White v Pink Batts Insulation P/L & Anor [2002] NTCA 4

PARTIES:	**RICHARD WHITE**
	V
	PINK BATTS INSULATION PTY LTD & ANOR
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP8/00 (9315534)
DELIVERED:	7 June 2002
HEARING DATES:	14, 15 and 16 May 2002
JUDGMENT OF:	ANGEL, MILDREN & BAILEY JJ

CATCHWORDS:

Appeal – Further evidence – Principles applicable – Likely affect – Matters to be considered in determining whether to order a new trial.

REPRESENTATION:

Counsel:

Appellant:	S Southwood QC
First Respondent:	J Tippett QC
Second Respondent:	C Kourakis QC & P Barr

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
First Respondent:	De Silva Hebron
Second Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	ang2000202
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

White v Pink Batts Insulation & Anor [2002] NTCA 4
No. AP8/00 (9315534)

BETWEEN:

RICHARD WHITE
Appellant

AND:

PINK BATTS INSULATION PTY LTD
First Respondent

AND

COMMERCIAL UNION ASSURANCE
Second Respondent

CORAM: ANGEL, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 June 2002)

ANGEL J:

[1] On 16 May 2002, at the conclusion of a three day hearing, we dismissed the appellant's application to adduce further evidence on appeal pursuant to s 54 of the *Supreme Court Act* (NT) and dismissed the appeal with the usual consequences as to costs.

[2] What follows are my reasons for making those orders.

[3] Section 54 of the *Supreme Court Act* (NT) provides:

> "54. EVIDENCE ON APPEAL
>
> The Court of Appeal shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge or otherwise as the Court of Appeal directs."

As McHugh, Gummow and Callinan JJ said in *CDJ v VAJ* (1998) 197 CLR 172 at 202 the statutory power to receive further evidence on appeal is not to be construed in a way that would have the practical effect of obliterating the distinction between the original and appellate jurisdiction. There are certain stringent requirements for the re-opening of issues and the calling of further evidence on appeal and I shall return to them.

[4] The appellant sued the respondents for damages. He alleged he contracted small airways lung disease as a result of silica exposure whilst employed in a negligent system of work by the first respondent. The second respondent was allegedly the insurer of the first respondent liable to pay any damages due to the plaintiff. The learned trial judge, after a lengthy trial, held that the first respondent's system of work in which the plaintiff was engaged was negligent, but, that on all the evidence the appellant had failed to prove that he had silica induced small airways disease or any condition consequent upon his exposure to silica dust between 1971 and 1974 whilst employed by the first respondent.

[5] There was a considerable body of medical evidence called by the parties before the trial judge. The learned trial judge accepted the expert evidence

called by the defence and rejected the expert evidence called by the appellant. The learned trial judge found the appellant to be an uncreditworthy and unreliable witness. She found he had falsely exaggerated the medical conditions of co–workers in order to bolster his own claim. She found that he attempted to deceive his treating doctors, in particular Professor Bryant. She found he exaggerated and distorted his exposure to silica dust while working. She found he was not truthful in his assertion that he sought to withdraw from a certain business venture because of his illness. She rejected his claim that ill health had caused or reduced his ability to work as a real estate agent. Whilst it was common ground that the appellant had respiratory problems, the learned trial judge found that the appellant had grossly exaggerated his incapacity due to those problems. The learned trial judge disbelieved the appellant's account of his smoking history.

[6] The learned trial judge accepted the opinion of Dr Field that it was medically unacceptable that the appellant should have left the job where he was exposed to silica in 1974 and that it was only ten years or more later that the deleterious effects of such exposure should manifest themselves, a view supported by the evidence of Dr McKenzie and Professor Alpers whose evidence was also accepted. The learned trial judge concluded that even if the appellant had been exposed to the silica over the duration and with the intensity that the appellant maintained, that nevertheless the effluxion of time between that exposure and his complaints of respiratory problems was,

on the medical evidence which she accepted, reason to reject the appellant's claim that his respiratory problems were somehow related to his exposure to silica between 1971 and 1974. She found the appellant did not suffer small airways disease. She agreed with Dr McKenzie's conclusion that there was no evidence of silica in the appellant's lungs or any evidence that silica had caused damage to his lungs. As I have said, she concluded that the appellant had failed to prove that he had silica induced small airways disease or any condition which was related to his exposure to silica dust between 1971 and 1974.

[7] Prior to trial the appellant included amongst his treating doctors Professor Bryant whose ultimate conclusions the learned trial judge rejected. Prior to trial, the appellant and his medical and legal advisors had canvassed the possibility of the appellant undergoing an open lung biopsy. Professor Bryant opposed this course on medical grounds, principally because he considered it was irrelevant to the future treatment of the appellant and because there were risks associated with the procedure, in particular a potentially adverse consequence with respect to any prospective lung transplant.

[8] Ordinarily, further evidence will only be received on appeal if it could not by the exercise of reasonable diligence have been given at the trial. The appellant, having undergone an open lung biopsy subsequent to trial, now wishes to introduce on appeal the results of that biopsy, together with expert medical opinion relating thereto. The respondents faintly argued that the

appellant had deliberately elected to refrain from ascertaining and putting before the learned trial judge the open lung biopsy evidence. However, having heard evidence from the appellant and Professor Williams, who recommended the post-trial open lung biopsy, I am satisfied that it was done essentially for diagnostic and treatment purposes rather than to bolster the appellant's prospects on appeal. I do not accept that the evidence was deliberately withheld from the trial judge such as to weigh heavily against the appellant in the exercise of our discretion: *CDJ v VAJ*, *supra*, at 203. I think it was both understandable and reasonable for the appellant to accept the pre-trial medical advice of his then treating doctor, Professor Bryant, not to undergo that medical procedure. Due diligence did not, I think, require the appellant to undergo open lung surgery contrary to his expert medical advice.

[9] The application to admit further evidence in this Court was directed to show that a miscarriage of justice has occurred because the learned trial judge's acceptance of the defence medical evidence was ill-founded in so far as that evidence was predicated upon an assumption which the post trial open lung biopsy proved false. The open lung biopsy established the presence of silica or silicate particles within the small airways of the appellant's lung, whereas the defence medical experts, relying on certain CT scans and other medical procedures which, it now appears, failed to identify silica or silicate material within the appellant's small airways, all reached their conclusions on the basis no such material was present in the appellant's lungs.

[10] Before turning to the significance, if any, of the finding of silica or silicate in the appellant's lungs, a matter of much dispute between the medical experts of the appellant and the respondents in reports received *de bene esse* on appeal, it is necessary to refer to a further criterion relevant to the reception of further evidence on appeal. It has been variously stated. In *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142–143, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said:

> "In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party, any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non–disclosed material had been made available. While it is not necessary that the appellant court be persuaded in such a case that it is "almost certain" or "reasonably clear" that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so."

In *CDJ v VAJ, supra,* McHugh, Gummow and Callinan JJ said, at 202:

> "The power to admit the further evidence exists to serve the demands of justice. Ordinarily, where it is alleged that the admission of new evidence requires a new trial, justice will not be served unless the Full Court is satisfied that the further evidence would have produced a different result if it had been available at the trial. Without that condition being satisfied, it could seldom, if ever, be in the interests of justice to deprive the respondent of the benefit of the orders made by the trial judge and put that person to the expense, inconvenience and worry of a new trial."

See also the earlier discussion in *Orchard v Orchard* (1972) 3 SASR 89 at 98–100, per Bray CJ.

[11] In the present case, I am of the view that it can not be said that the new evidence would probably produce an opposite result to that of the trial judge, or that it is "almost certain" or "reasonably clear" or even "a real possibility" that an opposite result would be produced were the new evidence to be introduced upon a re-trial. One fundamental problem with the appellant's case is that all the medical evidence supportive of the conclusions (a) that he has lung disease consequent upon silica exposure and (b) that his present disabilities were caused by that lung disease, are predicated upon a trivial smoking history, whereas the learned trial judge found that the appellant's evidence to that effect was unacceptable and false. The appellant is thus faced with the dilemma that regardless of the presence of silica or silicate in his lungs, and for present purposes disregarding the medical expert opinions sought to be introduced on the appeal by the respondents to counter the appellant's case, the appellant's present respiratory problems, putting the matter at its most benign, are as explicable on account of his smoking as on the case he now seeks to present. This accords with the conclusion of the learned trial judge, namely that he has simply failed to establish on the balance of probabilities that he has silica induced small lung airways disease or that any incapacity he does have relates to silica dust exposure between 1971 and 1974 rather than another cause. The new evidence simply does not subvert the basis of the trial judge's conclusion that the appellant did not establish his case.

[12] Each respondent filed a Notice of Contention in the appeal, the first respondent to the effect that the appeal should be dismissed because the appellant had failed to establish that he was employed by the first respondent during the period 1971 to 1974, and the second to the effect that the appellant had failed to establish a relevant contract of insurance between the second respondent and the first respondent. The learned trial judge did not deal with the issues raised in the Notices of Contention. Given my conclusion above that the open lung biopsy and associated evidence should not be received on appeal and there being no other grounds of appeal, it is unnecessary to deal with the issues raised in the Notices of Contention.

[13] In concluding that the evidence should be rejected and the appeal dismissed, I desire to say I respectfully agree with Bray CJ in *Ventura v Sustek* (1976) 14 SASR, 395 at 401 when he said:

> "Courts must always be uneasy when there is a suggestion that the whole truth has not been told at the trial and that further material is now available which might have produced a different result. In a world where time and expense are of no consequence, to adapt a phrase used in connection with the unreformed system of Chancery procedure in the last century, it may be that it would be right to allow trials to be reopened over an indefinite period and on an indefinite number of occasions. But this is not such a world. It is of the highest public interest that there should be some finality in litigation and that a judgment regularly obtained, and not shown to be erroneous on the material before the trial court, should stand unless stringent requirements for the reopening of the issues and the calling of fresh evidence are complied with."

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MILDREN J:

[14] I agree with Angel J that the application to adduce further evidence on appeal should be rejected and that the appeal should be dismissed with costs. I also agree with his Honour, for the reasons he gives, that the appellant's application should not be dismissed due to lack of due diligence, but that it should be dismissed because the new evidence would probably not produce a different result. In this respect, I consider that the relevant test is that laid down in *CDJ v VAJ* (1998) 197 CLR in the circumstances of this case.

[15] As Angel J points out, the appellant's difficulty is that the learned trial judge concluded that the appellant's present respiratory systems were not caused by exposure to silica between 1971 – 1974, but were explicable due to cigarette smoking. I agree with Angel J that the further evidence does not subvert that finding, but I wish to add a few comments of my own.

[16] The further evidence sought to be led falls into two categories. First, there is the histopathological evidence of Dr Jessup, supported by the examination of the biopsy specimens by Professor Williams. These findings are in themselves not contentious. Secondly, there are the opinions of the appellant's medical witnesses who comment on the significance of those findings. These opinions are contentious, as the subsequent reports of the respondent's medical experts demonstrate.

[17] In *CDJ v VA,* the High Court, McHugh, Gummow and Callinan JJ, commented upon the difference between uncontested evidence (*supra,* at para 114) and evidence "not tested by cross-examination or otherwise in the Full Court..." (*supra,* at para 80). So far as the uncontested findings are concerned, it is plain that they do not prove that the appellant's respiratory problems are caused by exposure to silica. Indeed, Professor Williams in his report of 21 November 2000 says:

> "This is clearly a complicated and perplexing case. I would say however that none of the investigations that have been performed in isolation have proven to be clearly diagnostic or explain the difficulties that Mr White is experiencing ... Finally the open lung biopsy has not proved absolutely clear cut with respect to small airways disease."

[18] The contest between the experts boils down to whether or not the histopathological findings support the view that the cause of the appellant's small airways disease is due to exposure to silica, or whether they do not. Each of the appellant's experts eliminate smoking as the probable cause because of a "trivial smoking history". That history was not accepted by the learned trial judge. There is no further evidence to be led on that subject remotely likely to alter the result.

[19] Mr Southwood QC for the appellant placed great weight upon the finding in the histopathology report of "scant brightly birefringent, needle-shaped crystallive material, consistent with inhaled silicate crystals" noted within the macrophages immediately adjacent to the "Macklin's dust sumps" and in macrophages within the lymphoid aggregates. It was put that this

undermined her Honour's finding, based on the evidence of Dr McKenzie who was called by the respondent, that "there was no evidence of silica in Mr White's lungs or any evidence that silica caused damage to the lungs". However, the evidence before the learned trial judge, which she accepted, did not discount the possibility of silica in the macrophages.

[20] Further, the articles which the appellant's experts relied upon were available to the learned trial judge. The most significant article was one entitled "Small Airways Disease and Mineral Dust Exposure" by Andrew Churg et.al. in 1984, where the authors described "a pathologic lesion consisting of fibrosis and pigmentation of the walls of respiratory bronchioles that occurs in workers exposed to a variety of nonasbestos mineral dusts which we believe is a specific marker of mineral dust exposure and is of potential functional significance". The histopathology results do not show results of this kind.

[21] Accordingly, the appeal should be dismissed.

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BAILEY J:

[22] I agree with the reasons given by Angel J and have nothing to add.

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