47/94

SUPREME COURT OF VICTORIA

GUSS v JOHNSTONE and ANOR

Hayne J

16 June 1994

CIVIL PROCEEDINGS – REHEARING – NOTICE OF DEFENCE SENT TO WRONG COURT – ORDER MADE IN DEFAULT OF DEFENCE – INTEREST CLAIMED IN REQUEST FOR ORDER – HIGHER AMOUNT ALLOWED – WHETHER ORDER IRREGULARLY MADE - WHETHER ORDER SHOULD HAVE BEEN SET ASIDE.

G., a solicitor, after being served with a complaint, sent a notice of defence to the wrong court. More than six months later, a judgment was obtained in default of defence. After being served with a Bankruptcy notice four months later, G. applied to have the default order set aside and the matter reheard. This application was refused and G.'s subsequent appeal to the Supreme Court was dismissed as incompetent. Subsequently, G. made another application for rehearing which was refused. Upon originating motion to review this refusal—

HELD: Motion dismissed with costs. Application for costs on a solicitor/client basis refused.
1. As the notice of defence had not been filed in accordance with the Rules, it was open to conclude that the notice had not been validly given. Accordingly, any failure by the Registrar to refer the matter to open court pursuant to 0.10.03(2) of the Rules did not make the order made by default irregular.

2. Although the amount of interest allowed was in excess of the amount claimed in the request for an order, it did not exceed that allowable under the relevant statutory provision and accordingly, the judgment was not irregular.

HAYNE J: [1] On 22nd September 1992 a summons was issued out of the Magistrates' Court at Heidelberg in which Raymond Johnstone, a barrister, claimed $8,430 for fees from Joseph Guss, a solicitor. That summons was served on Guss on 17th November 1992 and Guss alleges that on 7th December 1992 a notice of defence was prepared and one copy sent to the solicitors for Johnstone and another sent in error to the Magistrates' Court at Melbourne rather than the Magistrates' Court at Heidelberg. On 16th June 1993, more than six months later, Johnstone obtained judgment in default in an amount of $8,430 together with $817.04 interest and $344.50 costs.

On 28th October 1993 Guss was served with a bankruptcy notice which he alleges was the first notice he had of the fact that judgment had gone against him. On 11th November 1993 he filed an application to set aside the judgment and have the complaint re-heard. That application came on for hearing on 8th December 1993 before Mr Magistrate Murphy who refused to make the order sought.

Guss sought to appeal against that decision to this court but the appeal was dismissed as incompetent by order made on 20th April 1994. On 23rd May 1994 Guss applied again for an order to set the judgment aside and rehear the complaint. This application was heard by Mr Magistrate Ellis who again refused the order. On 30th May 1994 Guss issued an originating motion naming the Magistrates' Court of Victoria and Johnstone as defendants in which he sought judicial **[2]** review of the decision of Mr Magistrate Ellis. The relief sought in the originating motion was described in the following terms:

> "1. A declaration that the order of Mr Magistrate Ellis made on 23rd May 1994 at the Melbourne Magistrates' Court is a nullity;
> 2. That the default judgment entered at the Magistrates' Court at Heidelberg dated 16th June 1993 be set aside;
> 3. That the plaintiff be granted leave to defend the complaint;
> 4. That the complaint be otherwise remitted to the Magistrates' Court at Heidelberg for hearing;
> 5. Such further or other orders or relief as the court may see fit;
> 6. Costs."

Twelve grounds were stated in the originating motion as being the grounds on which the applicant, Guss, sought to have judicial review of the decision made by Mr Magistrate Ellis on 23rd May 1994.

On 15th June 1994 the proceeding came before Master Evans who referred the matter to a judge. It has come on for trial before me. It is not clear on the face of the originating motion what exactly is the relief or remedy in the nature of *certiorari*, mandamus, prohibition or *quo warranto* which is now sought but it is plain from both the way in which the papers have been prepared and from the course that the argument has taken that the relief that is sought is in truth relief of the **[3]** kind provided for by order 56 of the rules of court. *[His Honour then dealt with the nature of relief sought and continued] ...* **[7]** In my view it is not demonstrated by the plaintiff that the judgment below was irregular and that he was entitled as of right to have that judgment set aside. In support of the proposition that the judgment was irregular, two propositions were advanced. First it was said that this was a case in which a notice of defence had been filed and that in the circumstances judgment should not have gone, or, if there were doubt about whether notice of defence had been filed, it was a matter in which the Registrar should have referred the matter into open court under order 10.03(2) of the *Magistrates' Court Civil Procedure Rules*.

As to this ground, it is enough to say that in my opinion it is not demonstrated that notice of defence was given in the manner required by the *Magistrates' Court Civil Procedure Rules*. It seems that notice of defence was given to the solicitor for the plaintiff below but that it was not filed in accordance with the rules with the **[8]** appropriate court. In those circumstances it seems to me plain that it was at least open to the Registrar and to Mr Magistrate Ellis to conclude that notice of defence had not been validly given in accordance with the rules.

If that is so, then it would seem to me to have been open both to the Registrar and to Mr Magistrate Ellis to conclude that it was not a case in which any failure to refer the question whether defence had been given properly into open court rendered any judgment obtained in default of defence irregular.

Although some reliance was placed upon the decision of Mr Justice Crockett in the matter of *Brown v Csar, Brown v Grbac*, a note of which appears in (1987) *Magistrates Cases* 184, I am of the view that that case does not provide any immediate guidance for the disposition of the present matter if only because it concerned the then governing act and rules which were cast in radically different terms from those which now govern civil proceedings in the Magistrates' Court.

Next it was submitted that the judgment obtained below was irregular because judgment was entered for too much. This submission had its origin in the fact that the application that was made for entry of judgment sought entry of judgment for an amount of interest that was less than the amount that was ultimately allowed when the order was made. Thus, so the argument went, judgment was given for an amount more than had been claimed and was irregular.

It was asserted on behalf of Johnstone (and not contested on behalf of Guss) that the amount of interest **[9]** that had in fact been allowed in the order made on the application of Johnstone was an amount that represented an accurate calculation of interest if calculated at the then prevailing rates for a time permitted by those provisions of the *Supreme Court Act* that applied to the Magistrates' Court through the provisions of section 33 of the *Supreme Court Act*. Thus, as I understand it, the case that is sought to be made on behalf of Johnstone is that the application for judgment in default that was made on 10th June 1993 made an error in the calculation of the amount of interest to be allowed in that it claimed interest for too short a period.

In my view it is not shown that the judgment obtained below was irregular by reason of the circumstances that I have described. The amount allowed for damages by way of interest was an amount that did not exceed that allowable under the relevant statutory provisions. It is plain that by his application of 10th June 1993 Johnstone sought interest according to the relevant statutory provisions. The fact that his solicitors may have miscalculated the amount of interest to which he was entitled and thus understated the amount does not in my view mean that thereafter judgment went for a sum greater than that which was claimed. Thus, in my view it is not demonstrated that the judgment was irregular for either of the reasons proffered.

So far as the second branch of complaints made on behalf of Guss is concerned, which I have described earlier as being that as a matter of discretion the Magistrate should have chosen to set the judgment aside, **[10]** it is enough if I say this: the application to set aside that was made to Mr Magistrate Ellis was the second application of its kind. As I understood it, no fresh material was placed before the Magistrate over and above material that had earlier been considered at the time of the first application. But whether or not that is so, the fact remains that it is plain that the Magistrate in considering the application had regard to matters of the kind dealt with in such well known authorities as *Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173 at 176 and *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596, 602.

It is not shown, in my view, that no reasonable magistrate could have reached the conclusions which Mr Magistrate Ellis did. It is not to the point to ask whether I or another judge would have arrived at the same conclusion as he did; rather, it is enough to know that he appears to have addressed the appropriate questions and it is not in my view shown that he failed to take into account any relevant matter or took to account any irrelevant matter. Thus, even if the matter is properly to be examined according to the various matters raised on behalf of the plaintiff, it is in my view not demonstrated that any of those grounds is well founded.

In the circumstances it is not necessary to embark upon any consideration of whether *certiorari* would lie even if the various criticisms made of what occurred below had been made out and I expressly refrain from expressing any view on those questions. For these reasons I am of the view that the **[11]** proceeding should stand dismissed.

Counsel for Johnstone contended that in the circumstances I should order that the proceedings be dismissed with costs to be taxed as between solicitor and client. It was submitted that this was in effect the second application to challenge the order obtained by default in the Magistrates' Court and that for that reason alone warrant was shown to order some departure from the ordinary rule that costs should be taxed as between party and party. I do not accept that in this case the fact that this is the second application to challenge the judgment below is sufficient reason to warrant departing from the ordinary rule. No other reason was advanced in support of the proposition. Accordingly, the order will be proceeding dismissed with costs including reserved costs.

APPEARANCES: For the plaintiff Guss: Mr A Marshall, counsel. J Guss, solicitor. For the defendant Johnstone: Mr R Cook, counsel. Hawthorne Willism & Tait, solicitors.
