24/96

SUPREME COURT OF VICTORIA

STRATTON v MAIL MANAGEMENT PTY LTD

O'Bryan J

12, 20 June 1996

CIVIL PROCEEDINGS – APPLICATION FOR ADJOURNMENT – HEARING DATE FIXED 3 MONTHS IN ADVANCE – INTERLOCUTORY STEPS NOT TAKEN UNTIL DATE OF HEARING – INCONVENIENCE CAUSED TO COURT AND PLAINTIFF BY GRANTING ADJOURNMENT – WHETHER MAGISTRATE IN ERROR IN REFUSING ADJOURNMENT.

Where a magistrate took into account the effect of an adjournment on the parties and the court; that the defendant could pursue an indemnity claim at a later date; that the hearing date had been fixed three months earlier; and that the defendant had engaged in delaying tactics in failing to join third parties and take interlocutory steps until the date of the hearing, the magistrate was not in error in refusing the defendant's application for an adjournment.

***Sali v SPC Ltd* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841, referred to.**

O'BRYAN J: [1] The point for determination in this proceeding is whether an order of a Magistrate made on 16 February refusing the plaintiff's application for an adjournment of a civil complaint was wrong in law. This proceeding for judicial review is from the exercise of a discretion and, to succeed, the plaintiff must satisfy the Court that the learned Magistrate erred in exercising his discretion. Cf. *Repco Corporation Ltd. v Scardamaglia* [1996] VicRp 2; [1996] 1 VR 7 at 10; [1995] Aust Torts Reports 81-330; *Avco Financial Services Ltd v Abschinski* [1994] VicRp 76; [1994] 2 VR 659 at 670-71; [1994] ASC 56-256; *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202. In *House,* the High Court said, in a joint judgment:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

Error of the kind described in *House* must be demonstrated by the plaintiff. Nevertheless, "although an appellate court will be slow to interfere with the discretion of a trial Judge (Magistrate) to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to the **[2]** other party." *Sali v SPC Ltd* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841 at 843. The High Court qualified the above proposition in the following passage from the joint judgment of Brennan, Deane and McHugh JJ:

> "In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties." (843-44)

Although the parties caused voluminous material to be filed in this appeal the facts are largely not in dispute.

Chronology of Events:

1. In or about October 1994 Stephanie Ruth Baillie and John Thomas Gordon Stratton allegedly engaged Mail Management Australia Pty. Ltd. to perform works and provide materials in relation to artwork and mailing. Mail Management completed the work at a total cost of $26,825 and demanded payment of the same. Baillie and Stratton neglected or refused to pay the moneys allegedly owed.

2. On 4 July 1995 Mail Management filed a claim for $25,000 in the Magistrates' Court at Melbourne in which Baillie was the first named defendant and Stratton was the second named defendant. The particulars of claim indicate that the claim was joint and several.

3. Initially Stratton alone was served with the complaint.

4. An undated Notice of Defence was filed by Gill Kane and Brophy, solicitors, on behalf of Stratton.

The defence denied that Baillie and Stratton engaged Mail Management to perform works and provide materials and asserted **[3]** that Mail Management "was engaged by another person or other persons, to perform works and provide materials". The defence also asserted that with respect to the work performed by the plaintiff "the defendants merely acted as a courier". It may be observed at this stage that Stratton has never filed an affidavit in the Magistrates' Court in relation to this claim and has not done so in connection with this appeal. Insofar as the defence appears to assert that Baillie and Stratton acted as agents for principals, the defence does not name the principals or assert that the names were made known to Mail Management at the time of the engagement.

5. On 22 September, 1 November and 11 November 1995 pre-hearing conferences were held at Melbourne Magistrates' Court. On 11 November a hearing dated 16 February 1996 was fixed by the Court.

6. On 4 December 1995 Baillie and Stratton consulted James William Robinson of Best Hooper. On 8 December Robinson advised Gill Kane and Brophy that unless confirmation was received by 15 December that Curran and Corsetti will indemnify Baillie and Stratton in respect of the Mail Management demand Best Hooper would replace Gill Kane and Brophy as solicitors on the record for the defendants, apply to adjourn the trial date and "join Curran and Corsetti as third parties so that indemnity can be claimed from them formally in this proceeding".

7. On 15 December Gill Kane and Brophy advised Best Hooper "the matter has been settled on the basis that a release will be provided to Baillie and Stratton". **[4]**

8. On 5 January 1996 Gill Kane and Brophy advised Best Hooper "this matter has failed to settle".

9. On 7 February Baillie was served with the complaint.

Best Hooper advised Zaparas and Dandanis (solicitors for Mail Management) by facsimile transmission that Baillie and Stratton proposed to file a defence "in terms different from and broader than the defence previously filed on behalf of Mr Stratton", that Baillie will file third party notices against Curran and Corsetti, that Baillie will consider joining Gill Kane and Brophy, that Stratton wishes to join all these persons as third parties. The facsimile concluded: "All this means that the previous trial date of 16 February 1996 must be abandoned, although it could be used for directions. By Monday 12 February please advise your client's attitude to the above matters."

10. Zaparas and Dandanis advised Best Hooper that Mail Management intended to proceed on 16 February to enforce the terms of the settlement agreement effected by Gill Kane and Brophy.

11. On 15 February Best Hooper filed and served on Mail Management, Curran and Corsetti an application,
(a) to adjourn the hearing fixed on 16 February;
(b) to amend the defence filed on behalf of Stratton;
(c) to orally examine Mail Management's Managing Director;
(d) to orally examine Curran and Corsetti;
(e) to issue a third party notice directed to Gill Kane and Brophy, Curran, Corsetti and others whose **[5]** identity is revealed after the oral examinations referred to in (c) and (d) above.

12. On 16 February the hearing of the claim against Baillie was adjourned by the Court because service of the claim was not effected until 7 February. The learned Magistrate refused to adjourn the hearing of the claim against Stratton.

Judgment was obtained against Stratton in the sum of $25,000 plus costs of $3,433.50. The complaint was determined on the cause of action pleaded in the complaint and not on the settlement agreement allegedly made in December 1995.

Baillie's Affidavit and Defence

On 15 February Baillie made and filed an affidavit on her own behalf and on behalf of Stratton in which she described the circumstances in which the claim came about. In essence the deponent said that Corsetti, State Secretary of the Australian Manufacturing Workers Union had

encouraged her and Stratton to nominate for positions in a union election and promised financial and other support. Later, Curran of the Australian Meatworkers Union also offered assistance in the form of cash, premises and telephones. The affidavit provides very little detail about her relationship with Mail Management. Baillie deposed that she and Stratton wish to claim against those "who have put us in our present predicament" namely, Gill Kane and Brophy, Corsetti, Curran and "the others whose identity will be disclosed after Corsetti, Curran and Hill (Manager of Mail Management) have been examined".

[6] On 27 February Baillie filed a defence to the claim in which she says that at all relevant times "she was acting and informed the plaintiff that she was acting as agent for a principal or principals" and that the plaintiff was so aware. These allegations do not provide a defence to the claim unless the name of the principal or principals was disclosed to the plaintiff. In the absence of disclosure the plaintiff was entitled to sue the agent. Baillie also asserts that "she was only liable jointly with the second defendant". The basis for this assertion is not disclosed in the defence and will require proof of an express or implied term to this effect in the agreement made with Mail Management.

The Hearing on 16 February

Stratton did not attend Court on 16 February apparently because he chose to work on that day. Counsel appeared on behalf of Mail Management, Baillie and Stratton. The application to orally examine Mail Management's Managing Director was struck out because the document had not been served. The application to join third parties was held by the Court to be too late because the complaint was listed for hearing that day.

The Court's attention was drawn to the absence of Stratton. The application to adjourn the hearing insofar as it concerned Baillie was granted on account of the short interval between service of the complaint and the hearing date. The application to adjourn the hearing insofar as it concerned Stratton was refused. The learned Magistrate said: **[7]** "The basis of refusal of this application is that this matter is listed today." After an interval of time the learned Magistrate commenced to hear the claim, insofar as it concerned Stratton, and judgment was entered against him at the conclusion of the hearing.

The Appeal

In this Court Mr Horgan submitted that the learned Magistrate erred in exercising his discretion on a number of grounds. Firstly, that he did not give any or sufficient weight to the circumstance that Stratton was delayed in advancing interlocutory steps in defence of the claim by the settlement allegedly entered into on his behalf on 15 December which failed on 5 January. Secondly, that as a consequence of the failure of the settlement it was reasonable to expect that Best Hooper would endeavour to revive the settlement before resuming the defence case. Thirdly, that on 7 February Best Hooper advised Zaparas and Dandanis of circumstances which would require an adjournment of the hearing on 16 February. Fourthly, that the learned Magistrate did not have regard to the prejudice which would be caused to Stratton if the application to adjourn the hearing was refused. Fifthly, that the learned Magistrate gave undue weight to the fact that the complaint was listed for hearing on 16 February and no weight was given to the fact that the complaint had not previously been adjourned. **[8]** Sixthly, that the learned Magistrate did not take into account the fact that Best Hooper were only on the record as solicitors for Stratton since 7 February. Seventhly, that Stratton was desirous of defending the claim and was not sleeping on his rights. Eighthly, that the learned Magistrate did not balance the prejudice which would be caused to Stratton if the application was refused against the prejudice which would be caused to Mail Management if the application was granted. Finally, Mr Horgan submitted that a reasonable Magistrate would have granted the application in all the circumstances.

Mr Peters of counsel who appeared for Mail Management submitted that the learned Magistrate's discretion did not miscarry and he relied upon the following matters. Firstly, that the hearing date was fixed on 11 November and in accordance with the practice of the Magistrates' Court the legal advisers to the parties knew that the hearing would probably take place on that date. Secondly, that Best Hooper received instructions to act for Stratton on 4 December and took no step to change the hearing date until 15 February. Thirdly, that Stratton did nothing on or before 16 February to show that he had a viable defence to the claim. Fourthly, that Stratton is still able to pursue a claim against Curran and Corsetti for indemnity in respect of the judgment sum

and against Gill Kane and Brophy, if so advised. **[9]** Fifthly, that the right of Mail Management to pursue its claim in the courts and recover the amount due to it without undue delay was evenly balanced against the right of the defendant to present his defence on 16 February.

A number of authorities were cited and relied upon by counsel for the parties. It is unnecessary to canvass the authorities at this stage for I consider the authorities earlier cited comprehensively explain the principles of law applicable in this case. I have reached the conclusion that the learned Magistrate's exercise of discretion has not been shown to have miscarried. He had regard to all relevant matters and took into account the effect of an adjournment on both the claimant and the defendant. Relevantly, the learned Magistrate concluded that the proposed third party claim for indemnity could be brought by Stratton after the claim was determined. The circumstance that the indemnity claim may have to be commenced in the County Court because the indemnity claim will exceed the jurisdiction of the Magistrates' Court did not require the Magistrate to accede to the application to adjourn the hearing. The interlocutory steps that Stratton's counsel indicated to the Magistrate Stratton desired to pursue were unnecessary and likely to produce considerable delay in the hearing of the claim.

Above all else the learned Magistrate was entitled to conclude that Mail Management was entitled to have its claim heard on the day fixed by the Court three months earlier and that Stratton had engaged in delaying tactics in failing **[10]** to join third parties, obtain discovery or seek an adjournment until the day of hearing. No doubt the learned Magistrate also had regard to the state of the civil list in the Court and the inconvenience caused by an adjournment. Bearing in mind, however, that the claim against Baillie had to be adjourned, this was not a compelling reason for the application to be granted. For these reasons the motion will be dismissed with costs.

APPEARANCES: For the Plaintiff: Mr S Horgan, counsel. Solicitors: Best Hooper. For the Defendant: Mr J Peters, counsel. Solicitors: Zaparas Dandanas Pty.
