Carrigan v Ridsdale & Others [1999] NTSC 141

PARTIES:	JANE VICTORIA CARRIGAN v MARY RIDSDALE and: JOHN REEVES QC and: RICHARD COATES and: PETER BROWN and: A SOLICITOR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	181 of 1999 (9925940) LA 15 of 1999 (9925967)
DELIVERED:	17 December 1999
HEARING DATES:	9 December 1999
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Appeal – statutory right of appeal – whether appeal is to proceed before summons for prerogative relief.

Administrative law – prerogative writs – certiorari and mandamus – existence of another remedy – appeal also available.

Legal Practitioners Act 1974 (NT), ss 48 and 51B
Twist v The Council of the Municipality of Randwick (1976) 136 CLR 106, considered
Marine Hull & Liability Insurance Co Ltd v Hurford & Anor (1985) 62 ALR 253, considered.
Hill & Others v King & Others (1993) 31 NSWLR 654, considered.
The Queen v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation (1981) 147 CLR 471, followed.

REPRESENTATION:

Counsel:

Applicant:	J. Carrigan
1st,2nd, 3rd & 4th Respondents:	P. Cantrill
5th Respondent:	G. Wilson

Solicitors:

Applicant:	N/A
1st, 2nd, 3rd & 4th Respondents:	Withnall Maley & Co
5th Respondent:	Clayton Utz

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

Carrigan v Ridsdale & Others [1999] NTSC 141
No. 181 of 1999 (9925940)

BETWEEN:

JANE VICTORIA CARRIGAN
Plaintiff

AND:

MARY RIDSDALE
First Defendant

AND:
JOHN REEVES QC
Second Defendant

AND:
RICHARD COATES
Third Defendant

AND:
PETER BROWN
Fourth Defendant
(in their capacity as members of the Legal Practitioners Complaints Committee)

AND:
A SOLICITOR
Fifth Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 17 December 1999)

[1] The plaintiff in these proceedings on Originating Motion seeks an order declaring void the decision of the first, second, third and fourth defendants sitting as the Legal Practitioners Complaints Committee (hereinafter referred to as "the Committee") on 13 October 1999.

[2] Further and in the alternative the plaintiff seeks a remedy in the nature of certiorari to quash the decision, findings and orders of the Committee made on 13 October 1999.

[3] Consequent on the application for certiorari the plaintiff seeks a remedy in the nature of mandamus commanding the Committee to deal with the appeal in accordance with law.

[4] The Committee was and is established as a statutory body pursuant to the provisions of s 48 of the *Legal Practitioners Act*.

[5] The decision, findings and orders which are the subject of these proceedings were made on 13 October 1999 as follows:

(i) the plaintiff's charge against the solicitor was dismissed.

(ii) certain findings of fact; and

(iii) an order that the plaintiff pay the solicitor's costs.

[6] The particulars of the Originating Motion are as follows:

> "(a) The Committee erred in law when the second defendant, holding office as deputy Chairman of the Committee failed to disqualify himself from hearing the matter that is subject of

this action; on the basis that a reasonable person would apprehend a likely perception of bias.

(b) The deputy Chairman was, at the time of the commencement of this matter, directly receiving instructions from the solicitor the subject of the complaint in another matter pending in this or another Court."

[7] In addition to filing an Originating Motion, the plaintiff has in separate proceedings No. LA 15 of 1999 (9925967) lodged a Notice of Appeal pursuant to s 51B of the *Legal Practitioners Act* to the Supreme Court.

[8] The grounds of appeal are as follows:

"1. The findings of fact were not in accord with the evidence and that the decision of the said Committee was not warranted having regard to such evidence.

2. The Committee erred in law when it erroneously found that the Respondent had not misled the Industrial Relations Court of Australia, thereby finding there was no charge to answer.

3. That the Committee should have found that the Respondent did knowingly, willfully or recklessly mislead the Industrial Relations Court of Australia.

4. The Committee unfairly awarded costs to the Respondent and, in any event, such an order ought not to have been made."

[9] The orders sought on appeal are as follows:

"1. The decision, findings and orders of the Committee be quashed.

2. That this Honourable Court substitute or make findings or orders consistent with the matters set out in the grounds of appeal listed above.

3. And for such further or other orders as to this Honourable Court may deem just and proper.

4. An order for costs against the Respondent."

[10] The only issue the subject of this application was for a ruling from the Court as to whether the Summons on Originating Motion or the appeal pursuant to s 51B of the *Legal Practitioners Act* should proceed first.

[11] The plaintiff, Ms Carrigan, who appeared in person, submits that the Summons on Originating Motion should be heard first. Ms Wilson appearing on behalf of the fifth defendant submits that the appeal pursuant to s 51B of the *Legal Practitioners Act* should proceed first. Mr Cantrill on behalf of the first, second, third and fourth defendants indicated his support for the view that the appeal should proceed first.

[12] Ms Wilson submits that the sensible way to proceed is to have the issue of perceived bias incorporated into the appeal proceedings. Mr Cantrill also submits that separate proceedings are not necessary because the Notice of Appeal could be amended to include the issue of bias as a ground of appeal.

[13] In this case, the Committee refused Ms Carrigan's request to have the second defendant step down as a member of the Committee. The Committee then proceeded to hear the complaint and dismissed the complaint as against the fifth defendant.

[14] Failure of the trial judge to withdraw from a case for bias is a matter of appeal only if after objection made at trial the judge has refused to disqualify himself and has determined the case (see Williams, *Civil Procedure Victoria* paragraph 64.01.920. It would appear that those criteria have been fulfilled in this case.

[15] The case of *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 to which Ms Carrigan made reference in respect of a submission on the issue of bias was in fact an appeal to the High Court from a decision of the Court of Appeal Division of the Supreme Court of New South Wales. The only issue on appeal to the High Court was the question of perceived bias. This is an example of where the issue of perceived bias was dealt with on appeal.

[16] In her written submissions to the Court, Ms Carrigan addressed the issue of bias which is the subject of her complaint in respect of one of the members of the Committee. I do not intend to deal with those aspects of Ms Carrigan's submissions because the only issue for the Court to decide at this point is which application should proceed first in point of time.

[17] To support her contention that the Summons on Originating Motion should proceed first, Ms Carrigan refers to s 51B(1) of the *Legal Practitioners Act* which provides as follows:

> "Subject to subsection (2), a right of appeal to the Supreme Court shall lie against a finding, admonishment or fine confirmed by the Complaints Committee under section 49A(2)(a) or 50(4A)(a), or a finding recorded, admonishment or reprimand administered or order made by the Complaints Committee in the exercise or purported exercise of its powers or the performance or purported performance of its functions under this Act."

together with Order 83.20(2) of the *Supreme Court Rules* which states:

> "Where an appeal is by way of rehearing, either party may call new evidence at the hearing."

[18] Ms Carrigan submits that what is contemplated by the legislation is not a hearing de novo but a rehearing in the ordinary sense.

[19] The plaintiff's essential submission is that a right of appeal will not act as an appropriate alternative remedy displacing the discretionary remedy of a prerogative writ. The plaintiff, Ms Carrigan, submitted that a rehearing available by exercise of the statutory appeal may not be regarded by the Court as a substitute for a full and proper hearing by the tribunal, whose decision ought to be quashed by certiorari for denial of procedural fairness.

[20] In addition it is Ms Carrigan's submission that the whole issue is a perceived bias on the part of one of the Committee members. The prerogative writ should be dealt with first as the issue on the Originating Motion can be dealt with in less time than a rehearing on appeal.

[21] In the matter of *Twist v The Council of the Municipality of Randwick* (1976) 136 CLR at 106 the High Court held that the existence of a right of appeal is not of itself a conclusive indicator of the exclusion of procedural fairness, particularly if the decision has a drastic effect upon interests and at p 110 Barwick CJ said:

> "… The court will approach the construction of the statute with a presumption that the legislature does not intend to deny natural justice to the citizen. Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice. …"

and at p 114 per Mason J:

> "However, the appeal is not restricted in any way. It is a full appeal on facts and on law in which the appellant is entitled to call evidence. The appeal extends to such elements of discretion as may enter into the making of the order as well as to the existence or non-existence of the conditions which are to be satisfied before an order can be made. There is nothing in the language of the section to preclude the court from considering afresh for itself these discretionary elements. …"

and Jacobs J at p 118:

> "Nevertheless, although an appeal has been given in these wide terms, I cannot conclude therefrom that the legislature intended to exclude the right of an owner in natural justice to be heard by a council on the question whether an order ought to be made in the first instance. …"

[22] In *Marine Hull & Liability Insurance Co Ltd v Hurford & Anor* (1985) 62 ALR 253, Wilcox J discussed the judgments in *Twist v The Council of the Municipality of Randwick* (supra). Wilcox J then stated at p 263 – 264:

> "The High Court further considered the relationship between natural justice and a right of appeal in *R v Marks; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* – 'the BLF' – (1981) 147 CLR 471; 35 ALR 241. The BLF complained of a denial of natural justice in a hearing before a Deputy President of the Conciliation and Arbitration Commission, Marks J. The union had appealed from the decision of Marks J to the Full Bench of the Commission; unsuccessfully, but no complaint was made that the Full Bench had denied natural justice. At (CLR) pp 484-5 Mason J repeated, in less tentative form, the view he had expressed in *Twist, supra* : -
>
> 'In any event, what happened before Marks J cannot constitute a basis for prohibition on the ground that there was a denial of natural justice. The BLF exercised its right of appeal to the Full Bench. On an appeal the Full Bench may admit further evidence and it may confirm, quash or vary the award or decision under appeal or make an award or decision dealing with the subject matter of the decision under appeal: s 35(9)(a), (c) and (d). In *Twist v Randwick Municipal Council*, this Court held that the existence of a full statutory right of appeal on facts and law was indicative of a legislative intention that

> the citizen's only right of redress against the council's failure to give him an opportunity to be heard before making a demolition order was by way of appeal . . .
>
> 'The present case has some similarities to *Twist*. There is here a full appeal on fact and law under s 35. Moreover, s 35(9)(a) enables the Full Bench to admit further evidence. Further, by reason of their very nature and their capacity to create unemployment, to dislocate industry and to disturb the life of the community including the essential services on which the community depends, industrial disputes call for speedy and final determination, an object which is best achieved by recognizing that the remedy of a party complaining that he has been denied natural justice at first instance is to exercise his right of appeal under s 35 to the exclusion of pursuing relief by way of prerogative writ.
>
> 'There is a problem in saying that a member of the Commission is not under a duty to observe the rules of natural justice and there is a further problem in saying that the Parliament can oust the jurisdiction of this Court under s 75(v) of the Constitution to grant relief against an officer of the Commonwealth by way of prohibition for denial of natural justice. Even so, the BLF exercised its right of appeal under s 35 and the Full Bench examined the matter for itself . . . In my opinion the BLF received a full and fair hearing in the appeal and in those circumstances any denial of natural justice before Marks J was irrelevant (*Calvin v Carr*).'
>
> Murphy, Aickin and Wilson JJ each expressed agreement with this aspect of the judgment of Mason J. The decision, therefore, stands as authority for the view that the effect of a full right of appeal is not – as Barwick CJ suggested – to exclude the obligation to give natural justice but rather to limit the available remedies for breach to a prosecution of the appeal."

[23] In the matter of *Hill & Others v King & Others* (1993) 31 NSWLR 654, the Court of Appeal in New South Wales considered the issue of an appeal and summons for prerogative relief from an order made under the *Liquor Act* and stated:

> "…. The existence of a general right of appeal on a question of law from the Licensing Court makes it unnecessary in most, if not all, cases to resort to proceedings for prerogative relief and in such

> circumstances the Court is not bound to grant prohibition or certiorari for jurisdictional error. The recent High Court decisions which establish the discretionary nature of prohibition when sought under s 75(v) against a Federal judge from whose decision an appeal ultimately lies by special leave to the High Court support this conclusion."

[24] I agree with the submissions on behalf of the fifth defendant that the subject of perceived bias can be raised on the appeal and there is no prejudice to the appellant if the matter proceeds by way of appeal.

[25] My understanding of the principle to be distilled from the authorities to which I have referred, is that where a person has a statutory right to appeal, the remedy on appeal should be pursued rather than an application on a prerogative writ. From the information received at this interlocutory application, I have come to the conclusion that the correct procedure is for the plaintiff to proceed with her appeal pursuant to s 51B of the *Legal Practitioners Act* and that it is this appeal which should be determined first.

[26] I will refer the matter to the Registrar to make the appropriate arrangements with the parties for the appeal to be listed for hearing. The plaintiff may also wish to consider her position with respect to any amendments to her grounds of appeal.

[27] As this matter has come before me by way of an interlocutory application, I consider that I am not part heard on this appeal.
