Alice Springs Upholstery v Bonello [2001] NTSC 108

PARTIES:	ALICE SPRINGS UPHOLSTERY v TERESA ANN BONELLO
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No 50 of 2000 (9919031)
DELIVERED:	30 November 2001
HEARING DATES:	5 November 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	J Stirk
Respondent:	D McConnell

Solicitors:

Appellant:	Povey Stirk
Respondent:	Morgan Buckley

Judgment category classification:	C
Judgment ID Number:	Mil01262
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS
No 50 of 2000 (9919031)

Alice Springs Upholstery v Bonello [2001] NTSC 108

BETWEEN:

ALICE SPRINGS UPHOLSTERY
Appellant

AND:

TERESA ANN BONELLO
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 November 2001)

[1] This is an appeal from a small claim proceeding brought pursuant to s19(4) of the *Local Court Act.*

[2] The respondent's claim against the appellant was for the sum of $5,480 (plus court fees and bailiff's fees) being the cost to reupholster a leather lounge suite. It was alleged that at some time unspecified, the respondent engaged the appellant to reupholster a lounge suite in leather. The work was completed by 23 January 1998. The respondent claimed that on 3 February 1998 she was unhappy with the reupholstery and complained to the appellant about the quality of the appellant's work. The appellant did nothing about

the complaint until August 1998 when Mr Herlaar, the owner of the appellant's business, went to the respondent's home to inspect the lounge. After the inspection, Mr Herlaar agreed to remedy the defects and said he would arrange for the suite to be picked up in three weeks' time. When this did not eventuate the respondent, after further discussions with the appellant proved fruitless, eventually issued her claim against the appellant for the cost of remedying the work. The claim was filed on 18 August 1999 and came on for hearing on 24 March 2000. Judgment in favour of the respondent for an amount of $6,500 plus $138 for filing and bailiff's fees was entered on 18 August 2000.

[3] The amended notice of appeal argues a number of grounds, but it is not necessary to deal with them all. It will be sufficient if I deal with four matters relied upon as follows:

1. The respondent was permitted to tender and rely upon at the hearing a report from a Mr Maurie Isaacs written on the letterhead of Furnishing Industry Association of Australia (Vic/Tas) Inc, dated 20 October 1999 (the first report), in circumstances where:

   (a) the author of the report was not made available for cross-examination;

   (b) the qualifications of the author of the report as an expert were not led in evidence;

(c) the appellant was not told of his right to cross-examination the author of the report.

2. After the hearing had been completed and judgment had been reserved, the learned Magistrate, without the knowledge or consent of either party, appointed Mr Isaacs as an investigator pursuant to s 27 of the *Small Claims Act;* and

3. subsequently obtained a further updated report from Mr Isaacs concerning the lounge suite in question (the second report), including a statement as to his own experience and qualifications in the upholstery trade, without the knowledge or consent of either party; and

4. relied on the report so obtained in deciding the case adversely against the appellant's interests in circumstances where the first knowledge of either party of the existence of a second report from Mr Isaacs appeared in her Worship's written reasons for judgment.

[4] The appellant therefore complains that there was a failure to accord procedural fairness and natural justice to the appellant and a reasonable apprehension of bias by her Worship against the appellant.

[5] The principal contentions of Mr McConnell for the respondent were that the appellant was well aware before the hearing that the respondent intended to rely upon Mr Isaac's first report and raised no objection to the report being received. Mr McConnell also submitted that, in view of the appellant's

admissions concerning the workmanship employed by the appellant, there was no point to the appellant cross-examing Mr Isaacs because such a course was futile. It was further submitted that Mr Issacs was not in fact the respondent's witness, but an independent expert; that the second report added nothing of substance to the first report and that in the circumstances, no injustice was done because the result was inevitable given the admissions made by Mr Herlaar during the course of the hearing and which the learned Magistrate relied upon in reaching her decision.

[6] I do not accept the submission that a finding for the full amount of $6,500 against the appellant was inevitable given Mr Herlaar's admissions; nor do I accept that the learned Magistrate did not rely upon the second report in reaching her conclusions. As to the former, Mr Herlaar, whilst agreeing that there were some errors of workmanship, did not accept the full extent of the errors claimed by the respondent were due to any failure by the appellant. Further, his case was that no complaint was made until August 1999 and by that time, whilst he was prepared to rectify the work if it was feasible, it was apparent that rectification might be difficult. Because the leather had deteriorated due to the respondent's dogs using the furniture, he wanted to have the leather tested to see if it could be re-used, but as the respondent refused to cooperate, the rectification work was not carried out.

[7] The learned Magistrate found that the work was not carried out in a satisfactory manner in the first place. In order to arrive at this conclusion, the learned Magistrate must have relied upon the second report and the

author's qualifications to express the opinions he held as an expert as to the finding that the original leather could not have been re-used in order to carry out the repairs. This opinion was expressed only in the second report.

[8] Nor do I accept that the appellant raised no objection to the first report being received. It is plain from the transcript that the learned Magistrate received the report into evidence without asking the appellant if any objection was raised to the report, without telling Mr Herlaar that he had the right to cross-examine Mr Isaacs, and without any evidence whatsoever as to Mr Isaac's qualifications as an expert. Later, Mr Herlaar made it plain that he knew nothing about Mr Isaac's qualifications but nothing was done even at that stage to advise him that he had the right to cross-examine Mr Isaacs.

[9] It is fundamental, even in proceedings conducted under the provisions of the *Small Claims Act*, that a party has the right to cross-examine the other party's witnesses and a proceeding conducted so as not to accord this procedural right is conducted unfairly in terms of s 19(4) of the *Local Court Act*: see *Bayram & Ors v Benton* (1994) 98 NTR 1 at 10. At the very least, the learned Magistrate should have informed Mr Herlaar that he had the right to cross-examine Mr Isaacs as to his qualifications and experience as well as to any of the matters contained in the report. Fairness to the appellant required that Mr Isaacs should have been made available for cross-examination if his report was to be unconditionally received into evidence, unless the appellant consented to the report being tendered in the witness' absence: see *Bayram & Ors v Benton*, supra, at 11.

[10] I also accept the submission of Mr Stirk for the appellant, that the approach to Mr Isaacs to appoint him as an investigator was most improper. Whilst s 17(1) of the *Small Claims Act* enabled the learned Magistrate to appoint any person as an investigator, this cannot be done without the knowledge of the parties. As Mason J said in *Re JRL; ex parte CJL* (1986) 161 CLR 343 at 350:

> It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.

[11] In this case, the appointment of Mr Isaacs was made without the knowledge or consent of either party. As Mr Isaac's first report had been tendered on behalf of the respondent who had questioned his credentials, the appearance of bias is even more difficult to dispel. Given that s 27(5) prevents an investigator from being called as a witness, it is vital that the parties are consulted about the appointment before it is made. Further, whilst the choice of the investigator may often be left ultimately to the court, s 27(2) requires that the court shall appoint a particular person nominated by the parties as the investigator. It is implicit in s 27(2) that the parties must first be consulted before the appointment is made. But not only was Mr Isaacs appointed without consulting the parties, his report was received and acted upon behind the parties' backs. It is true that her Worship subsequently revealed in her written reasons for judgment that she had obtained this report, but far from dispelling any reasonable apprehension that the learned

Magistrate had been improperly influenced by his report, the reasons for judgment revealed that she had in fact been influenced by it. A more blatant departure from the rules of natural justice is difficult to imagine.

[12] For the reasons given above, the appeal must be allowed. The judgment in favour of the respondent is set aside and I direct that the matter be retried before a differently constituted court.

[13] As to costs, up until the day of the hearing of the appeal the appellant's notice of appeal included as ground 2, "that the learned Magistrate erred in law in not considering evidence before the Tribunal or in the alternative did not give sufficient weight to evidence before the Tribunal in coming to the decision of 18 August 2000". This ground was abandoned at the last minute. Mr McConnell submitted that the respondent ought to be given the costs thrown away of preparing to argue that ground as it was a discrete and separate issue which needed to be specially prepared for. Mr Stirk opposed Mr McConnell's application and submitted that costs should follow the event. It is true that that is the usual order even if an appeal has only succeeded on some of the grounds pursued, but the court also has a discretion to deprive a successful party of part of its costs and also to award costs against that party where particular issues are able to be separated from the others. It is agreed that the time involved in preparing that ground involved the respondent's counsel in work to the value of $425 and it is clear that that time has been wasted. I consider that the appellant should be ordered to pay the respondent those costs.

[14] So far as the costs of the appeal generally are concerned, there was some submission to the general effect that the respondent ought not have to pay the appellant's costs because the fault lay not in anything the respondent had done, but in what the learned Magistrate had done. This may be so, but that is not a sufficient reason to deprive the successful party of its costs. Clearly this is a case where, if there had been a suitors' costs fund, as there is in every other Australian jurisdiction, the court would have made an order that the costs of both parties be paid out of the fund. Despite two recommendations from the Law Reform Committee that such a fund be established, there is no such fund in the Northern Territory and the best that the respondent can now hope for is an ex gratia payment from the Northern Territory. In my opinion this is a proper case for such a payment to be made. The formal order I make is that the respondent pay the appellant's costs of and incidental to the appeal to be taxed, less the sum of $450 for the costs thrown away as a result of the appellant abandoning ground 2 of the original notice of appeal.
