Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd [2015] NTSC 23

PARTIES:	HAGEN CORPORATION PTY LTD ACN 083 240 671 AS TRUSTEE FOR THE HAGEN FAMILY TRUST v BIKES TOP END PTY LTD ACN 129 985 646 TRADING AS CYCLONE MOTORCYCLES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 4 of 2014 (21311993)
DELIVERED:	24 April 2015
HEARING DATES:	29 October 2014
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

APPEALS – Appeal from Local Court – Held evidence was capable of supporting the trial magistrate's findings of fact – No error of law

APPEALS – Trial magistrate gave adequate reasons for his decision

APPEALS –Vehicle to be used on a 'public street' – Vehicle a 'motor vehicle' under the Motor Vehicles Act – Motor Vehicles Act applicable in requiring the vehicle to be registered

APPEALS – Apprehended bias – Trial magistrate communicated with fellow magistrate whose husband was the principal of the Respondent – Communication to the effect that the trial magistrate was inviting the Respondent to apply for indemnity costs – Communication occurred after the trial magistrate delivered his decision – Reasonable apprehension the trial magistrate may not have been impartial – Appeal allowed

Competition and Consumer Act 2010 (Cth) Schedule 2 ss 18(1), 29, 33
Consumer Affairs and Fair Trading Act ss 125, 165
Local Court Act s 19
Motor Vehicles Act s 5

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *R v Watson; ex parte Armstrong* (1976) 136 ALR 248; *Re JRL*; *ex parte CJL* (1986) 161 CLR 342; *Webb v R* (1994) 181 CLR 41, applied.

Alice Springs Town Council v Mpweteyerre Aboriginal Corp (1997) 115 NTR 25; *Kiama Constructions v Davey* (1996) 40 NSWLR 639; *Rajski v Wood* (1989) 18 NSWLR 512; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32, referred to.

State of Victoria v Psaila & Anor; State of Victoria v Lamb [1999] VSCA 193, followed.

REPRESENTATION:

Counsel:

Appellant:	M Crawley
Respondent:	D McConnel

Solicitors:

Appellant:	Bowden McCormack
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd [2015] NTSC 23
No. LA 4 of 2014 (21311993)

BETWEEN:

Hagen Corporation Pty Ltd ACN 083 240 671 as trustee for The Hagen Family Trust

Appellant

AND:

Bikes Top End Pty Ltd ACN 129 985 646 trading as Cyclone Motorcycles

Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 24 April 2015)

[1] Hagen Corporation Pty Ltd ("Hagen Corp") is the trustee for the Hagen Family Trust. Mr Hagen is a director of Hagen Corp.

[2] In May 2012 Mr Hagen went to Cyclone Motorcycles, a business conducted by Bikes Top End Pty Ltd ("Cyclone") and spoke to a salesman, Mr Curtis, about buying a Ranger Diesel Crew 900 four wheel six seater vehicle ("the

vehicle"). Friends of Mr Hagen, Mr Harris and Mr Smith were present during those discussions with Mr Curtis.

[3] Following those discussions Mr Hagen, on behalf of Hagen Corp, entered into a contract with Cyclone to purchase the vehicle and an "NT Rego Kit".

[4] After purchasing the vehicle and the NT Rego Kit, Mr Hagen tried to register the vehicle with the Motor Vehicle Registry ("MVR") for use on roads in the Northern Territory but was unable to do so.

[5] On finding that the vehicle could not be registered, Mr Hagen, on behalf of Hagen Corp[1] purported to rescind the contract and issued proceedings in the Local Court against Cyclone claiming:

(a) a declaration that the contract had been validly rescinded;

(b) return of the purchase price ($27,840) or alternatively damages in that amount;

(c) costs; and

(d) interest.

[6] The statement of claim alleged that Mr Curtis had made certain representations to Mr Hagen.

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[1] Proceedings were initially issued naming another of Mr Hagen's companies, JMT Builders Pty Ltd, as plaintiff in the mistaken belief that that company was the trustee of the Hagen Family Trust. As all parties were agreed that the transaction in question was conducted on behalf of the Hagen Family Trust, by consent, the name of the plaintiff was amended to "Hagen Corporation Pty Ltd as trustee for the Hagen Family Trust".

(a) Hagen Corp alleged that Mr Curtis had expressly represented that the vehicle was able to be registered for use on the roads in the Northern Territory if the additional "NT Rego Kit" was purchased and fitted and impliedly represented (by not stating that there would be conditions on any registration) that such registration would be unconditional.

(b) It was also alleged that by marketing the kit under the name "NT Rego Kit" without any disclaimer, the defendant had represented by implication that a vehicle fitted with the kit could be registered for use on roads in the Northern Territory.

[7] The statement of claim pleaded that these representations amounted to misleading or deceptive conduct within the meaning of s 18(1) of the *Australian Consumer Law* ("ACL"),[2] false or misleading representations within the meaning of ACL s 29, and misleading conduct as to the suitability of the NT Rego Kit for its purpose within the meaning of ACL s 33.

[8] In its defence, Cyclone denied making the representations and pleaded that the salesman had advised Mr Hagen that it was not possible to apply for unconditional registration for the vehicle in the Northern Territory but that he may be able to obtain conditional registration if he fitted the NT Rego Kit to the vehicle and the MVR approved the application, but that it was entirely within the discretion of the MVR as to whether such registration would be granted.

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[2] referring to Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

[9] The statement of claim also alleged that pursuant to s 165 of the *Consumer Affairs and Fair Trading Act* ("CAFTA") it was a condition of the sale of the vehicle that the vehicle was of a standard fit to meet the requirements of the *Motor Vehicles Act* with respect to registration. CAFTA s 165(1) provides:

> Subject to ss (2), it is a condition of the sale of a motor vehicle by a dealer that the vehicle is of a standard fit to meet the requirements of the *Motor Vehicles Act* with respect to registration.

[10] Section 165 (2)(b) provides that sub-section (1) does not apply to a motor vehicle sold under a contract in the prescribed form excluding the application of that sub-section. It was common ground that the contract whereby the vehicle was sold to Hagen Corp was not a contract in the prescribed form excluding the operation of s 165(1).

[11] A motor vehicle for the purposes of CAFTA is defined (in s 125) as follows:

> "motor vehicle" means any motor car, motor cycle or other vehicle used on land which is propelled wholly or partly by any volatile spirit, by steam, gas, oil, hydrocarbon or electricity, or by any means other than human or animal power (whether the vehicle is new or used, and whether or not it is in working condition or complete) but does not include:
>
> (a) a vehicle used on a railway or tramway; or
>
> (b) a vehicle included in a class or description of vehicles declared by regulation not to be motor vehicles for this Part;
>
> …

[12] It is common ground that there is no regulation excluding vehicles of the class to which the vehicle belongs from the definition of motor vehicle for the purposes of CAFTA s 165.

[13] In its defence to this aspect of Hagen Corp's claim, Cyclone denied that s 165 applied to the contract. In the alternative it pleaded that the vehicle was of a standard fit to meet the registration requirements of the *Motor Vehicles Act* and further in the alternative pleaded that if s 165 did apply, Hagen Corp had waived any right to terminate the contract for any breach of the condition created by s 165 by using the vehicle after it was delivered.

The Trial

[14] The case was tried before Mr Neill SM. Mr Hagen, Mr Curtis, Mr Harris and Mr Smith all gave evidence about the discussions that occurred between Mr Hagen and Mr Curtis before Hagen Corp purchased the vehicle.

[15] In a judgment delivered on 5 June 2014 Mr Neill SM gave judgment for the defendant. In doing so he made a finding that Mr Hagen was a witness lacking credibility. He said at [39]:

> I am satisfied I should not accept any evidence of Hagen where it conflicts with or differs from the evidence of Harris, Smith, Curtis or Armitage, all of whom I am satisfied were credible witnesses.

[16] His Honour also made the following findings:

> 47. The pleaded case was that the Plaintiff had sought to purchase a vehicle of this type which could be unconditionally registered for use on roads, that Hagen told the Defendant's representative

Curtis this, that Curtis represented that the vehicle with the rego kit installed could be unconditionally registered, that the Plaintiff relied on this representation in purchasing the vehicle, and that the representation was false or misleading.

48. The Plaintiff did not at any stage before or after the close of evidence seek to amend its case to plead a different case in the light of the evidence which emerged. Specifically, the Plaintiff did not seek to plead that achieving conditional registration, rather than unconditional registration, was the purpose made known to Curtis, that conditional registration was the subject of Curtis's representation to Hagen, that Hagen relied on this different representation in purchasing the vehicle, and that this different representation was false or misleading ("the alternative case").

49. Mr Crawley for the Plaintiff submitted that no amendment to the Plaintiff's pleadings was necessary. He submitted the evidence which emerged at the hearing could support the alternative case. He submitted that the difference between the case as pleaded and the alternative case essentially involved particulars rather than any new issue.

…

56. Even if the Plaintiff had sought and been granted leave to amend its pleadings to plead the alternative case I would have dismissed that amended claim. This is because of my finding in paragraph 39 above that I should not accept any evidence of Hagen where it conflicted with or differed from the evidence of Harris, Smith, Curtis and Armitage. On their evidence and disregarding conflicting or differing evidence from Hagen, I am not satisfied that the Plaintiff could make out the alternative case on the balance of probabilities in any event.

[17] The trial magistrate also dismissed Hagen Corp's claim under CAFTA s 165 on the grounds that although the vehicle was a "motor vehicle" as defined in CAFTA, it was not "motor vehicle" as defined in the *Motor Vehicles Act*.

Section 5 of the *Motor Vehicles Act* defines "motor vehicle" in the following terms:

> "**motor vehicle** means any motor car, motor carriage, motor cycle, goods vehicle, motor omnibus, motor tractor or other vehicle propelled **on public streets** *[emphasis added]* wholly or partly by any volatile spirit or by steam, gas, oil or electricity, or by any means other than human or animal power, and includes a trailer at any time attached to a motor vehicle but does not include any vehicle used on a railway or a powered cycle".

[18] His Honour pointed out that the words "on public streets" which appear in the definition of "motor vehicle" in the *Motor Vehicles Act* do not appear in the definition in CAFTA s 125[3] and went onto dismiss Hagen Corp's claim based on CAFTA s 165(1) in the following terms.

> 70. I rule that for the purposes of the *Motor Vehicles Act* a vehicle propelled as defined but not on public streets, is not a "motor vehicle" as defined in that Act.
>
> 71. I rule that the requirements and standards identified in section 8 of the *Motor Vehicles Act* for registration of any sort apply only to motor vehicles as defined in that Act and therefore do not apply to vehicles which are not used on public streets.
>
> 72. Where there are no standards or requirements for registration prescribed for a vehicle because it is not a motor vehicle under the *Motor Vehicles Act*, the section 165(1) CAFTA condition will nevertheless be imported into the contract for the sale of that vehicle by a dealer by operation of the section if the vehicle is a motor vehicle as defined in CAFTA. However in such a case the imported condition will be of no effect.
>
> 73. In the present case the vehicle was an off road vehicle of a type which is not sold to be used on public streets – see paragraph 40 of these Reasons. The Defendant understood that the Plaintiff

[3] set out at [11] above

would liaise with MVR and attempt to persuade it that conditional registration should be allowed, however such liaison and its outcome was solely the responsibility of the Plaintiff.

74. I find that the vehicle was not a "motor vehicle" as defined in the *Motor Vehicles Act*, that there was no standard or requirement for registration applicable to the vehicle under that Act, and therefore there was no such standard or requirement imported into the contract for the sale of the vehicle pursuant to section 165(1) of CAFTA.

75. Accordingly I find there was no breach of the section 165(1) CAFTA condition in the contract for the sale of the vehicle.

[19] At the end of his reasons for decision, his Honour made the following remarks in relation to costs:

77. The Plaintiff has been entirely unsuccessful in the proceedings. This ordinarily means that costs follow the event and should be payable by the Plaintiff.

78. Where costs are ordered against a party in Local Court proceedings there remain further issues to be considered. The first is the basis on which the costs are to be assessed – that is either the usual standard basis or the rarer indemnity basis – see Rules 38.02 and 38.03(1) of the Local Court Rules and Order 63 Rules 24 to 29 of the Supreme Court Rules. The second is the percentage of the Supreme Court scale which is to be allowed in assessing costs on the standard basis – see Local Court Rule 38.04(2) – and how that is to be approached. That is relevant in the present case given the amount of the claim was between $10,001 and $50,000 – see Local Court Rule 38.04(3)(b)(ii).

79. I reserve all questions of costs before me for submissions on 19 June at 9:00am.

[20] The principal of Cyclone, Mr Armitage, is the husband of a magistrate, Ms Armitage SM. Before the start of the trial the trial magistrate disclosed that he had met Mr Armitage on perhaps two or three social occasions and

had briefly spoken to him. Neither party made an application that Mr Neill recuse himself from hearing the matter.

[21] However, by letter dated 24 June 2014 the solicitors for Cyclone disclosed to solicitors for the plaintiff that on an unspecified date after the delivery of his Honour's reasons for decision, the trial magistrate had spoken to Ms Armitage SM in relation to the case. The letter disclosed that the trial magistrate had asked Ms Armitage whether Mr Armitage's advisors had picked up that the reasons for decision "more or less invited" Cyclone to apply for indemnity costs.

[22] The costs argument was adjourned to 25 June 2014 and on that date counsel for the plaintiff sought a further adjournment to enable him to prepare an application that the learned magistrate excuse himself from hearing the costs argument on the basis of the disclosures in the letter dated 24 June.

[23] His Honour initially refused the application saying:

> … The matter as it stands today simply does not raise the proper basis for the apprehension of bias that Mr Crawley wished to make more fully in terms of a legal argument.
>
> I say that for these reasons: The letter states that following the publishing of the reasons for decision, I had a communication with Ms Armitage, a fellow magistrate who's also the wife of Steven Armitage, the principal of the defendant. The letter goes on to say the reasons for decision, more or less invited the defendant to apply for indemnity of costs. The communication by Mr Neill SM to Ms Armitage SM was whether Mr Armitage advisors had picked up that point.

> I don't intend to say anything myself about what did or didn't happen, I'm simply proceeding on the basis of the communication from solicitors for the defendant, and solicitors for the plaintiff which I have just read out. …

[24] Following further argument however, his Honour adjourned the costs hearing to 27 June 2014.

[25] On that date, and without hearing further argument, his Honour allowed the application that he recuse himself in the following terms:

> … I've come to the view I'm going to accede to your request and my reason is this, that although I clearly foreshadowed that the issue of broader costs had been raised by what took – by the results of my decision, that's a different thing from a perception that might be held that I'd already determined a question as opposed to raised it and having looked at what was put before me I don't propose to descend into any detail about what's contained in that letter, but the fact that it's out there is sufficient.
>
> Accordingly, I'm going to order that the issues be argued, the cost issues be argued before Chief Magistrate, Dr Lowndes. …

[26] The costs argument was heard before Dr Lowndes CM and on 7 August 2014 Dr Lowndes ordered the plaintiff to pay the defendant's costs on an indemnity basis at 100% of the Supreme Court scale. That decision was based on the findings and reasons for decision published by the trial magistrate.

The Appeal

[27] In a lengthy Amended Notice of Appeal, Hagen Corp appealed against the decision of the trial magistrate and against the costs decision on the following grounds: [*punctuation in original]*

1. The trial magistrate erred in law in deciding to dismiss the Appellant's claim, when the evidence was inconsistent with and contrary to such decision.

1.1 Having found that the witnesses Curtis, Smith and Harris were credible witnesses, in light of their evidence that:

(a) In the case of Smith, the Respondent by its salesman Curtis represented that the Vehicle could be registered for use on roads if the Appellant bought the "NT Rego Kit";

(b) In the case of Harris, the Respondent by its salesman Curtis represented that he did not see getting registration as being a problem at all;

(c) In the case of Curtis, he could not recall what he said about the Vehicle being able to be registered; that the Vehicle could be made to meet the requirements of the MVR and the Respondent regularly does so for remote communities,

the trial magistrate was bound to find that the Respondent represented that the vehicle could be registered for use on roads in the Northern Territory as alleged in [4a] of the Statement of Claim.

1.2 In light of the unchallenged evidence of the witness Saunders that the Vehicle was not capable of being registered for use on roads,

the trial magistrate was compelled to find the representation was false and misleading.

1.3 The evidence compelled a finding that the Appellant relied upon and was induced by the representation to enter the contract to purchase the Vehicle and suffered loss as a consequence.

2. In the alternative, the trial magistrate erred in law in refusing to entertain a claim based upon an alternative case arising from the evidence presented.

2.1 The trial magistrate erred in categorising such a claim as an entirely different case;

2.2 The alternative case was still based upon representations made to the Appellant by the Respondent as to the capacity to use the Vehicle on roads.

3. The trial magistrate erred in law in determining that in any event any claim based upon such alternative case would have been dismissed, when the only true and reasonable conclusion contradicted that.

3.1 The trial magistrate found that the Appellant in its dealings with the Respondent was seeking some means of achieving conditional registration for the Vehicle for limited use on roads;

3.2 Having found that the witnesses Curtis, Smith and Harris were credible witnesses, in light of their evidence that:

(a) In the case of Smith, the Respondent by its salesman Curtis represented that the Vehicle could be registered for use on roads if the Appellant bought the “NT Rego Kit”;

(b) In the case of Harris, the Respondent by its salesman Curtis represented that he did not see getting registration as being a problem at all;

(c) In the case of Curtis, he could not recall what he said about the Vehicle being able to be registered; that the Vehicle could be made to meet the requirements of the MVR and the Respondent regularly does so for remote communities, the trial magistrate was bound to find that the Respondent represented that the vehicle could be registered for use on roads.

3.3 In light of the unchallenged evidence of the witness Saunders that the Vehicle was not capable of being registered for use on roads, the trial magistrate was compelled to find the representation was false and misleading.

3.4 The evidence compelled a finding that the Appellant relied upon and was induced by the representation to enter the contract to purchase the Vehicle and suffered loss as a consequence.

4. The trial magistrate erred in law in failing to give any or any adequate reasons for his findings that

4.1 "even with the rego kit installed, [the Appellant] would have to present a case to MVR to persuade it to grant… some limited form of registration";

4.2 Hagen was a witness lacking credibility;

4.3 he would have dismissed any amended claim.

5. The trial magistrate erred in law in failing to determine the claim based upon the Marketing Representation. Had he done so, he would have been compelled to accept the claim.

5.1 The use of the name "NT Rego Kit" in the absence of an express disclaimer amounts to a representation that with the kit, a vehicle can be registered in the Northern Territory;

5.2 There was no evidence of such a disclaimer;

5.3 the unchallenged evidence of the witness Saunders was that the Vehicle was not capable of being registered for use on roads in the Northern Territory;

5.4 The evidence compelled a finding that the Appellant relied upon and was induced by the representation to enter the contract to purchase the Vehicle and suffered loss as a consequence

6. The trial magistrate erred in law in his interpretation of the definition of a “motor vehicle” for the purposes of the Motor Vehicles Act and the application of section 165(1) of the Consumer Affairs and Fair Trading Act to the impugned transaction.

6.1 The Vehicle is a “motor vehicle” for the purposes of the Motor Vehicles Act;

6.2 To find otherwise was inconsistent with the trial magistrate’s findings that the Vehicle could be registered as a motor vehicle under the Motor Vehicles Act.

7. In any event, in light of the late disclosure other than by the trial magistrate of a communication passing between him and Ms Armitage SM, another magistrate personally interested in the matter while the matter was extant, in circumstances where

7.1 The communication in effect went further than merely identifying outstanding issues but suggested any application for indemnity costs may well be successful;

7.2 The communication was passed on by Ms Armitage SM to the Respondent and/or its legal advisors and seems likely to have influenced the Respondent’s decision to seek indemnity costs;

7.3 The communication was raised by the trial magistrate with one party without the previous knowledge or consent of the other party;

7.4 The trial magistrate failed subsequently to expressly acknowledge or to disclose the fact or particulars of such communication;

7.5 The fact that such communication was made to Ms Armitage SM elevates the initial concerns of a party over a magistrate deciding a case involving (by close relationship) a fellow magistrate, to the level of reasonable apprehension that an impartial mind has not been brought to bear;

7.6 The trial magistrate appears to have seen nothing wrong in so doing such that serious questions arise as to the extent if any to which this matter has been quarantined from a fellow magistrate with a personal interest in this matter;

compels a finding of a reasonable apprehension of bias in the trial process such that the decision ought to be set aside and the matter transferred into the Supreme Court for hearing or remitted for rehearing before a different magistrate.

8. In making an order for indemnity costs, Dr Lowndes CM erred in law in that he:

8.1 Having the matter referred to him following the recusal of the trial magistrate, misdirected himself not to bring a fresh mind to bear on the matter;

8.2 In failing to consider the matter from the perspective of the Appellant, misdirected himself as to what was required for there to be wilfulness in the conduct of the Appellant;

8.3 Treated statements by the trial magistrate as to the evidence given as findings of fact he could not review.

Grounds 1 to 3

[28] An appeal from the Local Court lies to the Supreme Court on a question of law only.[4]

[29] Grounds 1 to 3 essentially complain about findings of fact made by the trial magistrate in relation to the alleged representations. In order to succeed on these grounds of appeal, Hagen Corp would need to establish that there was no evidence capable of supporting the findings of fact made by the trial magistrate. If there is evidence which, if believed, would support the finding, there is no error of law.[5]

[30] The essence of Hagen Corp's claim is that the pleaded representations were made, that they were false or misleading, that Hagen Corp (through Mr Hagen) relied upon those misrepresentations or was induced by them to

4 *Local Court Act* s 19

5 *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 at 38

purchase the vehicle, and that Hagen Corp suffered loss as a consequence. To succeed on grounds 1 to 3 the appellant would need to establish that there was no evidence on which his Honour could base a finding that any of these matters had not been made out.

[31] Hagen Corp submitted that the evidence of the witnesses Harris, Smith and Curtis, all of whom the trial magistrate found to be credible witnesses, compelled a finding that the representations as pleaded were made. That ground has not been made out. In its statement of claim, Hagen Corp pleaded that Mr Curtis had expressly stated that the vehicle was able to be registered for use on the roads in the Northern Territory if the NT Rego Kit was purchased and fitted and, by not stating that there would be conditions on any registration, represented by implication that such registration would be unconditional.

[32] The evidence of Mr Harris, relied on by Hagen Corp, does not support the pleaded representation. That evidence is as follows:

> Do you recall what Brad said?---He asked to get it registered if we can drive them on the road to access the beach and access the work sites, but more or less so we could drive on the roads.
>
> And what did the salesman say in response to that event?---He said it can be difficult, but it can be done.
>
> And did he say anything about the particular purpose that Brad wanted to use it for?---He said that if you've got good reason there shouldn't be an issue.
>
> …

> Was anything said by the salesman about how hard or difficult it would be in Brad's particular circumstances to get registration?---Well, he said if your reason's good enough, which he believed our reason was fine and it shouldn't be an issue at all.
>
> …

[33] This evidence tends, if anything, to support Cyclone's pleading that Mr Curtis told Mr Hagen that registration might be possible at the discretion of the MVR.

[34] Moreover, in cross-examination Mr Hagen made the following concession:

> Mr Hagen, I just want to clear up an issue about what you understood registration would provide you. You didn't think that once this vehicle was registered you'd be able to drive it anywhere and everywhere, did you?---Well, I wouldn't drive it to Alice Springs, no.
>
> No. And you wouldn't bring it back to town, for example, and drive it around the streets of Darwin?---Through the streets of Darwin?
>
> Yes?---No, not at all.
>
> So it was really about registration for you to be able to use in the remote areas that you were working for ALPA?---In remote communities and above, yeah.
>
> …

[35] Hagen Corp also submitted that the evidence unequivocally established that the pleaded representation was false, relying on the uncontested evidence of Mr Saunders, director of transport regulation compliance with the MVR, as follows.

> … Would the provision of a kit of that nature change the capacity of the vehicle to be registered or not registered conditionally?---No, it wouldn't, because the vehicle still doesn't comply to the Australian Design Rules, not fitted with a compliance plate. … may be considered on a case by case basis of an approved vehicle for conditional registration, depending what the approved use was … It all depends on the intended use.
>
> …
>
> … it was to use it for transporting people on roads in remote communities. Is that something you'd countenance as a suitable use for conditional registration?---No. … at the application it was to use the vehicle on the road network for the transporting of goods and people over an extended distance. …

[36] Hagen Corp contended that this evidence established that the vehicle was not capable of being registered in the Northern Territory. In my view it establishes no such thing. The tenor of Mr Saunders' evidence is that vehicles of the kind sold to the appellant may be able to be registered on a conditional basis depending on the intended use and that such applications would be considered on a case by case basis. Again, that evidence is more consistent with Cyclone's pleading of what was told to Mr Hagen by Mr Curtis.

[37] The appeal cannot succeed on grounds 1 to 3.

Ground 4

[38] In ground 4, Hagen Corp complains that the trial magistrate failed to give adequate reasons for his decision.

> Reasons are required so that the legal representatives of the parties can see why it was that the case was decided, and advise their clients,

> particularly in relation to rights of appeal; secondly, to promote confidence in civil trial procedures, and thirdly to enable appeal courts to determine any further appeals.[6]

[39] This principle does not require a trial magistrate to give exhaustive reasons for every single incidental finding of fact. In this case, in my view, on a fair reading, the trial magistrate's reasons for decision adequately disclose why his Honour found in favour of the defendant.

[40] Hagen Corp specifically complains that the trial magistrate did not explain his finding at [45] of the reasons that:

> … Hagen understood that even with the rego kit installed he would have to present a case to MVR to persuade it to grant him some limited form of registration-conditional registration-to use the vehicle on roads to any extent at all.

[41] Hagen Corp complains that that was not Mr Hagen's evidence and nor was it the evidence of Smith or Curtis. However, in my view that was the substance of the evidence of Mr Harris who was present, with Mr Hagen, during the relevant conversation as set out in [32] above.

[42] Hagen Corp also complains that the trial magistrate did not give reasons for his finding that Mr Hagen was a witness lacking credibility. That is not correct. At [39] of the reasons for decision his Honour said:

> On the basis of the abovementioned claims made by or at the direction of Hagen, on the basis of Hagen's unexplained conflicting

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6 *Alice Springs Town Council v Mpweteyerre Aboriginal Corp* (1997) 115 NTR 25

> and irreconcilable evidence on affidavit and at the hearing,[7] on the basis of Hagen's demeanour in giving his evidence and on the basis of the evidence of Harris, Smith, Curtis and Armitage, I find that Hagen was a witness lacking credibility. …

[43] Such an explanation is more than adequate. It is not necessary for a judicial officer to give detailed reasons for preferring the evidence of one witness over another.[8]

[44] Hagen Corp makes the further complaint that the trial magistrate did not provide adequate reasons for his conclusion[9] that even if the plaintiff had obtained leave to amend its statement of claim to plead a case based on an alternative representation, his Honour would have dismissed that amended claim.

[45] Again, I disagree. His Honour gave as his reason that, on the evidence of Harris, Smith, Curtis and Armitage, his Honour was not satisfied that the plaintiff could make out the alternative claim. It is not correct to characterise this, as Hagen Corp did in its submissions, as opaque. Paragraph 56 should not be read in isolation. It is preceded by an analysis

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7 In his affidavit Mr Hagen swore that he had not become aware that conditional registration was the only registration available until after he had purchased the vehicle and tried to register it. In cross-examination he admitted that he had always understood that conditional registration was the only registration potentially available. (See Reasons [27] and [28]).

8 *Kiama Constructions v Davey* (1996) 40 NSWLR 639 at 642

9 At [56]

of the evidence of these witnesses[10] and consequent findings[11] from which it is clear why his Honour would have dismissed any amended claim.

Ground 5

[46] In ground 5, Hagen Corp complains that the trial magistrate erred in failing to determine the claim based on the marketing representation and submits that, had he done so, his Honour would have been compelled to accept the claim.

[47] This submission depends on acceptance of the Hagen Corp's assertion that the unchallenged evidence of the witness Mr Saunders was that the vehicle was not capable of being registered for use on roads in the Northern Territory. As I have already outlined above, in my view that was not the substance of the evidence given by Mr Saunders. Rather, his evidence was that such applications would be considered on a case by case basis depending on the intended use of the vehicle.

Ground 6

[48] Hagen Corp contends that the analysis of the trial magistrate (set out at [18] above) is in error. First it is contended that the finding that the vehicle was not a "motor vehicle" for the purposes of the *Motor Vehicles Act* fails to have regard to the definition of "a public street" in that Act as extending to "any place to which the public has access". Second, Hagen Corp contends

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10 At [30] to [38]

11 At [39] to [45]

that the finding that the vehicle was not a motor vehicle for the purposes of the *Motor Vehicles Act* is inconsistent with the trial magistrate's finding that the vehicle was capable of conditional registration. If it was not a motor vehicle for the purposes of the *Motor Vehicles Act* there would be no power to register it at all.

[49] Cyclone contends that there is no such internal contradiction. In written submissions, counsel for Cyclone pointed out that the *Motor Vehicles Act* is a regime for the registration of vehicles and CAFTA a regime for the protection of consumers and that the learned magistrate's interpretation of the meaning of "motor vehicle" in the *Motor Vehicles Act* has the effect that a vehicle which is not intended to be driven on public streets is exempted from the requirements of the *Motor Vehicles Act* but once it is driven on public streets (or is intended to be driven on public streets) then it must comply with the provisions of that Act.

[50] I agree that this analysis avoids any internal contradiction in the reasoning of the trial magistrate. However, it is not a complete answer to the appellant's claim because of the extremely wide definition of "public street" in the *Motor Vehicles Act*.

> "public street" means any street, road, lane, thoroughfare, footpath or place open to, or used by, the public and includes a road on land leased under the *Special Purposes Leases Act* for use as a road, but does not include:
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> (a) a road, or part of a road, that is closed under the *Control of Roads Act* or under the *Local Government Act*; or

(b) a street, road, lane, thoroughfare, foot-path, or other place, under construction,

and not open to or used by the public.

[51] It appears from the evidence in this case that Cyclone was advised by Mr Hagen that the vehicle would be used for recreational purposes in places where the public has access, for example on the beach, as well as for access to work sites which might require travel along public roads (as commonly understood).[12]

[52] That being so, it was a motor vehicle within the meaning of the *Motor Vehicles Act*. Accordingly, the requirements for registration in that Act applied to the vehicle and it cannot be said, as the trial magistrate found to be the case, that those requirements had no content.

[53] Cyclone's alternative contention in its defence was that Hagen Corp had waived any right to terminate the contract for any breach of the condition created by s 165 by using the vehicle after it was delivered. It may be that that contention is correct. However, no such issue was raised in the notice of appeal and the matter was not argued before me.

Ground 7

[54] I am reluctantly driven to the conclusion that the appeal must be allowed on ground 7.

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[12] See, for example, the evidence of Mr Harris at [32] above.

[55] Hagen Corp properly conceded that the fact that the trial magistrate was called upon to decide a case involving a family member of a fellow magistrate, together with the degree of social interaction disclosed before the start of the trial, was not sufficient to found a reasonable apprehension of bias.

[56] The test for apprehended bias is that set out by the High Court in *Livesey v New South Wales Bar Association*[13] namely whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question involved in the case.[14]

[57] In this case, the conduct which gives rise to a reasonable apprehension that the trial magistrate might not have brought an impartial and unprejudiced mind to the resolution of the case was his confidential communication to his fellow magistrate, the wife of the principal of Cyclone. It was argued by Cyclone that that conduct is not sufficient to ground a reasonable apprehension of bias for anything other than the costs argument and that his Honour had properly excused himself from hearing the costs argument.

[58] While I agree that the conduct did give rise to reasonable apprehension of bias in relation to the costs argument and that his Honour did properly excuse himself from hearing that argument, I am reluctantly compelled to

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13 (1983) 151 CLR 288

14 *ibid* at p 293 approving the test laid down in the majority judgment in *R v Watson*; *ex parte Armstrong* (1976) 136 ALR 248 at p 258-263

the conclusion that the conduct was such as to infect the previous proceeding as well.

[59] It is a well established principle that there should be no communication or association between the judicial officer judging a case and one of the parties (or the legal advisors or witnesses of such a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party. In particular the judicial officer must refrain from any private communication with one of the parties on a matter relating to the case until after the case has been completely finalised. A communication with one party behind the back of the other or others, particularly on a matter relating to the case, is likely to provide a reasonable basis for a suspicion that a judicial officer may not be impartial. In *Re JRL; ex parte CJL,*[15] Gibbs CJ expressed the principle as follows.

> It is a fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other: see *Kanda v Government of Malaya* at p 337. McInerney J stated the practice as it is generally understood in the profession in *Reg v Magistrates' Court at Lilydale; Ex parte Ciccone*, at p 127, as follows: (citations omitted)
>
> > *"The sound instinct of the legal profession - judges and practitioners alike - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof*

[15] (1986) 161 CLR 342

> *from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."* [16]

[60] In this case the communication with Ms Armitage went further than merely identifying outstanding issues and costs issues in the case. Assuming (as was done during argument) that the disclosure in the letter of 24 June was an accurate summary of what his Honour said, there was an implied indication that an application for indemnity costs may well be successful. Indeed, the communication could be construed as encouraging Cyclone to make an application for indemnity costs. Such a communication raises a reasonable apprehension in the mind of a fair minded observer that the trial magistrate may have been seeking to favour or assist Cyclone, and that in turn raises a reasonable apprehension that the learned trial magistrate may not have been impartial between Cyclone and Hagen Corp in determining the controversy between them at the trial. To my mind, the matter is compounded by the fact that the learned magistrate did not make full and frank disclosure of the nature of the communication when the matter was raised before him on 25 June.

[61] Counsel for the respondent has pointed out that no application was made for his Honour to disqualify himself from hearing the case when he made the

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[16] (1986) 161 CLR 342 per Gibbs CJ at p 346 [4]; See also Mason J at p 350-351

initial disclosure about having met Mr Armitage socially and submitted, correctly in my view, that any such application would have been doomed to fail. He pointed out that the communication complained of took place after judgment in the case had been given and submitted that it could not therefore give rise to an apprehension of bias during the trial.

[62] However, subsequent conduct can cast a different light on what went before, and conduct occurring after a case has been decided can give rise to an apprehension of bias during the case. In *State of Victoria v Psaila & Anor; State of Victoria v Lamb*[17] the Victorian Court of Appeal considered an appeal against two separate decisions of a particular judge on the basis of remarks made by the judge said to give rise to an apprehension of bias. A question arose as to whether remarks made in the second case could be taken into account in assessing whether or not there was a reasonable apprehension of bias in the first case, which had been heard and determined before those remarks were made. The Court of Appeal held that they could. In considering that issue, Brooking JA said:[18]

> The present case is one of alleged "disqualification by conduct, including published statements", to use the broad classification suggested by Deane, J. in *Webb v. R.* [1994] HCA 30; (1994) 181 C.L.R. 41 at 74 and adopted by Charles, J.A. in giving the leading judgment in *Clenae Pty. Ltd. v. Australia & New Zealand Banking Group Ltd.* [1999] VSCA 35 at [31]. In *[the first decided case]* it was submitted to us on behalf of the respondent that no regard could

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17 [1999] VSCA 193 (29 November 1999)

18 at [32] and [34]. Although Brooking JA dissented in the result, at [101] Batt JA agreed with Brooking JA that for the purpose of deciding the question in *[the first case]* regard may be had to what the judge said in *[the later case]* for the reasons set out in the paragraphs here quoted. Ormiston JA (at [51]) accepted for the purposes of that case that it was so.

> be had to what took place in *[the later decided case]*. Different propositions were advanced at different times during the argument, but in the end the submission, as I understood it, on behalf of the respondent was that, where the allegation was only of ostensible bias, not actual bias, no regard could be had, at all events in cases of what Deane, J. described as "disqualification by conduct", to events occurring after the judicial officer whose conduct was impugned had finally determined the proceedings. The proposition varied from time to time, but that was, I think, its final form. The foundation of the proposition was, I think, the suggestion that the fair-minded observer could not be making observations after the conclusion of the proceedings in relation to which the question of ostensible bias had been raised. I see no reason in principle why, where ostensible bias by reason of conduct is alleged, the conduct which is said to suggest lack of impartiality may not take place before, during or after the proceedings. Indeed, I do not see why the ostensible bias should not be found, for example, wholly in statements made before the proceedings had begun, or wholly in statements made after they had concluded. In the present case the party complaining attempts to reinforce impressions created by the conduct on which it relies during the proceedings by reference to conduct in another case after those proceedings had concluded. I do not see why this may not be done, provided always of course that the subsequent conduct relied on can rationally be said to bear upon whether the judicial officer was likely to decide the earlier case without bias. When I speak of conduct I of course include statements; indeed, the conduct will usually take that form. It would be a remarkable thing if a judicial officer could, shortly after deciding a case, make comments which could reasonably be regarded as suggestive of bias against one of the parties and yet the decision be immune from attack unless the remarks were such as to show actual bias notwithstanding that a clear case of ostensible bias could be established by them assuming that they were available for that purpose.
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> …

[63] In reaching this conclusion, Brooking JA relied on remarks made by Deane J in *Webb v R.*[19] In that case, Deane J said:

> "If the test of a reasonable apprehension on the part of a fair-minded observer with knowledge of the material objective facts fell to be

[19] (1994) 181 CLR 41; [1994] HCA 30

> applied by reference only to those facts which were apparent at the time, there would be much to be said for the view that the real likelihood or real danger test should be retained to be applied in cases where some of the damaging material facts - whether prior, contemporaneous or subsequent - as ascertained by the appellate court were not known at the time of the proceedings. In my view, however, the material objective facts are not so confined for the purposes of the test. The fair-minded observer is a hypothetical figure. While the question is not settled by any decision of the Court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or subsequent, of the person concerned."

[64] It is, of course, also necessary to consider whether the impugned conduct (ie the confidential communication with the wife of the principal of the defendant) could logically give rise to an apprehension that his Honour may not have decided the case impartially.[20] In my view it could. As explained above, a fair minded observer with knowledge of the confidential communication might suspect that his Honour was attempting to favour the defendant by encouraging the defendant to make an application for indemnity costs, and might accordingly, suspect that his Honour may not have been impartial as between the plaintiff and the defendant during the trial.

[65] Apprehended bias having been made out, it is appropriate, on appeal, for this Court to allow the appeal on that ground and to set aside the decision of the learned trial magistrate. If it is established that a decision is tainted by

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20 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at p 345

an apprehension that the judicial officer hearing the case may not have brought an open and unbiased mind to its determination, then "if an order is later made which … is susceptible to appeal, the Court may … consider in conjunction with any such appeal … an attack on the order based upon arguments as to its invalidity grounded in the actual or apprehended bias of the judge who made it."[21]

[66] The appeal on this ground is allowed. The decision of the learned trial magistrate is set aside and the matter is remitted to the Local Court for re-hearing by another magistrate.

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[21] *Rajski v Wood* (1989) 18 NSWLR 512 per Kirby P at 518. Hope JA reached the same conclusion at 527. Priestley JA agreed with both Kirby P and Hope JA at 522.