

Deans v Jones [2004] NTSC 26

PARTIES: PETER NOEL DEANS

v

JENNIFER PHYLLIS JONES

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: No 96 of 1999 (9916569)

DELIVERED: 28 May 2004

HEARING DATES: 4 and 5 May 2004

JUDGMENT OF: MILDREN J

CATCHWORDS:

Practice and Procedure – appeal from Master – whether new trial permitted before a Judge – Supreme Court Act, s 31 – whether new trial can or should be on terms

Halsbury, *Laws of Australia*, vol 20, par 325-11360

Supreme Court Act, s 31

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others (1997) 115 NTR 25, applied

Johnston v Jackson (1879) 5 VLR 331, followed

REPRESENTATION:

Counsel:

Appellant: J Waters QC
Respondent: D Elliot

Solicitors:

Appellant: D Francis and Associates
Respondent: D Elliot

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Deans v Jones [2004] NTSC 26
No. 96 of 1999 (9916569)

BETWEEN:

PETER NOEL DEANS
Appellant

AND:

JENNIFER PHYLLIS JONES
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 28 May 2004)

- [1] On 3 December 2003 I delivered my reasons for allowing the appeal in this matter and for setting aside the orders made by the Master, the subject of the appeal. I invited further submissions as to the orders which should now be made. I indicated at the time that, subject to any further submissions by the parties, the matter should be remitted for rehearing on the outstanding issues.
- [2] On 4 May 2004 I heard further submissions from the parties. Both sides have urged upon me not to remit the matter to the Master. As the Master has

since conducted a settlement conference between the parties I agree that it would be embarrassing and inappropriate to take that course.

[3] S 31 of the Supreme Court Act provides:

31. Appeal

- (1) A party to a proceeding affected by a judgment given in that proceeding by the Master or a referee in the exercise of the jurisdiction of the Court may appeal from that judgment to the Court.
- (2) On an appeal under subsection (1), the Court may –
 - (a) affirm, vary or reverse the judgment appealed from, in whole or in part, and give such judgment as in all the circumstances it thinks just; or
 - (b) set aside the judgment appealed from, in whole or in part, and substitute its own judgment or remit the proceeding to the Master or referee, as the case may be, for further hearing and determination subject to such directions as the Court thinks fit.

[4] So far as I can tell, s 31 has not been considered by this Court. S 31 does not specifically refer to the making of an order for a retrial before a Judge. Does such a power exist? I consider that it does. In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others* (1997) 115 NTR 25, the Court of Appeal had occasion to consider whether this Court could substitute its own opinion for that of the Local Government Tribunal when the statute conferring the right to appeal to the Court had made no provision at all for what orders could be made if the appeal was successful. I held that the Court had the power to do everything indispensable for the purpose of exercising its power to hear the appeal or everything fairly incidental or consequential to the power, and this must include the power to substitute its

own decision: see 115 NTR at 34-36. Martin CJ agreed. Thomas J at 115 NTR 50-51 reached the same conclusion. Applying those principles to s 31, it seems to me that I must have a power to order a retrial before a Judge in circumstances where, as here, I cannot decide the case myself as the findings are inadequate, and I cannot remit the proceeding to the Master.

[5] Not all of the issues decided by the Master were the subject of any specific ground of appeal, as I noted in my judgment of 3 December 2003. The question now arises as to whether I should, or indeed can, restrict the nature of the rehearing by excepting two findings made by the Master on two principle issues fought before and determined by the Master, not made the subject of any specific ground of appeal. Counsel for the appellant, Mr Waters QC, has submitted that those issues cannot be isolated, and in his submission the whole matter will have to be reheard. Ms Elliot for the respondent has urged me to limit the rehearing to those issues which remain outstanding. The amount in dispute in these proceedings is relatively small. The cost of a full retrial on all issues may well exceed the maximum amount likely to be recovered.

[6] I was not directed to any authorities on that subject. In Halsbury's *Law of Australia*, vol 20, par 325-11360, the learned authors observe:

If an appeal on the ground of the failure of the judge to give reasons is allowed, the appellate court may order a new trial, or remit the proceeding to the judge for delivery of reasons.

- [7] It is not now appropriate to take the latter course. However, a new trial may be granted on terms. In *Johnston v Jackson* (1879) 5 VLR(L) 331 the plaintiff to a libel action was granted a new trial on the terms that he admitted publication which has been proved to the satisfaction of the Court and withdrawing his plea of justification. I consider that I do have the power to order a new trial on terms, and that may include in a proper case the withdrawal of issues decided by the Master about which no complaint has been made on appeal, if those issues can be properly separated from the issues to be decided at the retrial.
- [8] Mr Waters QC submitted that the issues cannot be separated. The first of the issues is the period of the relationship. Here the learned Master's finding was the relationship commenced near the end of 1992 and did not end until December 1998. I consider that that finding can be isolated without any injustice to the parties and without any embarrassment on a retrial. As it will save costs and time, I consider that the matter ought not to be relitigated.
- [9] The second matter is that the learned Master held that the appellant had failed to show that the respondent had been guilty of impropriety and gross negligence in the management of the Palms Diner. I agree with Mr Waters QC that restricting the retrial in relation to that finding is likely to prove embarrassing as it will be necessary to enquire into the circumstances in order for the Court to consider what is just and equitable, especially having regard to losses and who should bear them.

[10] In conclusion, the appeal is allowed and the judgment the Master made on 20 August 2003 is set aside, and a new trial is ordered before a Judge of the Court on condition that the appellant is to admit that the period of the relationship extended from near the end of 1992 until December 1998.
