

The defendant was served with a summons claiming damages arising out of a motor vehicle collision. A notice of defence was lodged nine days after expiration of the period specified for lodgment of notices. The defendant was notified by the Community Legal Service about the late lodgment and was invited to give instructions as to taking further action. Judgment was entered 22 days later and no action was taken by the defendant until some two months later when he saw new legal practitioners. He was then aware of the judgment against him and that he had a right to apply for a rehearing. It was not until a further six months elapsed that an application for rehearing was issued. Upon the return of the application the Magistrate was of the view that the applicant had "sat on his rights for too long" and dismissed the application. No reference was made by the Magistrate as to whether there was any prejudice to the complainant by reason of the delay. Upon order nisi to review—

HELD: Order nisi discharged.
(1) Distinctions should be drawn between cases such as the present and
(a) those where a defendant seeks to have an existing action dismissed for want of prosecution; and
(b) those where judgment has been entered without the defendant's being aware of it.

(2) In the present case, no specific prejudice to the complainant could be alleged. However, it was capable of being inferred by the defendant's gaining further time, the possibility of his disposing of his assets and the possibility that circumstances may change to adversely affect the complainant.

(3) In view of the defendant's ignoring his solicitor's request for further instructions and giving no explanation for the six-months' delay after becoming aware of his right to apply for a rehearing, it was not established that the Court failed to exercise its discretion properly in refusing the application.

MURRAY J: [1] This is the return of an order nisi to review a decision of a Stipendiary Magistrate sitting at Heidelberg whereby the Magistrate dismissed an application on behalf of the applicant for a rehearing of a claim made by the respondent by special summons. The evidence showed that no notice of defence on behalf of the defendant had been entered within the prescribed period of 21 days after service of the special summons and in due course the **[2]** respondent entered judgment in the sum of $5,640.83 with $366 costs against the applicant.

The application was made under Part XVII *Magistrates (Summary Proceedings) Act* 1975. The provisions of Part XVII prescribe the procedure whereby a party who does not appear and against whom a conviction or order is entered may apply for that conviction or order to be set aside and for the information or complaint on which it was made to be reheard. Pursuant to the provisions of s154(2) the Court has a discretion to set aside a conviction or order subject to such terms and conditions as it thinks fit.

After unsuccessfully applying to the Master for an order nisi the applicant made application by way of appeal from the Master's refusal to McGarvie J on 27th February 1986 and his Honour granted leave to the applicant to file and rely upon an affidavit of Ian Donald McDonald sworn 3rd December 1985. In due course he granted an order nisi upon the following grounds:

> "(a) The Magistrate failed to give any or any sufficient weight to -
> (1) The lack of evidence of prejudice to the respondent if the complaint was reheard;
> (2) The evidence that the greater part of the damage to the complainant's vehicle was caused by another vehicle;

(3) The inference that the delay was due to the neglect of the appellant's solicitors;
(b) The result was so unjust as to indicate that the Magistrate's discretion had miscarried."

[3] The said affidavit of Ian Donald McDonald is the only material which discloses what transpired before the Magistrate on the occasion of the application. The applicant did rely upon an affidavit sworn by him but this is largely irrelevant as it does not deal with the proceedings before the Magistrate. The affidavit of Mr McDonald who appeared for the applicant before the Magistrate deposes that the applicant gave sworn evidence to the Magistrate to the effect that a collision occurred on 5th August 1984 between a motor car driven by him and a motor car driven by the complainant at the intersection of Bell Street and Coomalie Crescent, West Heidelberg and that the collision was a minor one.

The applicant stated that after the collision had occurred, when he and the complainant were exchanging particulars, the complainant's vehicle was struck heavily by another car which did not stop. The complainant said that he was served with a special summons claiming damages in September 1984 and that he subsequently instructed the West Heidelberg Community Legal Service with respect to this summons. He was uncertain whether this was before or after the expiry of 21 days after service. The affidavit deposes that according to the Court file a notice of defence was lodged by the solicitors for the applicant on 29th October which was shortly after the 21 day period under the provisions of the *Magistrates (Summary Proceedings) Act* had expired. The affidavit proceeds to state that the applicant gave evidence that he had been advised by his solicitor that the notice of defence had been lodged out of time and that he had no **[4]** right to a rehearing. A letter was tendered written by the West Heidelberg Community Legal Service to the applicant dated 8th November 1984 which reads as follows:

"Dear Charles,

We write to advise that we attempted to enter a defence to the charges. Unfortunately the defence was filed outside the 21 day period necessary. The relevant law is that a person must enter a defence within 21 days of receiving the summons and it was already over three weeks when we interviewed you. We expect that the solicitors for the other party will now enter judgment against you.

We seek your instructions as to whether you wish to take this matter further, by way of for example, challenging the quote for damage."

The affidavit of Mr McDonald deposes that the affidavit of service on the court file indicated that the summons had been served on 29th September 1984 and a letter from West Heidelberg Community Legal Service to Mr J Green, the solicitor for the respondent, dated 17th October 1984 in relation to the accident was also tendered. This letter reads as follows:

"We advise that we act for Charles Street who has handed us a special summons in relation to a car accident which occurred on the 5th August 1984.

We are prepared not to enter notice of defence at this stage, on condition that judgment not be entered, and that you provide us with a quote setting out our client's damage.

On our client's instructions there were two separate accidents, the first of which involved our respective clients, and the second of which involved your client and a hit run driver. We would expect that the quote would differentiate between the damage caused to your client's vehicle by the two separate accidents.

In addition, our client instructs us that your client's headlights were not operating **[5]** at the time of the accident and that, at the time of the accident it was dark.

On a 'without prejudice' basis we are prepared to advise that our client has been on unemployment benefits for the past two and a half years, and that at the time of the accident he was driving his daughter's vehicle. We would expect that these matters may well affect the disposition of the case."

In reply the respondent's solicitor refused to give any undertaking not to enter judgment. The affidavit proceeds to show that in cross-examination the applicant admitted that he knew that he had the right to apply for a rehearing from about February 1985. No evidence was called on behalf of the respondent before the Magistrate to show that there had been any prejudice to the respondent caused by the delay which had occurred.

The affidavit deposes that the Magistrate, in dismissing the application for a rehearing, said that in his opinion the applicant had "sat on his rights for too long" and that therefore the application would not be granted. The Magistrate did not make reference to whether the applicant had a defence on the merits or whether there was any evidence of prejudice to the complainant by reason of the delay. No answering affidavit was filed in the proceedings before me and I therefore proceed upon the basis of the facts set out in Mr McDonald's affidavit.

Mr Ramsey, who appeared for the applicant, in a very cogent and persuasive argument submitted that the evidence indicated that the Magistrate failed to give any or any sufficient weight to the fact that there was no evidence that the respondent had suffered or would suffer **[6]** any prejudice by reason of the delay which had occurred and that mere delay of itself was of no great importance in the absence of any evidence of prejudice to the opposite party. He submitted that the brief statement by the Magistrate that the applicant had "sat on his rights for too long" indicated that the Magistrate's discretion had miscarried by reason of an apparent failure to take into account the absence of evidence of prejudice to the respondent which had been occasioned by the delay and hardship which would be suffered by the applicant if he was unable to have his case decided on the merits. He referred to the claim in the solicitor's letter dated 17th October that the respondent's headlights were not operating at the time of the accident and to the claim that the greater part of the damage to the respondent's vehicle had been caused by a second accident. Mr Ramsey referred to a number of decisions including *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596; *Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173 and *Evans v Bartlam* (1937) AC 473; (1937) 2 All ER 646; (1937) 53 TLR 689.

In reply, Mr Fennessy, who appeared for the respondent, referred me to the well known authorities relating to the reluctance of appellate courts to interfere with the exercise of discretion and pointed to the curious and unexplained discrepancy which appeared from the two letters written by the West Heidelberg Community Legal Service which had been tendered in evidence, namely, the letter addressed to the respondent's solicitor was dated the 17th October when the 21 day period for giving a notice of defence had not expired while the subsequent letter to the applicant dated 8th November stated that the **[7]** 21 day period had expired when the applicant was first interviewed by a member of the Service. He also referred to the lack of any explanation for the delay which occurred between February 1985 when the applicant sought advice from his present solicitors and August 1985 when the application for a rehearing was filed.

In my opinion, distinctions must be drawn between cases in which a defendant seeks to have an existing action dismissed for want of prosecution and cases such as the present. In the former the plaintiff has an action on foot and the order that the defendant seeks would deprive him of the right to have that action heard. The defendant's rights have not been affected by reason only of the existence of the action. It follows that unless the defendant can show that he has been prejudiced in his defence of the action by reason of the plaintiff's dilatoriness, the courts have usually refused to deprive the plaintiff of his right to have his action heard.

If the defendant has been prejudiced, whether by the death of witnesses, the destruction of documents or other similar causes, it is usually easy for the defendant to show such prejudice positively. Even in the absence of specific causes of prejudice some prejudice may be inferred by the mere passage of time particularly in cases in which witnesses will be called. See my remarks in *McKenna v McKenna* [1984] VicRp 58; (1984) VR 665 at 674.

In cases such as the present the plaintiff has acquired a right which the defendant seeks to destroy. No specific prejudice may be alleged but nevertheless some prejudice may be inferred. The defendant will gain further time and may dispose of his **[8]** assets. Many circumstances may change and events may occur which will adversely affect the plaintiff. Nor can it be said in my opinion that the power of the court to order interest will necessarily nullify the prejudice caused by the delay in receiving the amount of the judgment.

Similarly, a distinction must usually be drawn between cases in which a judgment or order has been entered or made against the party and that party has not been notified of it. Delay in those circumstances may be through no fault of the party concerned and the question of prejudice to the other party may be a critical factor in determining whether the judgment or order should be set aside and a rehearing ordered.

In the present case, the facts before the Magistrate showed the following chronology:

5. 8.84 Collision occurred.
18. 9.84 Summons issued.
29. 9.84 Summons served.
17.10.84 Letter bearing this date written to respondent's solicitor.
20.10.84 21 day period expired.
29.10.84 Notice of defence lodged.
8.11.84 Legal Service writes to applicant advising him of late lodgment of defence and enquiring whether he wished to take the matter further.
30.11.84 Judgment entered against applicant.
Feb. '85 Applicant sees new solicitors.
Aug. '85 Application for a rehearing issued.
5. 9.85 Application heard and dismissed.

[9] There was no evidence given to the Magistrate as to why the applicant apparently ignored his solicitor's letter of 8th November 1984 asking for instructions as to whether he wished to take the matter further. While the letter did not in terms inform him that he had the right to apply for a rehearing, it is quite untrue to say, as the affidavit deposes that the applicant did say, that the letter said that he had no right to apply for a rehearing. There is no evidence to explain why the delay which occurred between February 1985 when the applicant saw new solicitors and August 1985 when the application for a rehearing was issued. It may be that during that period negotiations were taking place between the parties or that an application was made for legal aid and the delay was due to negotiations with the Legal Aid Commission. But either of these reasons could very easily have been proved.

It does not follow in my view that because the Magistrate did not specifically refer to the fact that if he refused the application the applicant would not have the opportunity of litigating his case. Such a fact was self-evident. Nor does it follow that the Magistrate did not advert to the absence of evidence of prejudice. There was no evidence of any specific prejudice but the problem before the Magistrate was whether he should, on the one hand, grant a rehearing and deprive the respondent of his judgment or, on the other hand, refuse the application and deprive the applicant of his chance to put his defence.

Despite the powerful submissions made by Mr Ramsey, I am not persuaded that the decision of the Magistrate or that the words he used in giving it establishes that his **[10]** discretion miscarried. The Magistrate was entitled, in my opinion, to suspect that the conduct of the applicant throughout had been directed towards achieving delay rather than *bona fide* litigating his case. Whether the Magistrate did draw this inference I am unable to say but I am entirely unconvinced that on the material before him he ignored the absence of evidence of specific prejudice and failed to exercise his discretion properly.

For these reasons the order nisi will be discharged with costs.
