Lawton v Fernon [2011] NTCA 06

PARTIES:	MICHAEL LAWTON
	v
	JOAN PATRICIA FERNON
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP2 of 2011 (20908447)
DELIVERED:	8 September 2011
HEARING DATES:	3 August 2011
JUDGMENT OF:	MILDREN, SOUTHWOOD & BLOKLAND JJ
APPEAL FROM:	MASTER LUPPINO

REPRESENTATION:

Counsel:

Appellant:	R. M. Galloway
Respondent:	A. Young

Solicitors:

Appellant:	Cecil Black Family Lawyers
Respondent:	De Silva Hebron

Judgment category classification:	C
Judgment ID number:	Mil11500
Number of pages:	5

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

Lawton v Fernon [2011] NTCA 06
No AP 2 of 2011 (20908447)

BETWEEN:

MICHAEL LAWTON
Appellant

AND:

JOAN PATRICIA FERNON
Respondent

CORAM: MILDREN, SOUTHWOOD and BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 8 September 2011)

MILDREN J:

[1] On 24 June 2011, the Court, by a majority, delivered judgment in this matter, allowing the appeal, and dismissing the notice of contention filed by the respondent. The Court reserved the question of the costs of the appeal pending receipt from the parties of written submissions. Those submissions having been filed, counsel for the appellant has submitted that the respondent should pay the appellant's costs of and incidental to the appeal to be assessed on a standard basis. Counsel for the respondent's principal submission was that there should be no order as to costs; alternatively if the Court made any order in favour of the appellant, it should be assessed at no more than 10% of the appellant's costs. No submissions were made as to the

costs of the hearing before the Master because the question of costs at first instance has yet to be considered.

Success on points not taken below

[2] Counsel for the respondent submitted that none of the grounds of appeal, still less the successful grounds, were agitated in the Court below, and that in these circumstances, a successful appellant is generally not entitled to costs, citing the decision of the Victorian Court of Appeal in *Armstrong v Boulton.*[1] In the Court below, counsel for Mr Lawton submitted that in determining the pool of assets available for distribution, superannuation ought not to be considered. The contrary contention was made by counsel for Ms Fernon. As noted in my previous judgment at para [9] neither counsel assisted the Court by reference to any authorities, except for a reference by counsel for Ms Fernon to the decision of *Fiket v Linco*[2] which did not discuss this issue. However, it was tolerably clear that Mr Lawton's counsel urged the Master not to include superannuation in this way because "it is not due to anybody and you have to wait until retirement. And we say that it should be removed from the list of assets because it is clearly not an asset."[3] He developed the argument further, submitting that, although it was to be considered as a financial resource, "the superannuation interests taken over

[1] [1990] VR 215 at 223.
[2] (1998) 145 CLR 456.
[3] Tr p 126.

all were equal”[4] This was obviously a reference to the values of the superannuation funds which the parties might have access to, in so far as they were to be treated as a financial resource. In my opinion it would not be right to conclude that the appeal succeeded, in so far as the argument concerning superannuation was concerned, on a point not taken before the learned Master.

[3] It was further submitted that, in so far as the majority of the Court found that there was an error in the calculation of the appellant’s inheritance, this was also a point not argued below. As noted in my previous judgment at para [45], no submission was made below that the figure submitted by counsel for Ms Fernon to the Master was wrong. Counsel for the appellant submitted that the figure derived from evidence from the bar table given by counsel for Ms Fernon in the court below, and that it was “inapt” to assert that the point was not taken. The principal point of difference between the figure arrived at by the Master, and the amount which the majority found on appeal, related to (1) an adjustment derived from excluding superannuation from the pool; (2) a higher value for the Ausex shares which the Master had adopted and (3) an allowance for the interest saved because of the reduction of the mortgages, which the Master also had allowed. In these circumstances, I do not think it can be properly characterised as an error brought about by a failure by counsel in the Court below to take the point.

[4] Tr p 129-130

Calderbank offer

[4] Counsel for the respondent submitted that on 14 March 2011, some three weeks before the hearing of the appeal, the respondent made a *Calderbank* offer which the appellant did not better following the hearing of the appeal. As counsel for the appellant points out in his written submissions, the result of the appeal was much more favourable than the offer. I would reject this submission.

Other submissions

[5] Counsel for the respondent referred to a number of decisions of the Court of Appeal of New South Wales relating to costs, where certain principles have developed. Most of the principles to which he referred in his written outline, related to the approach to be taken on awarding costs at first instance, and are not relevant, as we have not been invited to make a costs order in relation to the original proceedings, this being left to the Master to decide. However, whatever may be the correct approach at first instance, it is clear that a different approach is taken on appeal. In *Kardos v Sarbutt (No.2*[5]*)* the Court of Appeal of New South Wales held that the fact that the appellant achieved substantial success warranted an order for costs in her favour, notwithstanding that she did not succeed on all of the points argued on appeal. In *Baker v Towle*[6] the same Court held that the usual rule was that costs on appeal should follow the event, unless there were a sufficient

[5] [2006] NSWCA 206.
[6] (2008) 39 Fam LR 323.

reason to otherwise order. In that case, the Court allowed 25% of the costs of the appeal because the appellant was not wholly successful.

[6] In my opinion, the appellant was wholly successful in this appeal, notwithstanding that the appellant did not succeed on all of the grounds advanced either in the Notice of Appeal or on the hearing. The matters upon which the appellant did not succeed did not occupy much of the time of the Court. The whole hearing was disposed of very efficiently and in less than a day. It resulted in a significant amount in the appellant's favour.

Conclusion

[7] I would order that the respondent pay the appellant's costs of the appeal to be taxed on the standard basis.

SOUTHWOOD J:

[8] I agree with the reasons for decision of Mildren J.

BLOKLAND J:

[9] I agree.