Lexcray Pty Ltd v Northern Territory of Australia [2003] NTCA 11

PARTIES:	LEXCRAY PTY LTD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AP22 of 1999
DELIVERED:	16 April 2003
HEARING DATES:	24, 25 October 2002
JUDGMENT OF:	ANGEL ACJ, BAILEY J and GALLOP AJ

CATCHWORDS:

APPEAL

Court of Appeal – Jurisdiction - Whether the Northern Territory Court of Appeal has power to re-open an appeal after perfecting of its final judgement – Subsequent discovery by respondents of a letter by the Minister on level of compensation to be paid under BTEC scheme after the appeal was dismissed – Whether power to re-open a judgement by reason of changed circumstances

Supreme Court Act 1993 (NT) 1993 ss 51(1), 54, 55(1)
Supreme Court Rules 2.01, 29.02, 29.03 36.07, 82.02

Lexcray Pty Ltd v Northern Territory of Australia (No.2) (2001) 10 NTLR 150, mentioned
Bailey v Marinoff (1971) 125 CLR 529, applied
Gamser v The Nominal Defendant (1976) 136 CLR 145, followed
DJL v The Central Authority (2000) 201 CLR 226, followed
State Rail Authority of NSW v Codelfa Construction Pty Ltd (1982) 150 CLR 29, considered
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481, considered
Pinochet's Case [2002] 1 AC 119, considered
Taylor & Anor v Lawrence & Anor [2002] 2 All ER 253, applied
Shaddock & Asociates Pty Ltd v Parramatta City Council (No 2) (1982) 151 CLR 590, considered

Milson v Carter [1893] AC 638, mentioned
Hatton v Harris [1892] AC, mentioned
R v Bowstreet Magistrate ex parte Pinochet (No 2) (1993) 176 CLR 300, followed
Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300, mentioned
Ras Behari Lal v King Emperor (1933) 102 LJPC 144, applied
Doyle v The Commonwealth (1985) 156 CLR 510, referred to
Commonwealth Bank v Quade (1991) 178 CLR 134, followed
Quade v The Commonwealth Bank (1991) 27 FCR 569, referred to
Home Office v Harman [1983] 1 AC 280, referred to
Australia National Airlines Commission v The Commonwealth (1975) 132 CLR 582, referred to
Fernance v Nominal Defendant (1989) 17 NSWLR 710, referred to
Harkness v Bell's Asbestos and Engineering Limited [1967] 2 QB 729, mentioned
Regina v Bowstreet Magistrate, Exparte Pinchet Ugarte (No 2) [2000] 1 AC 119, followed
Haig v The Minister (1994) 85 LGERA, not followed
Wilcox v Richardson & Anor [1999] NSWCA 329, followed
Woods v The Sheriff of Queensland (1895) 6 QLJ 164, mentioned
Owners of the SS Kalibia v Wilson (1910) 11 CLR 689, mentioned

REPRESENTATION:

Counsel:

Appellant:	S Gageler SC & M Durack
Respondent:	S Southwood QC & M Grant

Solicitors:

Appellant:	Cridlands
Respondent:	Solicitor for the Northern Territory

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

Lexcray Pty Ltd v Northern Territory of Australia [2003] NTCA 11
No. AP22 of 1999

BETWEEN:

LEXCRAY PTY LTD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: ANGEL ACJ, BAILEY J and GALLOP AJ

REASONS FOR JUDGMENT

(Delivered 16 April 2003)

[1] **ANGEL ACJ:** The appellant's summons of 30 May 2002 raises three questions –

(a) whether this Court's order dismissing the appellant's appeal which has been drawn up, passed and entered, has exhausted this Court's jurisdiction, or, expressing it another way, whether the Northern Territory Court of Appeal has power to re-open an appeal after it has given final judgment and the judgment has been perfected?

(b) if so, whether this Court ought to reopen the present appeal and receive fresh evidence?

(c) if so, whether on the basis of that evidence this Court ought to set aside its former final judgment, allow the appeal and order a re-trial.

(a) On 18 January 2001 this Court dismissed the appellant's appeal: *Lexcray Pty Ltd v Northern Territory of Australia (No. 2)*(2001) 10 NTLR 150. The judgment dismissing the appeal was perfected on 12 February 2001. The appellant applied for special leave to appeal to the High Court of Australia which adjourned the application to enable the appellant to bring the present application before this Court.

(b) The genesis of the present application was the respondent's failure to give complete discovery prior to the trial in the Supreme Court contrary to its obligation pursuant to rule 29.02 Supreme Court Rules. On 11 December 2001 the respondent for the first time discovered a letter dated 28 August 1990 from the Northern Territory Minister to the Commonwealth Minister for Primary Industry and Energy wherein it was said that the level of compensation paid in 1987 under the BTEC scheme for destocked cattle "changed the level of compensation paid from one that was clearly too low and inequitable to one that was fair and equitable". It is the appellant's case that the letter constitutes an admission that the level of compensation paid to the appellant was unfairly low and inequitable which provides a strong base

for the conclusion that the respondent had acted in breach of contract in failing to act fairly or reasonably in setting the level of compensation payable to the appellant and also good grounds for the conclusion that the respondent, prior to the appellant's purchase of Nutwood Downs, misled the appellant in its description of compensation payable under the BTEC scheme because of its failure to disclose that the compensation payable was unfairly low and inequitable. It was also the appellant's case that the admission that compensation be paid "was clearly too low and inequitable" significantly altered the underlying merits of the respective parties' positions at trial and the whole dynamics of the trial.

(c) The present case is not an application to rehear the appeal before the judgment has been drawn up and perfected. Nor is it an application to vary the judgment on the basis it was drawn up not in accordance with the Court's order. Nor is it an application that the Court should make an order supplemental to the judgment drawn up. It is not an invocation of the slip rule. It is an application that the Court should rehear the judgment dismissing the appeal and give another judgment in its place.

(d) After a judgment has been entered the general rule is that there is no jurisdiction to review, vary or set it aside, see *Bailey v Marinoff* (1971) 125 CLR 529; *Gamser v The Nominal Defendant* (1976) 136 CLR 145 at 146; *DJL v The Central Authority* (2000) 201 CLR 226. As a final court of appeal the High Court of Australia has inherent jurisdiction to vacate its orders in cases where there would otherwise be an irremediable injustice,

but this power will only be exercised in exceptional circumstances: *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38 per Mason and Wilson JJ, at 45 per Brennan J; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 482. However the Northern Territory Court of Appeal is an intermediate court of appeal and the question of its power to reopen appeals is to be considered in light of the Supreme Court Act and Rules and any express or implied powers to be seen therein rather than a consideration of the position with respect to the High Court or Privy Council or House of Lords or the procedure of the common law courts, see *DJL v Central Authority* (2000) 201 CLR 226 at 246-247.

(e) Counsel for the appellant argued that this court had jurisdiction to reopen an appeal on two bases, first, that the respondent's failure to discover constitutes an irregularity for the purposes of rule 2.01 Supreme Court Rules, and that in virtue of s 51(1) Supreme Court Act (NT) 1993, because the Court of Appeal may exercise the jurisdiction and authority of the Supreme Court, pursuant to sub-rule 2(b) of Rule 2.01, it can set aside its previous judgment. Secondly, it was submitted this court has inherent power to re-open a judgment given "in circumstances where through no default of a party he or she has been subjected to an unfair procedure": *Pinochet's* case [2002] 1 AC 119 at 132E. The appellant relied, amongst other things, upon the Court of Appeal's decision in *Taylor v Lawrence* [2002] 2 All ER 253 where the English Court of Appeal held it had a residual jurisdiction to reopen an appeal which had already been determined

in order to avoid real injustice in exceptional circumstances. It was said that though the outcome of litigation should be final there was a need to temper that principle in exceptional circumstances, although as Lord Woolf CJ said, at 358, "parties will not normally be permitted to have a second bite of the cherry".

(f) It is apparent that in *Taylor v Lawrence* (supra) a matter that weighed somewhat heavily with Lord Woolf CJ was that it would not be practical nor proportionate nor appropriate for the House of Lords to be involved in resolving the issue raised before the Court of Appeal, see, at 363F. Given the terms of Supreme Court Rule 2.01, it seems anomalous that in the present case, if as the respondent contends, this court has no jurisdiction to reopen the appeal and set aside the trial judge's judgment, on the other hand both the trial judge (pursuant to rule 2.01) and the High Court of Australia on appeal would have such power. That result seems both curious and inconvenient. As counsel for the appellant observed, all of the cases which say there is no power to reopen a perfected judgment on appeal involved judgments regularly entered. The present case on the other hand involves a judgment entered where there has been an irregularity, namely a failure of the respondent to abide by its obligation to discover fully pursuant to the Supreme Court Rules, a failure that persisted at the time of entry of judgment dismissing the appeal.

(g) The Supreme Court Rules confer power on the Court to correct a clerical mistake in a judgment or order or an error arising in a judgment or an order

from an accidental slip or omission: see Rule 36.07. That rule, known as the slip rule, applies on appeal and may be invoked whether or not the judgment or order has been entered: *Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590 at 595; *Milson v Carter* [1893] AC 638 at 640; *Hatton v Harris* [1892] AC 547. It seems to me that Rule 2.01 equally applies on appeal and is not confined to irregularities in the appeal. In any event, discovery is a continuing obligation and the irregularity of the respondent continued during the appeal. I reject counsel for the respondent's submission that s 55(1) Supreme Court Act only empowers the Court of Appeal to exercise the power, jurisdiction and authority of the Supreme Court during the conduct of the appeal at all times up to the point of judgment. I agree with the submission of counsel for the appellant that the Northern Territory Court of Appeal, which is the Supreme Court sitting *in banco* and not a separate court, has power under Order 2.01(2)(b) to set aside its judgment dismissing an appeal where there has been a failure to comply with a provision of Chapter I of the Supreme Court Rules. Furthermore, in my opinion, although a superior court of record has no general jurisdiction to reopen a final judgment or order that has been perfected, the inherent jurisdiction of the Supreme Court and therefore the Northern Territory Court of Appeal extends to reopening any judgment or order in circumstances where through no fault of a party, that party has been subjected to unfair procedure: *R v Bowstreet Magistrate ex parte Pinochet (No 2)* [2002] 1 AC 119 at 132E; *Autodesk Inc v Dyason (No 2)* (1993) 176

CLR 300 at 301-302. Of course I acknowledge to the full that finality is a good thing, but as Lord Atkin said in *Ras Behari Lal v King Emperor* (1933) 102 LJPC 144 at 147; [1933] All ER Rep 723 at 726: "Finality is a good thing, but justice is better".

(h) In my opinion this Court does have power to reopen the appeal.

(i) Rule 2.03 Supreme Court Rules provides:

> "2.03 APPLICATION TO SET ASIDE FOR IRREGULARITY
>
> The Court shall not set aside a proceeding or a step taken in a proceeding, or a document, judgment or order in a proceeding, on the ground of a failure to which rule 2.01 applies on the application of a party unless the application is made within a reasonable time, and before the applicant has taken a fresh step, after becoming aware of the irregularity."

As the High Court said in *Doyle v The Commonwealth* (1985) 156 CLR 510 at 518:

> " … a judge cannot dispense with the requirements of the Rules of Court unless the Rules give him power to do so, and when a power is expressly conferred on the court subject to a condition, a judge cannot, by relying on inherent powers, escape from the necessity of ensuring that the condition has been fulfilled."

There can be no suggestion that the appellant's application is made other than within a reasonable time. It is not suggested that the appellant has taken any fresh step after becoming aware of the respondent's irregularity.

(j) In the circumstances it is appropriate that we receive the affidavits of the parties' solicitors as fresh evidence on the appeal pursuant to s 54 Supreme Court Act.

(k) The question whether any order should be made as a consequence of the significant failure of the respondent to comply with orders for discovery of the relevant document in its possession is a matter of some difficulty in the present case. The document in question is not merely relevant to cross-examination of the respondent's witnesses, including its central witness, Dr Calley, as to credit. It is the uncontested evidence of Alan John Lindsay, solicitor for the appellant before this Court that the plaintiff's case would have been conducted in a tellingly different manner had it known of the letter. Counsel for the respondent submitted that the underlying facts as regards the level of compensation paid for destocked cattle was the same and that the Minister's letter merely expressed an opinion which, whether correct or not, did not alter the situation. However as counsel for the appellant submitted the letter, inter alia, would support a finding that the description of compensation in the Calley Plan was a misrepresentation of the true position as that plan did not tell the appellant that the compensation it would receive under the BTEC scheme was considered by the Minister, and presumably his department, to be unfairly low and inequitable. The respondent's whole case at trial was run on the basis the level of compensation paid prior to the appellant's acquisition of Nutwood Downs Station was fair and equitable. The Minister's letter contradicts that stance.

(l) The question whether a new trial should be ordered as a consequence of the respondent's misconduct leading to the letter remaining undisclosed until long after the trial is to be determined in accordance with the principles laid

down by the High Court in *Commonwealth Bank v Quade* (1991) 178 CLR 134 at 142-143, as follows

> "If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the courts would be of provisional character only, being subject to the discovery of further relevant evidence.
>
> The position is, however, different in a case such as the present where the unavailability of the evidence at the trial resulted from a significant failure by the successful party to comply with an order for the discovery of relevant documents in his possession or under his control. The application to the category of case of the general rule that a new trial should only be ordered on the ground of fresh evidence it if is 'almost certain' or 'reasonably clear' that the opposite result would have been produced if the evidence had been available at the first trial would, particularly where the failure was deliberate or remains unexplained, serve neither the demands of justice in the individual case nor the public interest in the administration of justice generally. In so far as the demands of justice in the individual case are concerned, it would cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party's misconduct. In so far as the public interest in the administration of justice generally is concerned, it would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements.
>
> It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, 'either particularly in relation to the parties or generally in relation to the administration of justice'. 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 appellate 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."

(m) The respondent has no excuse for its failure to discover the document earlier. The respondent filed some nine verified list of documents purportedly in compliance with Order 29.03 Supreme Court Rules. The adequacy of the respondent's pre-trial discovery was very much an issue between the parties both before and during the trial before Kearney J. There has been no lack of diligence on the part of the appellant in seeking its present relief. It is simply not possible to say that the result of the case would have been different if the obligation for discovery had been complied with and the letter had been available for the trial. It is clear enough that the appellant now has weighty arguments previously unavailable relative to its breach of contract case and an arguable case in misrepresentation constituted by the Calley Plan. The whole dynamics of the trial would have been different. The Minister's statement demonstrates that the appellant's case was not decided on its true footing or merits at the trial.

(n) There is undoubtedly a public interest in ensuring compliance with court orders and ensuring full discovery to prevent surprise, encourage settlement and narrow issues so the truth can be ascertained and justice can be done between the parties: *Home Office v Harman* [1983] 1 AC 280 at 315. Full

discovery and production of material documents is an incident of a party's right to a fair trial and hence is central to the administration of justice: *Australia National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 593. Given the significance of the Minister's admission in the letter, the circumstance that a fair trial has been denied the appellant by the conduct of the respondent in failing to discover the letter and the fact that both the appellant's and respondent's cases would have been conducted differently, and in the case of the appellant more advantageously had it known of the letter, it seems to me there has been a real miscarriage of justice which can only be remedied by a retrial. It is only upon a retrial that the true merits of the appellant's claims can be judged.

(o) In my opinion we should set aside our previous order dismissing the appellant's appeal with costs and in lieu thereof allow the appeal, set aside the trial judge's order dismissing the appellant's claim and order a retrial. The appellant's costs of the first trial should be borne by the respondent. The appellant should also have its costs of the appeal and its summons of 30 May 2002.

BAILEY J: I have had the advantage of reading the judgment of Gallop AJ. I agree that the applicant's summons should be dismissed with costs for the reasons stated by His Honour.

GALLOP AJ: On 18 January 2001 this Court dismissed an appeal from the judgment of a single Judge of the Court. The judgment of this Court was authenticated on 12 February 2001. The present applicant applied for special leave to appeal and that application was heard in the High Court on 3 May 2002. The order of the High Court was that the application for special leave be adjourned to permit the applicant to exhaust any rights that it may have in the Supreme Court of the Northern Territory arising out of the belated discovery of evidence.

(p) By summons issued on 30 May 2002 the applicant has applied to this Court for various orders as follows:

> "(1) The orders of the Court of Appeal of the Northern Territory made 18 January 2001 be reopened.
>
> (2) The Court of Appeal receive the affidavit of Alan John Lindsay sworn 28 May 2002 as further evidence pursuant to section 54 of the Supreme Court Act (NT).
>
> (3) The orders of the Court of Appeal of the Northern Territory made 18 January 2001 be set aside.
>
> (4) The appeal be allowed.
>
> (5) The orders of the Supreme Court of the Northern Territory made 30 August 1999 be set aside.
>
> (6) The orders of the Supreme Court of the Northern Territory made 13 October 1999 be set aside.
>
> (7) These proceedings be remitted to a single judge of the Supreme Court of the Northern Territory for a new trial.

(8) The Respondent pay the Appellant's costs of this application, the trial and the appeal assessed on an indemnity basis.

(9) Such further or other orders as this Honourable Court sees fit."

(q) In dismissing the appeal from the judgment of a single Judge of the Supreme Court this Court identified what the trial proceedings had been about. They arose out of the implementation of a national programme known as BTEC on a cattle station known as Nutwood Downs which is located in the Gulf region of the Northern Territory south east of Katherine. The Dunbar family, through its company Lexcray Pty Ltd ("Lexcray"), purchased Nutwood Downs from the Vesty's Group in 1984. The claim by Lexcray in the Supreme Court was that it sustained loss and damage as a result of misrepresentations, breaches of contract and breaches of fiduciary duty by employees of the Northern Territory prior to purchase and during the implementation of BTEC on Nutwood Downs. Lexcray's claims totalled approximately $9.7m including approximately $2.9m for market value compensation for cattle destocked under BTEC and $4.9m for the alleged loss of value in Nutwood Downs and interest.

(r) The applicant (as plaintiff in the trial proceedings) alleged that the respondent (the defendant in those trial proceedings) entered into three agreements with the applicant as follows:

(1) an agreement made on 5 January 1984 to pay compensation at rates equal to "market value";

(2) an agreement made in late August 1994 (the written part being a destocking compensation agreement) to pay compensation at rates equal to "market value" which value would be determined by the Minister; and

(3) in the alternative to (2) above, an agreement made in late August 1984 (the written part being the destocking compensation agreement) to pay compensation at rates which the defendant, by the Minister, acting fairly to the plaintiff, considered it would be reasonable to pay the plaintiff having regard inter alia to the extent of destocking proposed on Nutwood Downs, the financial ramifications thereof to the plaintiff, the aims and the objectives of the BTEC, and the terms of compensation required by the Commonwealth/Territory BTEC agreement, or the amount of compensation was to be a fair and reasonable amount, equal to the market value of each mustered animal destocked, plus a rate as determined by the Minister in respect of each unmusterable animal.

(s) The respondent failed to give complete discovery prior to the hearing of the proceedings in the Supreme Court, notwithstanding its obligation to give general discovery under O 29.02 of the Supreme Court Rules and the filing by it of some nine verified lists of documents purportedly in compliance with O 29.03. The respondent on 11 December 2001 for the first time discovered in the proceeding a letter dated 28 August 1990 from the Northern Territory Minister responsible for the BTEC to the Commonwealth

Minister for Primary Industry and Energy which stated in relation to the BTEC that the adoption of a policy of the progressive implementation of "market value" compensation from 1987 "changed the level of compensation paid from one that was clearly too low and inequitable to one that was fair and equitable". It is on the basis of the contents of that letter and the respondent's default in previously discovering it, that the appellant applies by summons as set out above for the appeal to be reopened and for the proceedings ultimately to be remitted to a single Judge of the Supreme Court for a new trial on limited issues.

Jurisdiction to reopen the appeal

(t) The respondent contested the jurisdiction of this Court to reopen the appeal heard and determined by it in the judgment delivered on 18 January 2001. The appellant relied on the following provisions of the Supreme Court Act and the Rules of Court. Section 55(1) of the Supreme Court Act 1993 (NT) reads:

> "(1) Subject to any law in force in the Territory, the Court of Appeal –
>
> (d) may exercise every power, jurisdiction and authority of the Court, whether at law or in equity or under any law in force in the Territory; and
>
> (e) shall give such judgment as, in all the circumstances, it thinks fit."

(u) The appellant relied also upon r 2.01. That Rule is contained within "Chapter 1 – General Rules of Procedure in Civil Proceedings" and reads as follows:

> "2.01 EFFECT OF NON-COMPLIANCE
>
> (1) A failure to comply with this Chapter is an irregularity and does not render a proceeding or step taken, or a document, judgment or order, in the proceeding a nullity.
>
> (2) Subject to rules 2.02 and 2.03, where there has been a failure to comply with this Chapter, the Court may –
>
> (a) set aside the proceeding, either wholly or in part;
>
> (b) set aside a step taken in the proceeding or a document, judgment or order in the proceeding; or
>
> (c) exercise its powers under this Chapter to allow amendments and to make orders dealing with the proceeding generally."

(v) It was submitted on behalf of the appellant that the power provided by s 55(1)(a) of the Supreme Court Act includes the power under O 2.01(2)(b) to set aside a judgment or order where there has been a failure to comply with the provision of chapter 1 of the Supreme Court Rules. The power falls to be exercised by reference to "the substantive merits of the case", *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 726; *Harkness v Bell's Asbestos and Engineering Limited* [1967] 2 QB 729 at 736. It was further submitted that notwithstanding the decision of the High Court in *DJL v The Central Authority* (2000) 201 CLR 226 that a Superior Court of

Record has no general jurisdiction to reopen a final judgment or order, the inherent jurisdiction of the Supreme Court extends to reopening any judgment or order "in circumstances where through no default of a party he or she has been subjected to an unfair procedure". Various authorities were cited by the appellant in support of that proposition, in particular *Regina v Bowstreet Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132E; *Bailey v Marinoff* (1971) 125 CLR 529 and *Taylor & Anor v Lawrence & Anor* [2002] All ER 353. It was further submitted that there is no doubt as to the power of the Court under s 54 of the Supreme Court Act to receive further evidence on an appeal. The power exists to serve the demands of justice and is not constrained by reference to the circumstances in which fresh evidence could be adduced at common law. However, even at common law there was, of course, no difficulty in a party adducing as fresh evidence admissible evidence centrally relevant to a case of which it was previously denied of knowledge by reason of the default of another party. The question whether the further evidence should give rise to a new trial falls to be determined in accordance with the principles laid down by the High Court in *The Commonwealth Bank v Quade* (1991) 178 CLR 134 at 142 – 143 and see also *Quade v The Commonwealth Bank* (1991) 27 FCR 569 at 581.

(w) The argument to the contrary advanced by the respondent was that s 55(1) of the Supreme Court Act does not have the operation contended for by the appellant. It was submitted that the section does not grant this Court of

Appeal jurisdiction to reopen an appeal in circumstances where there has been a failure by a successful respondent to comply with the discovery obligations imposed by O 29 of the Rules. The provision only empowers the Court of Appeal to exercise the power, jurisdiction and authority of the Supreme Court during the conduct of an appeal at all times up to the point of judgment. It was submitted that so much is apparent from the structure of the section in that the grant of power is expressed as an antecedent to the giving of such judgment as is fit in the circumstances.

(x) The submission further was that the application of O 2 of the Supreme Court Rules in the appellate context is governed by O 82.02 which provides:

> "82.02 Relief from Rules and Non-compliance.
>
> Order 2 with the necessary changes applies to this Chapter."

(y) When applied in the context of chapter 2, the references to "this Chapter" in O 2.01 are transposed to references to chapter 2. The purpose and effect of O 82.02 is to provide that a failure to comply with chapter 2 of the Supreme Court Rules (Appeal Rules) is an irregularity and does not render an appeal or step taken or a document, judgment or order in the appeal a nullity. The order provides for appropriate relief only where there has been a failure to comply with chapter 2 of the Supreme Court Rules.

(z) In any event, so the submission went, O 2.01(2)(b) of the Supreme Court Rules is not a provision which is directed to the reopening or setting aside

of judgment in these circumstances. The purpose of such provisions is to prevent proceedings being treated as a nullity and to prevent the determination of proceedings by reference to any technicality, slip or mistaken step rather than the substantive merits of the case. Order 2.01 of the Supreme Court Rules is designed to allow the Court to excuse an irregularity in a proceeding constituted by a failure to comply with the Rules. Such irregularities include defective dates and endorsements, defective service and similar acts of procedural non-compliance which without curative provision would render the proceeding a nullity. Order 2 does not allow the reopening of a judgment given on appeal where discovery is incomplete.

(aa) It was further submitted on behalf of the respondent that there is no inherent power in the Court of Appeal to deal further with an appeal which has already been dismissed by formal order in conformity with an order pronounced and authenticated. An appeal in which judgment has been entered may only be reopened after decision in limited and exceptional circumstances, for example, if it has been procured by fraud or collusion.

(bb) The cornerstone judgment on the subject is *Bailey v Marinoff*, supra, per Barwick CJ at p 530:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance in my opinion beyond recall by that court. It would in my opinion not promote the due administration of the law

> or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

(cc) Menzies, Owen and Walsh JJ agreed with the Chief Justice, Gibbs J, as he then was, dissented. I shall return to what Gibbs J had to say. *Bailey v Marinoff* was most recently followed by the High Court in *DJL v The Central Authority* (2000) 201 CLR 226 where the High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Haine and Callinan JJ, Kirby J contra) held that the Full Court of the Family Court did not have power to reopen final orders after their entry. *Bailey v Marinoff* had also been followed by the High Court earlier in *Gamser v The Nominal Defendant* (1976) 136 CLR 145 where Sir Garfield Barwick followed the previous decision of the High Court in *Bailey v Marinoff*. Put briefly, what those two High Court authorities say is that the Court of Appeal has no power to set aside and reopen a judgment already given and entered and there was no basis upon which that Court could properly interfere with a judgment so entered. Those cases, in my opinion, state the law. It is true that in *Haig v The Minister Administering National Parks and Wildlife Act 1974 (No 2)* (1994) 85 LGERA 435 Kirby J expressed the view that there was jurisdiction in this Court to reopen a perfected judgment, but only in exceptional circumstances. In *Wilcox v Richardson & Anor* [1999] NSWCA 329 the Court of Appeal constituted by Meagher, Handley and Powell JJA followed *Bailey v Marinoff* and *Gamser v The Nominal Defendant* and declined to follow *Haig v The Minister*.

(dd) It is the well settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made, the court has no jurisdiction to alter it. Gibbs J in *Bailey v Marinoff* introduced the concept of exceptional circumstances. He held that the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions, such as the slip rule found in most Rules of Court. He referred to the court having power to vary an order so as to carry out its own meaning or to make plain language which is doubtful, and that that power does not depend on Rules of Court, but is inherent in the court. His Honour further held that a court may amend a part of a judgment or an order which is "not the operative and substantial part". Similarly, the rule that a court may review an order made ex parte has been said to be "a rule of natural justice" (*Woods v The Sheriff of Queensland* (1895) 6 QLJ at 164) or "an elementary rule of justice" (*Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 at 694).

(ee) More recently the Court of Criminal Appeal of New South Wales has accepted that there may be possible exceptions to the common law rule as laid down in *Bailey v Marinoff*. In *R v Lapa* (1995) 80 A Crim R 398 Clarke JA, speaking for the Court of Criminal Appeal, accepted the existence of the common law rule as explained in *Bailey v Marinoff* that once a judgment has been perfected a court has no power, subject to any relevant rules, to alter its judgment in a substantial respect, but nevertheless

accepted that there may be possible exceptions concerning subsidiary matters.

(ff) In my view, however, the relief which the appellant seeks in this application does not fall within the class of exceptional matters which may justify departure from the ordinary rule as explained in *Bailey v Marinoff*. Accordingly, I would hold that this Court of Appeal has no jurisdiction to reopen the appeal determined by it and perfected by the authentication of the judgment. The dicta of Lord Woolf CJ in *Taylor and Anor v Lawrence & Anor* [2002] 2 All ER 353 at 359 are in point:

> "It is not uncommon for fresh evidence to come to light after a judgment has been perfected which puts that judgment in doubt. In such circumstances the unsuccessful litigant may be able to invoke that evidence in order to challenge the judgment by an appeal. Once the judgment is perfected, however, the court that has delivered the judgment, be it a court of first instance or the Court of Appeal, would not entertain an application to reopen the judgment in order to consider the effect of the fresh evidence. This is not because of any express statutory prohibition. In considering the extent of their jurisdiction the courts have ruled that a perfected judgment exhausts their jurisdiction because this accords with the fundamental principle that the outcome of litigation should be final."

(gg) In my opinion, the summons should be dismissed with costs.
