

31/90

## SUPREME COURT OF VICTORIA

**ANTONIADIS v KOUTROUBAS**

Marks J

19 February 1990

**PRACTICE AND PROCEDURE – CIVIL PROCEEDINGS – JURISDICTION – PARTNERSHIP DISSOLVED – ASSETS SOLD AND DISTRIBUTED – \$11000 IN TRADING ACCOUNT – DISPUTE BETWEEN PARTNERS AS TO RESPECTIVE ENTITLEMENTS – "THE VALUE OF THE SUBJECT MATTER" – WHETHER WHOLE ASSETS OR \$11000 – WHETHER WITHIN JURISDICTIONAL LIMIT: MAGISTRATES' COURTS ACT 1971, SS51(aa); 51(2)**

Section 51(2) of the *Magistrates' Courts Act* 1971 deprives a Magistrates' Court of jurisdiction in any cause of action in which "the value of the subject matter" is more than the jurisdictional limit of \$20000. Where, upon the dissolution of a partnership an amount in excess of \$34000 was realised and distributed between the partners, leaving in dispute the sum of \$11000 in the partnership trading account, the value of the subject matter in dispute was not the extent of the whole assets of the partnership but the sum held in the trading account. Accordingly, a magistrate was not in error in hearing the dispute and making an order as to the manner in which the \$11000 should be distributed between the partners.

**MARKS J:** [1] This is the return of an order nisi granted 1 September 1989 by Master Evans to review the order of the Magistrates' Court at Moonee Ponds made on 2 August 1989, that each party do what was necessary within 30 days to effectuate payments out of an account of the parties at the Commonwealth Bank, Yarraville, of \$7,617.50 to the defendant and \$3,177.50 to the plaintiff. The plaintiff and defendant, since 1974 or thereabouts, were in partnership in a cabinet making business. They agreed to dissolve their partnership on 29 June 1988 and plant and equipment belonging to it were sold at auction by agreement, on 2 August 1988. This realised a nett \$34,471.03. Each took \$15,000 on account and after further disbursements, there remained a sum of \$11,000 in their trading account at the Commonwealth Bank, Yarraville. They failed to agree thereafter as to how much of this last sum each was entitled. In the result, the defendant instituted proceedings by way of complaint and summons in the Magistrates' Court at Moonee Ponds, and it came on for hearing on 2 August, 1989. The summons to which I have referred as a complaint and summons is headed 'Special Summons' and although it has been referred to as the former, I take it that the latter is the correct description. The grounds on which Master Evans made his order are:

- A. (i) The Magistrate erred in law in holding he had jurisdiction to hear the complaint and summons.  
(ii) The Magistrate erred in law in holding he was not precluded by the provisions of s51(2)(a) of the *Magistrates' Court Act* 1971 from hearing the complaint and summons.

[2] B. The Magistrate failed to exercise his discretion properly or at all and deemed [the word 'deemed' should read 'denied'] the plaintiff natural justice in refusing the plaintiff's application for an adjournment in that –

- (i) he failed to have any or any proper regard to the fact that the refusal of the application might prevent the plaintiff from presenting his case as fully as necessary;  
(ii) he failed to have any or any proper regard to the fact that the refusal of the application would prevent a fair trial of the hearing.

I shall say something of Ground B first, as it may be disposed of shortly. The material discloses that no application for adjournment in fact was made on behalf of the plaintiff. Counsel who appeared in the Court below for the plaintiff has filed an affidavit which concedes that no actual application was made. The material in opposition states categorically that no application for adjournment was made. It was submitted by Mr Dixon of counsel for the plaintiff that although no application for adjournment might, strictly speaking, have been made, counsel for the plaintiff in the court below indicated to the Magistrate that it was desired to call a further witness on behalf of the party he was representing, but such witness was not then available. It is contended that

the Magistrate said that he intended or wished to have the hearing of the summons concluded that day.

There is a conflict of some kind on the material, but it is clear that no formal application for adjournment was made. On the material supplied in opposition, it appears that there is a denial that the Magistrate gave any indication at all that he would not grant an adjournment. [3] However, the ground must fail because no formal application was made and consequently no submissions were made to the Magistrate as to the relevancy of any evidence not then available, but which it was desired to call. The Magistrate was not given any opportunity to deal with an application properly before him. Ground B fails.

As regards Ground A, such difficulty as arises stems from the way in which the particulars of demand and claim for relief were expressed in the special summons. I do not set out the full document. It is sufficient to say that the particulars of demand alleged the partnership agreement, its dissolution, and that the \$11,000 was the remaining asset and that in respect of that sum, a dispute had arisen between the parties in respect of its distribution. The prayer for relief seeks declarations as to the existence of the partnership and its dissolution and orders for the taking of accounts, with consequential relief as to distribution.

The claims might be said, on one view, to seek relief in respect of the whole of the assets of the partnership. For this reason, it was submitted in the Court below, and here in support of Ground A, that there was no jurisdiction in the Magistrates' Court to entertain the dispute. The jurisdiction of a Magistrates' Court was amended in 1986 so that at the relevant time, s51(aa) of the *Magistrates' Courts Act* 1971 applied. [4] This provides:-

"In addition to any other jurisdiction every Magistrates' Court shall have jurisdiction in the following cases—

(aa) It may hear and determine any cause of action which is not by this or any other Act excluded from the jurisdiction of the Court; ..."

Section 51(2) of the same Act now reads:-

"The Court does not have jurisdiction in any cause of action—

(a) in which the amount sought to be recovered or the value of the subject matter is more than the jurisdictional limit unless the parties consent in writing; or (b), (c), (d) [not relevant]."

Mr Dixon of counsel for the plaintiff submitted that the subject matter of the special summons was the assets of the partnership, the value of which was on any view, greater than the jurisdictional limit of the Magistrates' Court, namely \$20,000. If one was confined to the way in which the claim for relief under the particulars of demand was formulated, there might be an arguable case in favour of the submissions of the plaintiff. The fact is, however, that this is a review of the orders which were actually made. The Magistrate made no orders affecting or touching the total assets of the partnership. He declined to entertain any claim for the taking of accounts for the whole of the partnership from its inception to the time of dissolution and he entertained merely the dispute which was alleged in the particulars of demand. [5] The parties, after unsuccessful settlement negotiations, conducted their respective cases merely on the basis that what was in dispute between them was the way in which the \$11,000 was to be distributed between them.

In my opinion, the Magistrate clearly was empowered, or perhaps to put it more accurately, I have not been satisfied by the plaintiff that the Magistrate was other than empowered to entertain the dispute which he was asked to determine. I have been referred to a number of cases including a decision of Brooking J of this Court in *McNicholas v Neubauer* [1985] VicRp 87; (1985) VR 888, where His Honour was concerned with an interpretation of s41(g) of the *County Court Act* 1958. However, His Honour considered there a quite different argument and it is interesting that in his reasons, His Honour specifically referred to the possibility that an issue can arise out of a partnership within jurisdiction which does not necessarily mean that the subject matter of the dispute is the whole assets. In my opinion, the resolution of the present issue is by reference to s51(2)(a) and the meaning of "the value of the subject matter" as appears in it. The subject matter of the dispute here was not the extent of the whole assets so as to require the taking of their accounts. The subject matter of the dispute was merely the \$11,000 which was the value

of the subject matter of the special summons litigated. All that was at issue between the parties was the amounts to which each was [6] entitled out of that remaining sum, which remained in a bank account which they had when they were trading as a partnership. For these reasons, I am not persuaded that Ground A can succeed. The order nisi is discharged with costs.

**APPEARANCES:** For the plaintiff Antoniadis: Mr RJ Dixon, counsel. Nomikoudis Ogilvy, solicitors. For the defendant Koutroubas: Mr S Anderson, counsel. Dawson Kennedy McDonald, solicitors.

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