PARTIES:	MIMILI COMMUNITY INC. v WOLSTENCROFT (NT) PTY LTD AND JACK WOLSTENCROFT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	30 of 1997 (9506910)
DELIVERED:	18 December 1997
HEARING DATES:	10 April1997
JUDGMENT OF:	Thomas J

REPRESENTATION:

Counsel:

Appellant:	M. Spargo
Respondent:	J. Reeves QC

Solicitors:

Appellant:	Caroline Scicluna
Respondent:	Martin & Partners

Judgment category classification:	B
Judgment ID Number:	tho97016
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tho97016

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 30 of 1997 (9506901)

BETWEEN:

MIMILI COMMUNITY INC
Appellant

AND:

WOLSTENCROFT (NT) PTY LTD
First Respondent

AND:

JACK WOLSTENCROFT
Second Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 December 1997)

This is an appeal from a Magistrate sitting in the Local Court at Alice Springs.

The plaintiff in the proceedings before the Local Court and the appellant in these proceedings claimed the sum of $15,430.00, plus interest, plus costs.

The learned Stipendiary Magistrate, in reasons for decision delivered 29 May, 1997, dismissed the plaintiff's claim.

The plaintiff, hereinafter referred to as the appellant, then lodged a Notice of Appeal against this decision. The grounds of appeal are as follows:

1. The learned Magistrate erred in law in failing to give reasons for finding that, considering all the evidence of the witnesses C.J. Power and Jack Wolstencroft, the Appellant had not discharged its burden of proof.

2. The learned Magistrate erred in law by, having found that the case principally came down to a question of credit between the witnesses C.J. Power and Jack Wolstencroft, failing to resolve that question or, in the alternative, failing to give reasons for the resolution of that question.

3. The learned Magistrate erred in law by failing to consider or find that certain facts when taken together were more consistent with the fraud of one or both Respondents than with lawful actions on their part.

PARTICULARS

(a) That there was no written authorisation from the Appellant for the payment of the disputed cheques.

(b) That that lack of written authorisation was highly unusual in the relationship between Appellant and the Respondents.

(c) That the Second Respondent could offer no or no satisfactory explanation for this absence of written authorisation.

4. The learned Magistrate erred in failing to consider or find that the Second Respondent's actions in handing over the Appellant's books were as consistent with fraud as with innocence.

PARTICULARS

The Second Respondent could have been content to hand over the books if he knew that he was to draw a cheque to his or the First Respondent's benefit.

5. The learned Magistrate erred in failing to conclude from the matters

in paragraphs 4 and 5 herein that the Second Respondent's presentation of the cheques was done without authorisation and was therefore fraudulent.

6. In any event, the learned Magistrate erred in awarding the costs of the proceeding to the Respondents.

PARTICULARS

The Respondents were unsuccessful in their counterclaim and set off in that they abandoned it or a substantial portion of it during the hearing, and substantial preparation had been required for the Appellant's defence to the counterclaim.

The appellant seeks the following orders from the Court:

1. That the decision of the learned Magistrate be set aside.

2. That Judgment be entered for the Appellant.

3. In the alternative, that the matter be remitted to the learned Magistrate so that further reasons may be given for her decision where appropriate.

4. That the learned Magistrate's order as to costs be set aside.

5. The costs of this Appeal and of the Tribunal below to be in the Appellant's favour.

6. Such further orders as this Honourable Court deems fit.

The second defendant, hereinafter called the second respondent, trading as Wolstencroft (NT) Pty Ltd, provided the appellant with accounting services. In the claim before the Local Court the issue was whether the appellant had given the second respondent authority for payment of the cheques to the first defendant, hereinafter called the first respondent.

There is no dispute with the learned Stipendiary Magistrate's summary of the facts which is set out at p2 of her Reasons for Decision as follows:

> "There is no dispute in the proceedings that on the 13th July 1994 the Second Defendant trading as Wolstencrofts commenced providing the Plaintiff with accounting services. Nor is there any dispute that on the 3rd February 1995 the Second Defendant drew a cheque on the Plaintiff's account in the sum of $4,100.00 in favour of the First Defendant, and that on the 10th February 1995 the Second Defendant drew two cheques on the Plaintiff's account in the sum of $10,000.00 and $1,330.00 respectively in favour of cash which was paid to the Second Defendant. What is in dispute is the authority for the payment of those cheques to the Defendant."

Counsel for the appellant then specifically referred to two further passages in her Worship's reasons for decision, the first at p16.5:

> "This case principally comes down to a question of credit in that the plaintiff disputes that they gave the defendant authority to draw the three cheques which were in fact drawn and cashed by the defendant. The defendant on the other hand says that he had oral authority from Mr Power to draw those cheques."

And at p18:

> "The burden of proof with respect to the claim lays with the plaintiff. Having considered all of the evidence of Mr Power and of Mr Wolstencroft in this matter, I am not satisfied on the balance of probabilities, that the defendant did not have authority to pay those cheques which are in dispute.
>
> Accordingly, the plaintiff's claim is dismissed."

The substance of this appeal is that the learned Stipendiary Magistrate gave no reasons for how she resolved the issue of credit between Mr Power and Mr Wolstencroft.

At the conclusion of the summary of the evidence the learned Stipendiary Magistrate stated at p17:

> "It would seem plain to me the Mimili Community would have extreme difficulty functioning without the books which were in the second defendant's possession, should the second defendant have refused to hand them over to the plaintiff.
>
> On the one hand, I am rather surprised there is no written authorisation for the payment of the disputed cheques in that it should not have been difficult for the second defendant after the phone call (which he says occurred on the 10th February) to have faxed through to Mr Power an authorisation to be signed before the cheques were actually drawn. Given that Mr Wolstencroft had apparently been sufficiently concerned to ensure that there was a witness to the conversation, I am surprised he did not go one step further and ensure there was in fact written authorisation from Mr Power. Such faxed written authorisation would have only taken minutes to obtain.
>
> I note the evidence of Mrs Wolstencroft, that immediately after the 10th February conversation she spoke to Desiree and told her to draw the cheques. Further that she told Desiree to make a note of the phone authorisation. Such a note does appear on the cheque butts, although there is no evidence from Desiree.
>
> I would be surprised if Mr Wolstencroft would hand over the books to the plaintiff with no agreement having been reached with the plaintiff as to a payment of outstanding moneys and I note the diary note which was made by Mr Power concerning the hand over which states: *"phone call ex Jack agreed to pay for hand over".* At the very least that note would seem to suggest that there was some discussion prior to the hand over of the documents as to payment of some sort being made. Mr Power does not recall such a conversation.
>
> Mr Power says he believes his note simply reflects the fact he agreed to pay for the actual cost of handing the books over to Pitcas but there was no agreement as to any outstanding moneys which should have been paid to the defendant."

The argument by Mr Spargo on behalf of the appellant is that the learned Stipendiary Magistrate, identified the essential issue as being the question of credit, but gave no reasons why the plaintiff's claim was dismissed. Counsel for the appellant submits there is an obligation on the magistrate to provide adequate reasons because if a magistrate's reasoning process is not apparent, then justice cannot be seen to be done, *Sun Alliance Insurance Ltd v Massoud* (1989) VR 8. I apply, with respect, the following principle expressed by Gray J at 18:

> "In my opinion, the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision.
>
> The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if:-
>
> (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
>
> (b) justice is not seen to have been done.
>
> The two above stated criteria of inadequacy will frequently overlap. If the primary Judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the losing party is denied knowledge of why his or her case was rejected."

In the matter referred to above, the Court of Appeal found the Judge at first instance had taken into account irrelevant material, incorrectly assessed the evidence of the plaintiff's wife, and had difficulty in understanding how the Judge got over the strong points of the defendants' case. It was further stated by Gray J at p18:

> "Turning to consider whether justice was seen to have been done, I cannot but feel that it was not. The defendant, having led a weighty body of incriminating evidence was entitled to have the evidence weighed by the Court and, if rejected, the grounds of its rejection expressed in reasoned terms. To have a strong body of evidence put aside without explanation is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant."

I consider the matter before this Court is distinguishable. In the matter before this Court, her Worship carefully summarised the evidence presented for the appellant and for the first and second respondents. The learned Stipendiary Magistrate correctly identified the one essential issue which was the question of credit between Mr Power and Mr Wolstencroft, both of whom gave evidence. Their evidence is in contradiction, the one with the other. Both versions could not stand and could only be resolved by deciding the issue of credit. The plaintiff, Mr Power, bore the onus of proof. He failed to discharge the onus.

I refer to the further comment of Gray J in *Sun Alliance Insurance Ltd v Massoud* (supra) at p19.

> "In my opinion the cases to which I have referred amply justify the statement of the two minimum criteria with which I commenced this discussion.
>
> That does not mean that on every occasion a judge will be in error if he fails to state reasons. The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision. Some examples of such situations were given by Cussen A.C.J. in *Brittingham v Williams* [1932] V.L.R. 237, at p239. In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference."

I consider the matter before this Court falls into this category.

I accept that in some circumstances a failure by a Judicial officer to give reasons for his or her decision or for some important part of his or her decision may be an error of law. That depends on the circumstances of each case (*Steggles Pty Ltd v Aguirre* (1988) 12 NSWLR 693 Priestley JA at 705).

In the matter before this Court, the learned Stipendiary Magistrate had carefully considered all of the evidence presented, and acknowledged the aspect relating to the lack of written authorities for payment of the disputed cheques. However, the ultimate decision turned on a decision of credibility between Mr Powers and Mr Wolstencroft.

This finding inevitably rested upon her Worship's impression of the two witnesses who gave the conflicting evidence. I apply the statement of Mahoney J in *Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639 at 642:

> "It is, special cases apart, not necessary for a trial judge to try to spell out why the one witness impressed him as credible and the other did not. Often this cannot be done. It would be to attempt to give a greater degree of definition than the subject matter may properly bear to attempt to explain why the choice was made. If the matter be one of impression, the law does not require that a trial judge rationalise his impression."

See also *Soulemezis v Dupley (Holdings)Pty Ltd* (1987) 10 N.S.W.L.R. 247.

It is clear from her Reasons for Decision that the evidence of Mr Power was not preferred over the evidence of Mr Wolstencroft. That was the burden that rested upon the plaintiff. In my opinion, it was not necessary for the learned Stipendiary Magistrate to say anything further.

For these reasons, I dismiss the appellant's appeal in respect of grounds (1) to (5) inclusive.

Ground 6 relates to an issue of costs relevant to the respondents' counterclaim which was withdrawn in the Local Court. This ground of appeal is as follows:

> 6. In any event, the learned Magistrate erred in awarding the costs of the proceeding to the Respondents.
>
> PARTICULARS
>
> The Respondents were unsuccessful in their counterclaim and set off in that they abandoned it or a substantial portion of it during the hearing, and substantial preparation had been required for the Appellant's defence to the counterclaim.

The background to this matter in the Local Court is as follows.

On the first morning of the hearing of this matter, during the course of evidence being given by Mr Power for the appellant, Counsel for the

respondent advised her Worship, following discussion on this issue, that the respondent's counterclaim was withdrawn. This occurred following some discussions between counsel and her Worship (Local Court transcript pp19-20). It is not in dispute that the respondent's counterclaim was withdrawn during the course of the first morning of the hearing which occupied 1½ days of Court time. I accept the submission by counsel for the appellant that the counterclaim was significant in quantum; the amount claimed on counterclaim was $32,000 plus interest, plus costs. I accept that a considerable amount of preparation was involved to meet the counterclaim which was abandoned totally by the defendant (respondent) at a very late stage, and subsequently dismissed by the learned Stipendiary Magistrate.

Since the hearing of the appeal, I have had the benefit of reading the transcript of 29 May 1997, at which time the issue of costs was briefly discussed at p2:

> "MR BENNETT: It was meant to be, put it that way. But in any event I'd be seeking an order for costs. I don't really see why the matter needs to be adjourned, Your Worship. We'd say that obviously we're not entitled to any costs on the counterclaim. But the plaintiff brought this proceeding unsuccessfully and we would submit that costs would follow the event.
>
> HER WORSHIP: Ms Scicluna?
>
> MS SCICLUNA: Well, we'd say a large proportion of the preparation of the case did not concern the defendant's counterclaim, so we'd be seeking an order as to costs.
>
> MR BENNETT: Obviously, Your Worship, we're not entitled to any costs on the counterclaim, whether it was withdrawn or dismissed or

whatever happens to it. But that doesn't alter the fact that the plaintiff brought this proceeding, the plaintiff brought the defendant to court, argued a case and lost it. With respect, I couldn't possibly see how the defendant isn't entitled to the costs of that claim.

…

HER WORSHIP: I consider that there should be costs paid by the plaintiff to the defendant on all claims. But I simply note any costs relating to the counterclaim not to be included.

…

Costs to be agreed or taxed."

The respondents advise that since the date of the making of this order, costs have been taxed in accordance with the order.

I agree with the submission by counsel for the respondents, Mr Reeves, that this appeal is limited to questions of law. Her Worship's decision on costs is a discretionary matter, therefore an appellant, appealing that order, has to establish that there has been a clear error of principle at law.

In Williams Civil Procedure, Victoria 3rd ed. at I10.01.35 a counterclaim is described as:

"… an independent proceeding by the defendant against the plaintiff which for convenience is tried with the plaintiff's claim."

At I10.01.40 Williams goes on to say:

"Where the plaintiff recovers judgment on the claim and the defendant judgment on the counterclaim, the court may award the plaintiff and defendant costs on the claim and counterclaim respectively. If claim and

> counterclaim are interwoven a special costs order may be necessary to secure a just result."

In *Smith v Madden* (1946) 73 CLR 129 at 133, Dixon J said in discussing the issue of costs as between claim and counterclaim that:

> "In such a case the taxation of the costs of the action and of the counterclaim is governed by the principle that the party receiving the costs of the claim should recover the general costs and whatever was reasonably incurred in bringing and maintaining or defending the action, as the case may be, considered as if there had been no counterclaim, and that the party receiving the costs of the counterclaim should recover the further or increased costs reasonably incurred in bringing and maintaining or defending the counterclaim."

I consider the costs issue in this appeal to be straightforward. The counterclaim was not heard. There was no interweaving of issues between claim and counterclaim requiring a special costs order. The defendants having withdrawn their counterclaim, which was subsequently dismissed by the learned Stipendiary Magistrate, costs should, except in special circumstances, have followed the event; *Ritter v Godfrey* (1920) 2 KB 47 at pp60-61; *Byrns v Davie* (1991) 2 VR 568. I note that in her written reasons for decision her Worship stated:

> "… I do not consider the defendant can succeed on the counterclaim."

It would appear the magistrate did not have the benefit of any prepared argument or submissions on the issue of costs.

I agree with the following submissions made by Mr Spargo, counsel for the appellant, made as follows:

> "To the extent that the claim and counterclaim were interwoven, a special costs order could have been made to secure a just result.
>
> *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 62
> *Chell Engineering v Unit Tool & Engineering* [1950] 1 All ER 378
> *Childs v Blacker* [1954] 2 All ER 243
>
> *Medway Oil & Storage Co Ltd v Continental Contractors Ltd* [1929] AC88
> *Smith v Madden* (1946) 73 CLR 129
> *Bank of Victoria v Synnot* (1885) 11 VLR 598
> *Australian Machinery Co Ltd v Hudson* [1939] St R Qd 168
>
> Alternatively, the claim and the counterclaim produced two separate judgments, such that costs ought to have followed the event of the counterclaim and been awarded in favour of the Appellant.
>
> *Atlas Metal Co v Miller* [1898] 2 QB 500."

The relevant statutory provision in the *Local Court Act* is s31 which provides as follows:

> "(1) Subject to this or any other Act or the Rules, the costs of and incidental to proceedings in the Court are in the Court's discretion and it has full power to determine by whom, to whom and to what extent the costs are to be paid."

The discretion provided in the local court is nevertheless governed by the rule of practice that costs follow the event, unless that rule is displaced in a particular case; *Gladstone Shopping Centre Pty Ltd v Ros Wills & Ors* (1984) 6 FCR 496.

There were no special circumstances in this case put to the Magistrate or to this Court to alter the normal rule that costs follow the event. Accordingly, I am satisfied the Magistrate's discretion in respect of the order for costs miscarried to the extent that no order was made in respect of the appellant's costs on the counterclaim.

To this extent I allow the appeal under ground (6) of the Notice of Appeal.

I confirm the order made by the Magistrate, and make a further order that the appellant is entitled to an order for costs in respect of the respondent's counterclaim in the Local Court, which was withdrawn and dismissed, such costs to be agreed or taxed.

The appellant in this matter has been unsuccessful on grounds (1) to (5) inclusive, and successful on ground (6). It may be appropriate to make orders for costs that the appellant pay 5/6ths of the respondents' costs of this appeal, and the respondent pay 1/6th of the appellant's costs of this appeal, representing the appropriate proportion of time taken to argue the appeal. I appreciate the parties have not addressed this Court on the issue of costs of the appeal, and if this proposal is not agreed or the parties cannot come to an agreement as to costs, then the parties are at liberty to list the matter for submissions on the question of costs of the appeal.