Angell & Anor v P North Consultants Pty Ltd & Anor [2007] NTCA 03

PARTIES:	ANGELL, MICHAEL AND MARATHON TYRES (WA) PTY LTD T/AS FENNELL TYRES (ACN 009 130 858) v P NORTH CONSULTANTS PTY LTD (ACN 053 414 556) (in Liq) AND ANDREW WOODS CONSULTANTS PTY LTD (ACN 055 317 970) (in Liq) T/AS FRONTLINE TRANSPORT (ABN 63 542 439 072)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPLICATION FOR LEAVE TO INSTITUTE A CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 2 of 2007 (20208463)
DELIVERED:	31 MAY 2007
HEARING DATES:	25 MAY 2007
JUDGMENT OF:	MILDREN J
APPLICATION FOR LEAVE TO APPEAL FROM:	MASTER COULEHAN, 12 OCTOBER 2006

CATCHWORDS:

APPEAL – Interlocutory Judgment – application for leave to appeal – Supreme Court Act s 53(1) – tests to be applied for grant of leave – whether judgment appealed from arguably affected by error – whether interests of justice require grant of leave – leave refused

PRACTICE AND PROCEDURE – application for leave to appeal from Master – tests to be applied – whether judgment arguably affected by error – whether appellant prejudiced – leave to appeal refused

Statutes:
Supreme Court Act, s 53, s 53(1), s 53(3)
Work Health Act, s 52, s 176(2)(b), s 176(3)

Citations:
Referred to:
In re Will of F B Gilbert (deceased) (1946) 46 SR (NSW)
Nationwide News Pty Ltd (t/as) Centralian Advocate & Ors v Bradshaw & Anor (1986) 41 NTR 1

REPRESENTATION:

Counsel:

Appellant:	P Barr QC
Respondent:	B G McManamey

Solicitors:

Appellant:	Ward Keller
Respondent:	Cridlands

Judgment category classification:	B
Judgment ID Number:	mil07404
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Angell & Anor v P North Consultants Pty Ltd & Anor [2007] NTCA 03
No. AP 2 of 2007 (20208463)

BETWEEN:

MICHAEL ANGELL
First Applicant

MARATHON TYRES (WA) PTY LTD T/AS FENNELL TYRES (ACN 009 130 858)
Second Applicant

AND:

P NORTH CONSULTANTS PTY LTD (ACN 053 414 556) (in Liq) AND ANDREW WOODS CONSULTANTS PTY LTD (ACN 055 317 970) (in Liq) T/AS FRONTLINE TRANSPORT (ABN 63 542 439 072)
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 31 May 2007)

Mildren J:

[1] The applicants seek leave to appeal from an order of the Master made on 12 October 2006 refusing their application for leave to interrogate the respondent (the second plaintiff). The decision of the Master was an interlocutory judgment and therefore leave to appeal is required under s 53(1) of the Supreme Court Act.

[2] Section 53 of the Supreme Court Act now provides as follows:

> "**53. Appeal from interlocutory judgment**
>
> (1) A party to a proceeding may not appeal under section 51(1) from an interlocutory judgment except by leave of the Court of Appeal.
>
> (2) An application for leave to appeal from an interlocutory judgment must be determined in the first instance on the papers by the Court of Appeal consisting of one Judge.
>
> (3) If the application is refused, the party is entitled to have the application determined by the Court of Appeal consisting of not less than 3 Judges.
>
> (4) An appeal from an interlocutory judgment of the Master or a referee must be heard by the Court of Appeal consisting of:
>
> (a) one Judge – if leave to appeal is granted under subsection (2); or
>
> (b) 3 Judges – if leave to appeal is granted under subsection (3)."

[3] It is not the general practice of the Court of Appeal to give reasons for disposing of an application for leave to appeal from an interlocutory order (see the cases referred to in Williams, *Civil Procedure Victoria*, para 61.01.460). An application for leave heard by the Court of Appeal by a single Judge under s 53(1) does not finally determine an application for leave because, under s 53(3) the applicant is entitled to have the application dealt with by the Court consisting of three Judges. It is not necessary to show that the Court constituted by a single Judge was wrong. The

application before three Judges will be heard afresh. Reasons for refusing or granting leave by the Court consisting of a single Judge are therefore unnecessary, but as this is the first occasion when this Court has dealt with an application of this nature since the Supreme Court Act was amended, I think it is desirable for some reasons to be given.

[4] In considering whether or not to grant leave the judgment of the Court of Appeal in *Nationwide News Pty Ltd (t/as) Centralian Advocate & Ors v Bradshaw & Anor* (1986) 41 NTR 1 provides some useful guidance as to how the discretion to grant leave is to be exercised.

[5] In the case of an appeal from an interlocutory judgment dealing with a matter of practice and procedure, a more stringent test is usually required than in other cases. As was said by Sir Frederick Jordan *In Re Will of F B Gilbert (deceased)* (1946) 46 SR(NSW) 318 at 323:

> "… I am of opinion that… there is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed indeterminably, and costs heaped up indefinitely. If a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercise of discretion in interlocutory applications from a judge in chambers to a Court of Appeal."

[6] As Nader J said at in *Nationwide News Pty Ltd (t/as) Centralian Advocate & Ors v Bradshaw & Anor* at p 13 when considering whether to grant leave to appeal from an interlocutory judgment of this kind, "the Court will regard

its discretion as unfettered, but, as a general guide, the applicant will be expected to show that the interests of justice make it desirable to grant leave".

[7] This may be so even if some technical error is able to be pointed to in the approach made by the Master, because as Nader J pointed out at p 14:

> "An order that is not wrong cannot be the cause of a party to the proceeding suffering injustice merely because it was made for the wrong reasons. The possibility of a right order for the wrong reasons is a real one because, in many cases, the primary judge is presented with only two alternative decisions with the consequence of a high statistical possibility of a right answer irrespective of way he has tackled the problem."

[8] The first plaintiff in the action, Mr Michael Lees, alleges that on 31 May 1999 he was injured in an accident which occurred in the course of his employment with the second plaintiff, Frontline Transport. At the time of the accident, a "dolly" had been jacked up under its axle assemblies to enable shock absorbers fitted to the dolly to be replaced. It is not clear to me exactly what is meant by a "dolly". The Macquarie Dictionary refers to a dolly as "a low truck with small wheels for moving loads too heavy to be carried by hand". It is alleged that the first defendant, Michael Angell, removed certain of the wheels of the dolly and jacked up the dolly using only a single jack. Mr Lees was underneath the dolly replacing a shock absorber when the dolly fell from the jack and onto him causing him serious injury.

[9] As a result of the injury, Mr Lees made a claim for Worker's Compensation against his employer, Frontline Transport, which was paid and which is continued to be paid pursuant to the provisions of the Work Health Act.

[10] Mr Lees claims that Mr Angell owed him a duty of care and that he breached that duty by using only one jack, by failing to take precautions to prevent the dolly from falling off the jack and by failing to use available stands to support the dolly whilst the wheels were removed. Mr Lees claims that Marathon Tyres is also negligent in failing to ensure that its employees were properly trained in the safe operation of lifting equipment, such as a jack and failing to ensure that its employees carried out their work in a safe manner which minimised the risk of injury to others. It is also alleged that Marathon Tyres is vicariously liable for the negligence of Mr Angell.

[11] The defendants do not admit that Mr Angell jacked up the dolly and further say that even if he did, it was done at the request of Frontline Transport's supervisor and not as part of his duties with Marathon Tyres. Further it is alleged that Mr Angell warned the supervisor of the danger of changing the shock absorbers relying only on the jack for support. Further the defendants assert that in responding to this request, Mr Angell became an employee *pro hac vice* of Frontline Transport. The defendants have also pleaded that the accident was caused by or contributed to by the negligence of Mr Lees and by the negligence of Frontline Transport.

[12] The claim of Frontline Transport is that, in the event that Mr Lees recovers damages of "less than the full amount to which he is entitled", Frontline Transport is entitled to be indemnified by the defendants under s 176(3) of the Work Health Act. Frontline Transport also claims a charge on any damages payable to Mr Lees pursuant to s 176(2)(b) of the Act. As well, Marathon Tyres has pleaded that a claim for damages is barred by the provisions of the Motor Accidents (Compensation) Act.

[13] It is to be noted that s 52 of the Work Health Act precludes an action for common law damages by Mr Lees against his employer or a co-worker. Further it is common ground that the defendant cannot successfully plead contributory negligence against the plaintiffs because of the provisions of the Work Health Act and the Law Reform (Miscellaneous Provisions) Act.

[14] In this case it is submitted by the applicants that the Master misunderstood the nature of the case alleged against the respondent (the second plaintiff) and/or did not appreciate that it was open to the applicants to prove the negligence of the respondent (the second plaintiff below) was the sole cause of the plaintiff's injuries. Reliance was placed upon a passage in the Master's judgment that where the Master noted that the negligence of the respondent (second plaintiff) was "was not directly relevant" and that "whether or not the second plaintiff had a system or failed (to) ensure such a system was adopted, is not relevant to these issues".

[15] In the circumstances of this case, I am unable to see how any negligence by Frontline Transport in failing to provide a safe system of work for Mr Lees is relevant to causation of his injuries such that, any subsequent negligence of the defendants is not causative of Mr Lee's injuries. There could be no breaking of the chain of causation in such circumstances.

[16] I therefore do not consider that it is reasonably open to argue that the Master erred in finding that answers to the proposed interrogatories on the question of whether or not the respondent had in place a safe system of work for the first plaintiff was in error. No submission was made by the applicant that any injustice will flow to the applicant if leave is refused.

[17] I note that the applicants' submissions are directed only to one aspect of the Master's decision relating to refusal of leave and do not address the rest of the Master's decision. Only interrogatories 1, 2, 3 and 4 of the proposed interrogatories deal with the system of work, instructions, guidance or training whereas the other interrogatories deal with other matters. No argument was addressed in relation to the correctness or otherwise of the Master's decision in relation to those matters.

[18] There is nothing in the material before me to suggest that interrogatories in this case are necessary or will serve a usual purpose or would save significant trouble and expense.

[19] I am satisfied therefore that the applicant has not shown that the decision of the Master is attended with sufficient doubt as to warrant the granting of

leave or that any substantial injustice will be caused if leave were to be refused.

[20] Leave to appeal is therefore refused.
