PARTIES:	TERRENCE FITZGERALD
	v
	JOHN PATTISELANNO
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEALS from LOCAL COURT exercising Territory jurisdiction
FILE NOS:	No. 34 of 1994
DELIVERED:	Darwin 13 May 1994
HEARING DATES:	28 April 1994
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

Costs - general principle - costs follow the event

Ritter v Godfrey (1920) 2 KB 47, followed

Costs - application of 'Suitors Fund' type legislation where proceedings miscarry for reasons for which no party is responsible - recommendation for ex gratia payment

Acquilina v Dairy Farmers Co-op Milk Co Ltd [1965] NSWR 772, referred to
Richards v Faulls Pty Ltd [1971] WAR 239, referred to
Jansen v Dewhurst [1969] VR 421, referred to
Barry v Shoobridge [1971] Tas. S.R. 265, referred to

Courts and Magistrates - disqualification for bias - whether reasonable apprehension of bias by way of an apparent prejudgment of the issues

Livesey v The NSW Bar Association (1983) 151 CLR 288, applied
Re JRL; ex parte CJL (1986) 66 ALR 239, applied

Sale of goods - transfer of title by non owners - whether s26 or s27 of the Sale of Goods Act apply

Sale of Goods Act (NT), ss26, 27
Cundy v Lindsay (1878) 3 App Cas 459, followed

REPRESENTATION:

Counsel:

Appellant:	A. Wyvill
Respondent:	In person

Solicitor:

Appellant:	David Francis & Associates
Respondent:	In person

JUDGMENT CATEGORY:	CAT 'A'
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 34 of 1994

IN THE MATTER OF the Local Court Act

AND IN THE MATTER OF an appeal against a decision of the Local Court at Darwin

BETWEEN:

TERRENCE FITZGERALD
Appellant

AND:

JOHN PATTISELANNO
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 13 May 1994)

The appeal

This is an appeal from a decision of the Local Court dismissing the appellant's claim for a declaration that he is the owner of a yacht, and entering judgment in favour of the respondent. An appeal from the Local Court is limited to "a question of law"; see s19(1) of the Local Court Act. The Notice of Appeal sets out one ground of appeal, viz:-

> "The presiding Magistrate erred in law in ruling that the within appellant had a voidable title and as such the within respondent being a purchaser for value without notice of the chattel obtained good title pursuant to Section 27 of the Sale of Goods Act."

The respondent appeared in person both at the Local Court and on the appeal.

The background to the Local Court proceedings

The events which led to the Local Court proceedings are as follows.

The appellant alleged that on 31 March 1983 he purchased a "Red Jacket" yacht. In 1987 that yacht was stolen from him by an unidentified person. He rediscovered it some 5 years later, on 9 September 1992, when it was in the possession of the respondent.

Within those 5 years a number of persons had bought and sold the yacht in turn, as bona fide purchasers for value without notice. Material before the Local Court showed that -

> "- - - enquiries by the Water Police revealed the following, the vessel was currently owned by John Philip Pattiselanno - - -, he purchased the vessel from a Paul Larcson - - -, Larcson had purchased the vessel from a Cherrie Megson - - -. Megson sold the vessel on behalf of her father a Joseph Megson,
> - - -. Joseph Megson [now deceased] stated he had in turn purchased the vessel from a male person, whose name he did not remember, some time in 1987
> - - -".

The Police were informed in September 1992 of the location of the yacht and the above facts, and they impounded it.

In due course they applied to the Court of Summary Jurisdiction for an order for the disposition of the yacht, pursuant to s130B(1) of the Justices Act. Section 130B(1) provides, as far as is relevant:-

> "(1) Where any property -
>
> (a) has come into the custody or possession of a member of the Police Force - - -
> - - -

> the Court of Summary Jurisdiction may - - - make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, may make such order with respect to the property as to the Court may seem fit."

The Court heard the application on 22 February 1993, and ordered that the yacht be delivered to the respondent. In doing so, the Court applied s27 of the Sale of Goods Act (herein "the Act") to what were the then agreed facts of the case.

On 24 March 1993, the appellant instituted proceedings in the Local Court claiming possession of the yacht, as allowed by s130B(2) of the Justices Act. I note in passing that on 4 May and 15 June 1993 the appellant applied unsuccessfully for summary judgment in those proceedings.

The Local Court proceedings and decision

In the Local Court Mr Spazzapan of counsel for the appellant argued his case on the basis that the respondent had not obtained a good title to the yacht as Mr Larcson, the 'owner' who had sold it to him, and Mr Larcson's predecessors, had no title, as the yacht had been stolen when they bought it. Their 'title' ultimately derived from a thief. Mr Spazzapan relied on s26 of the Act to establish this submission; see pp4-5. He sought to prove that the yacht the subject of the order of 22 February 1993 was identical with a yacht stolen from the appellant in 1987; that, while the appellant accepted that the respondent was a bona fide purchaser for value of that yacht, he had no title to it, because it was stolen; and the appellant had not conducted himself in such a way as to preclude himself from asserting his title as

owner. To this end Mr Spazzapan adduced evidence that the appellant had purchased the yacht in 1983; a receipt for its purchase was tendered. The appellant gave evidence of its theft in 1987, of reporting the theft to the police in 1987, and of his later attempts to locate it. He described the rediscovery of the yacht in 1992, and the method by which he identified that yacht as his stolen yacht. He was cross-examined by both the respondent and his wife; they were not legally represented. Mr Spazzapan then closed his case. The learned Magistrate discussed the possible need for a view, but no decision was made about that. His Worship adjourned, having clearly indicated that he would ask the respondent to provide his evidence after lunch.

After lunch, and before the respondent had opened his case, his Worship put to Mr Spazzapan, in essence, that since the appellant had conceded that the respondent was a bona fide purchaser for value, the appellant was bound to fail on the evidence adduced. His Worship considered that in those circumstances the case fell to be decided under s27 of the Act.

Sections 26 and 27 of the Act provide:-

"26. SALE BY PERSON NOT THE OWNER

(1) Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act shall affect the validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court or competent jurisdiction.

27. SALE UNDER VOIDABLE TITLE

> Where the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." (emphasis mine)

His Worship said (at p39 of the transcript):-

> "- - - section 27 in my interpretation doesn't mean that you pass [a] voidable title. It means where [I] sell some goods which I got from someone who stole them, I get a voidable title to those goods. And if - - at the time the real owner comes in and says, 'Look, they're my goods' and I try to sell them to someone else, my title's been avoided.
>
> But if at the time a purchaser comes along and says, 'Well I've got no notice of that. I paid money. I had no notice of the defect'. Well he gets good title, as against the original owner, the person from who it's stolen." (emphasis mine)

The foundation of the subsequent decision lies in the words emphasized. Mr Spazzapan submitted, in essence, that this was not the law, the respondent could acquire no better title than the thief, that is, no title at all, and s27 had no application in this case since on the facts no question of voidable title arose.

His Worship then gave his decision (at pp42-43 of the transcript):-

> "- - - I've listened to Mr Spazzapan and the submissions - - - in relation to sections 26 and 27. In my view his interpretation of the Act is misconceived. The authority upon which he relies is clearly distinguishable from the facts of this case and is to do with an owner voluntarily parting with the property - that is this case of *Central Newbury Car Auctions v Unity Finance Ltd* (1957) 1 QB 371 - and the subsequent

rights of that owner as against the arrangements he had with a car sale dealership.

On the basis of that case Mr Spazzapan seeks to draw a distinction between void and voidable titles. I don't have to hand - - - any authorities in relation to a clear explication of the difference between the two, but the issue in this matter is resolved in my view in this way. In my view the previous owner, - - - by Mr Paul Laksom [sic], - - - it's clear that in the course of the plaintiff's case they've admitted that Mr Pattiselanno was a bona fide purchaser for value.

Voidable title is one which is capable of being made void. At the time of the purchase - - - it wasn't avoided. - - - Having conceded that Mr Pattiselanno is a bona fide purchaser for value, in other words, the provisions of section 27 apply, and there's no proof before me that the title conveyed to Mr Pattiselanno at the time was avoided - and I'll read again from page 353 of [K.C.T. Sutton: 'Sales and Consumer Law in Australia and New Zealand (1983)]:

> "- - - a person who has voidable title to goods can confer a good title to them on a bona fide purchaser for value", which is what Mr Pattiselanno was, "provided that the seller's title had not been avoided at the time of the sale."

There's no evidence before me to that effect, and it seems to me that it's incumbent upon the plaintiff to prove that. The other issue is voidable title. My view is that voidable title is title which is capable of being made void, and clearly as it was, if I accept the plaintiff's case, that the ship - the boat we're talking about is one and the same boat and that it was stolen - if at the time that Mr Laksom [sic] had sold the - or prior to selling the boat he'd [that is, the appellant] attempted to get it back and the boat had been sold the situation may have been different, but there's no evidence of that in the plaintiff's case.

In my view the plaintiff has not established a claim or cause of action, or hasn't established his claim, and I don't need to consider the matter any further. I intend to dismiss the plaintiff's claim. As I've indicated, *Central Newbury Car Auctions* to my mind was clearly distinguishable and is relevant to the provisions of section 26(2). Section 26(1) clearly provides that that section is to be subject to the other provisions of this Act, and immediately after follows section 27. Having found that Mr Pattiselanno, and it's been conceded, is a

> purchaser for value, that seems to me to be the end of the case unless the plaintiff can show that the title was avoided, and he hasn't done that, and his claim must fail. The claim is dismissed. Judgment for the defendant." (emphasis mine)

It can be seen that the decision proceeded on the following basis: Mr Larcson had acquired a voidable title to the yacht, having bought it as one of a chain of 'owners' going back to the thief; there was no evidence his (voidable) title had been avoided at the time he sold it to the respondent; the respondent bought the yacht bona fide, for value, and without notice of Mr Larcson's defect in title; therefore the respondent had a good title to the yacht, under s27 of the Act. The decision does not explain why Mr Larcson had a voidable title; it is simply assumed to flow from s27 (see p6).

The issues on appeal

Mr Wyvill of counsel for the appellant submitted that his Worship erred in law, as this was a case to which, on the evidence as it then stood before his Worship, s26 of the Act applied, not s27.

In support he relied on *Cundy v Lindsay* (1878) 3 App Cas 459 which, inter alia, sets out the well established rule of "nemo dat quod non habet"; that is, no one can give a better title than he has.

On the facts which his Worship accepted as established for the purpose of reaching his decision, Mr Larcson obtained his 'title' to the yacht, ultimately, from a thief; in accordance with the principle "nemo dat quod non habet", expressed in law in

s26(1) of the Act, neither Mr Larcson nor his predecessors obtained any title to the yacht at all, voidable or otherwise. I accept the submission that the case as it stood before his Worship gave rise to an issue which fell to be decided under s26 of the Act; see generally K.C.T. Sutton (op.cit.) at pp276-277, and D.W. Greig and N.A. Gunningham 'Commercial Law' (3rd edit., 1988) at pp142-143 and pp178-182.

The fact that s26(1) is expressed to apply "subject to this Act" does not assist the respondent since s27 simply does not apply to stolen goods. Section 27 applies to cases involving fraud or deceit by a purchaser: see Greig and Gunningham (op.cit.) pp178-182. The law is very clearly stated by Lord Cairns L.C. in *Cundy v Lindsay* (supra) at pp463-4, viz:-

> "- - - by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. - - - If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by - - - a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

His Worship's decision was founded on an error of law and cannot stand; the appeal must be allowed.

The next question is what order this Court should make. The Court's powers are set out in s19(6) of the Local Court Act, viz:-

> "(6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks fit, including an order remitting the case for re-hearing to the Court with or without directions on the law."

Mr Wyvill rightly conceded that the case should be remitted to the Local Court for rehearing. His Worship gave his decision after the appellant had closed his case, and before the respondent had an opportunity to present his case. His Defence sets out 3 defences: (1) the yacht stolen from the appellant in 1987 was not the same yacht as was in his possession in September 1992; (2) he was a bona fide purchaser without notice and as such was entitled to possession of the yacht; and (3) the appellant was estopped by his conduct from asserting his title. Clearly, the respondent is entitled to seek to establish these defences.

Mr Wyvill submitted that the application should be determined afresh and by a differently constituted Local Court. He conceded that ordinarily the case should be remitted to the learned Magistrate to continue the hearing, but submitted that -

1. any prejudice suffered by remitting the case to be heard by another Magistrate would be minimal, as the evidence in chief for the appellant had been short; and

2. the learned Magistrate may have some "ostensible pre-decision [sic, predisposition]" in the case in that having given his decision and been informed that the appellant would appeal, he is recorded as saying:

"Yes, I don't think he's got Buckley's chance of winning."

The latter point seems in essence to be that the appellant has a reasonable apprehension of bias on his Worship's part, by way of an apparent prejudgment of the issues or in some other way might not bring an impartial and unprejudiced mind to their resolution. In the leading authority of *Livesey v The NSW Bar Association* (1983) 151 CLR 288, the High Court said at pp293-295:

> "- - - the principle to be applied in a case such as the present is that laid down in the majority judgment in *Reg. v Watson; Ex parte Armstrong* [(1976) 136 CLR 248 at pp258-263]. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this Court (see, e.g., *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155 at p158; *Reg v Shaw; Ex parte Shaw* (1980) 55 ALJR 12 at pp14, 16; and in the Supreme Court of New South Wales (see, e.g., *Barton v Walker* [1979] 2 N.S.W.L.R. 740, at pp748-749). - - -
>
> In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Aickin J in *Shaw* (1980) 55

> ALJR at p16.) If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or pre-judgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge or judges who constituted the court from which the appeal is brought." (emphasis mine)

Applying the approach in *Livesey* (supra) to the facts of this case, I consider that in all the circumstances neither the parties nor the public could reasonably apprehend that the learned Magistrate might not bring an impartial and unprejudiced mind to the resolution of the questions involved in the proceedings. No such reasonable apprehension has been firmly established, as required; see *Re JRL; ex p. CJL* (1986) 66 ALR 239 at 246, per Mason J. His Worship clearly based his decision wholly on a

proposition of law and not on the basis of any finding of fact adverse to the appellant.

The comment attributed to his Worship (see p9), to the apparent effect that the appellant had a forlorn chance of succeeding on appeal, must also be understood in light of the basis on which his Worship decided the case, that is, purely on a point of law. The comment, though unfortunate, unwarranted (and inaccurate), cannot found a reasonable apprehension of bias.

Accordingly, the appeal is allowed and pursuant to s19(6) of the Local Court Act the judgment herein of the Local Court of 1 February 1994 is quashed and set aside, and the case is remitted to the Local Court for further hearing.

The final issue is the question of costs.

The appellant seeks the costs of and incidental to the Local Court hearing on 1 February 1994 and of this appeal. Mr Wyvill submitted that the ordinary principle should apply; costs should follow the event. The principle that costs generally follow the event expresses the settled practice that in the absence of special circumstances a successful party should be awarded costs: see *Ritter v Godfrey* (1920) 2KB 47 at pp52 and 60. There are no special circumstances here; I order that the respondent pay the appellant's costs of this appeal. The costs in the Local Court will be determined by that Court at the conclusion of the hearing.

I should say that this is a case in which, if Suitors Fund type legislation was in force in the Territory, an order

would be made for the payment of the costs of the appeal under that legislation. The proceedings in the Local Court miscarried - and thus it became necessary to pursue this appeal - for reasons for which neither of the litigants bears any responsibility. The law was clear; the fault is a fault in the administration of justice rather than a fault of either party. The result is that the respondent has suffered a misfortune in that he must pay costs for the incurring of which he was not truly responsible. It is to meet such cases that Suitors Fund type legislation exists elsewhere; see generally *Acquilina v Dairy Farmers Co-op Milk Co. Ltd* [1965] NSWR 772 at pp773-4 per Moffitt J, *Jansen v Dewhurst* [1969] VR 421, *Barry v Shoobridge* [1971] Tas. S.R. 265 and *Richards v Faulls Pty Ltd* [1971] WAR 129 at p138. I recommend that in all the circumstances the Attorney-General consider making an ex gratia payment to indemnify the unfortunate respondent against the costs which he must pay.

Orders accordingly.
