SUPREME COURT OF QUEENSLAND

CITATION:	*MBL v JP* [2011] QCA 220
PARTIES:	**MBL** (appellant) **v** **JP** (respondent)
FILE NO/S:	Appeal No 2705 of 2011 SC No 1645 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2011
JUDGES:	Fraser JA, McMurdo and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders below be set aside.** **3. A new trial is ordered.** **4. The respondent pay the appellant's costs of and incidental to the appeal.** **5. The respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act*.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – INJUSTICE – PARTICULAR CASES – REFUSAL OF ADJOURNMENT – where respondent incarcerated and appeared via telephone – where trial judge considered the interests of justice warranted the refusal of an adjournment – whether trial judge erred in failing to grant appellant an adjournment of the trial – whether denial to respondent of opportunity to cross-examine was contrary to natural justice – whether it was unfair for trial to proceed in circumstances where respondent did not have access relevant documentation *Property Law Act* 1974 (Qld), s 286, s 298 *Uniform Civil Procedure Rules* 1999 (Qld), r 439

Aluminium Louvres and Ceilings Pty Ltd v Zheng [2006] NSWCA 34, cited
AON Risk Services Australia Limited v The Australian National University (2009) 239 CLR 175, [2009] HCA 27, cited
GAJ v RAJ [2011] QCA 190, cited
House v The King (1936) 55 CLR 499, [1936] HCA 40, cited
Kioa v West (1985) 159 CLR 550, [1985] HCA 81, followed
Ramsay v Australian Postal Corporation (2005) 147 FCR 39, [2005] FCA 640, cited

COUNSEL: The appellant appeared on his own behalf
P W Hackett for the respondent

SOLICITORS: The appellant appeared on his own behalf
No appearance for the respondent

[1] **FRASER JA**: I gratefully adopt and will not repeat Boddice J's description of the background to and the issues in this appeal.

[2] The respondent's evidence in chief at the trial was contained in affidavits. She was ready to enter the witness box but the trial judge denied the appellant the right to cross-examine her. As Boddice J explains in [23] of his Honour's reasons, the trial judge's ruling that the respondent was not required to be available for cross-examination was contrary to the relevant procedural rule (r 439 of the *Uniform Civil Procedural Rules* 1999 (Qld)). The respondent did not submit that there was any justification for that departure from the usual procedure in this case. That ruling therefore fell within Owen J's conclusion in *Ex parte Fealey*[1] that a decision is contrary to natural justice if it "denies to a litigant some right or privilege or benefit to which he is entitled in the ordinary course of the proceedings, as for instance where a Magistrate refuses … to allow a witness to be cross-examined".

[3] The respondent's testimony was plainly relevant to the trial judge's determination of the appropriate orders under s 280 of the *Property Law Act* 1974 (Qld). There was at least a possibility that the abrogation of the appellant's right to cross-examine deprived the appellant of a more favourable order. Since the respondent was unable to demonstrate that it would be futile to order a new trial, the appellant is entitled to that order.[2]

[4] I agree with the orders proposed by Boddice J.

[5] **McMURDO J**: I have had the advantage of reading the draft judgment of Boddice J. I agree with those reasons and the orders which he proposes.

[6] **BODDICE J**: By originating application filed 16 February 2009, the respondent sought orders, pursuant to s 280 of the *Property Law Act* 1974 ("the Act"), in respect of a property in Smithfield in the State of New South Wales ("the property"). On 21 March 2011, the Supreme Court declared that the appellant held

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1 (1897) LR (NSW) 282 at 288. This passage was quoted with apparent approval by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 98 [35], [2000] HCA 57.

2 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147, [1986] HCA 54.

the property on trust for the respondent. It was ordered that the appellant execute a transfer of that property to the respondent.

[7] The appellant appeals that decision. The issues on appeal are whether the trial judge erred in refusing to grant the appellant an adjournment of the trial, whether the trial was unfair, and whether the trial judge made an error such that the order transferring the property failed to distribute assets of the relationship in a just and equitable manner pursuant to s 286 and s 298 of the Act.

Background

[8] The appellant is 55 years of age. He is presently incarcerated at Woodford Correctional Centre, serving a 15 year sentence. That sentence was imposed on 5 March 2008 when the appellant was convicted of two counts of trafficking in dangerous drugs and one count of possession of a dangerous drug. He will be eligible for parole in March 2020.

[9] The respondent is aged 39. She is the primary carer of their child. On 5 March 2008, the respondent was convicted of possession of dangerous drugs. She was sentenced to four years imprisonment. On appeal, that sentence was reduced to two years. She was released on parole on 4 March 2009.

[10] The appellant and the respondent commenced living together in or about 2001. They separated in or about February 2007. At the start of their relationship, both the appellant and the respondent had assets. Other assets were acquired during the relationship. As a result of changed circumstances, and the subsequent criminal proceedings, most of those assets had been disposed of prior to trial. The remaining asset was the property. Disposition of that asset was subject to a determination by the trial judge as to relevant contributions made by the appellant and the respondent to the assets properly to be considered as part of the asset pool.

The trial

[11] The proceeding came on for hearing on 18 March 2011. It had been allocated that date on 14 December 2010. The proceeding had previously been listed for trial on 29 November 2010, but could not proceed due to the unavailability of a judge. The proceeding had been the subject of trial directions, having been placed on the supervised case list in June 2009.

[12] At the hearing, the solicitors on the record for the appellant sought leave to withdraw. At the same time, counsel, instructed by another firm of solicitors, made application on behalf of the appellant for an adjournment. Counsel indicated that his instructions were limited to appearing for the purposes of seeking the adjournment. As a result, the trial judge arranged for the appellant to appear by telephone.

[13] After hearing submissions, the trial judge granted the solicitors on the record leave to withdraw but refused an adjournment of the hearing. In refusing the adjournment, the trial judge found that the interests of justice were the paramount consideration. The trial judge noted that the proceeding had been characterised by delay, that there were circumstances of some urgency in its determination, that the respondent had limited funds, and that the respondent had "every proper expectation

that the matter should proceed to trial today".[3] The trial judge concluded that to grant an adjournment would cause injustice to the respondent and other litigants in the Court's Civil jurisdiction, and that costs are not always sufficient to serve the interests of justice.[4] The trial judge was satisfied the appellant was intent on delaying the proceedings and had the ability to conduct proceedings.[5]

[14] After an adjournment was refused, counsel withdrew. The trial then proceeded with the appellant unrepresented, and appearing by telephone.

Appeal

[15] The notice of appeal contains grounds of appeal relevant to contentions that the distribution ordered by the trial judge was unjust and inequitable in all the circumstances. However, affidavit material filed by the appellant at the time of filing the notice of appeal contained contentions that the trial judge erred in failing to grant the appellant an adjournment of the trial, and that it was unfair that he was required to proceed with the trial and to be cross-examined in circumstances where he did not have access to legal representation and the relevant documentation.

[16] Whilst these latter contentions did not form specific grounds of appeal, it was accepted by the respondent that they are appropriately to be viewed as grounds of appeal relied upon by the appellant.[6] The respondent submits that notwithstanding an acceptance that the grounds of appeal properly include an appeal against the refusal of the adjournment, the appeal should be dismissed as the trial judge properly refused the appellant's application for an adjournment of the trial, and ordered a just and equitable distribution of the joint property having regard to the available material.

Consideration

[17] The trial judge's decision to refuse an adjournment involved an exercise of discretion. That decision is only to be overturned on appeal if it is established that the trial judge made an error, in fact or law, in exercising that discretion.[7]

[18] In refusing the adjournment, the trial judge considered the relevant authorities, and weighed up the relevant circumstances and factors. Those circumstances plainly supported a conclusion that the interests of justice warranted the refusal of an adjournment. The appellant has not established any error of law, or misapplication of fact or law such as to disturb the trial judge's discretion. The trial judge properly refused the appellant's application for an adjournment.

[19] That, however, does not dispose of the appellant's submission that the trial, as conducted, was unfair. That unfairness is alleged to arise from the way in which the trial proceeded after the refusal of the adjournment. The appellant was not given the opportunity to cross-examine the respondent, and was cross-examined without having access to relevant documentation.

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3 T 1-12/25.
4 T 1-14/5.
5 T 1-15/25-35. See *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.
6 T 1-7.
7 *House v The King* (1936) 55 CLR 499 at 504-505.

[20] When the hearing of the proceeding itself commenced, the respondent's counsel read the material relied upon including two further affidavits filed by leave that morning. One of those affidavits was by the respondent. The respondent's counsel then indicated he was in a position "to both open the case and to call my client".[8] However, the trial judge stated that as no notice had been given by the appellant that he required the respondent for cross-examination, the respondent need not be called to give evidence. In determining that the respondent was not to be cross-examined, the trial judge did not seek any submissions from the appellant.

[21] The trial judge's failure to afford the appellant any opportunity to make submissions as to whether the respondent ought to be available for cross-examination amounted to a denial of procedural fairness.

[22] Procedural fairness requires that a party to court proceedings be afforded the opportunity to present a case.[9] Whilst there is no general rule that procedural fairness requires an opportunity for examination and cross-examination as part of a reasonable opportunity to present a case,[10] the opportunity to present a case, in the context of a proceeding such as this proceeding, includes the opportunity to test material relied upon, by cross-examination.[11]

[23] The appellant was entitled to be heard in relation to any denial of a right to cross-examine, particularly where the respondent's evidence was contentious, no reason was being advanced by the respondent as to why she ought not to be cross-examined and a further affidavit by the respondent had been filed by leave at the hearing. There had been no specific direction given in the case management of the proceeding requiring the appellant to give notice that the respondent was required for cross-examination. Whilst r 439 UCPR provides for the giving of notice to a deponent for cross-examination, the fact that notice has not been given does not mean a party cannot cross-examine the deponent. Further, the respondent had been given leave to file a further affidavit. Due to the short service, she was required to be available for cross-examination.[12]

[24] Whilst the trial judge indicated, in the course of submissions, that he doubted there were any areas in which there would be effective cross-examination, that did not mean there was no denial of procedural fairness. The trial judge was not aware of the areas to be the subject of cross-examination and it cannot be said that the matters contained in the respondent's affidavit, including the affidavit by leave, could not properly be the subject of cross-examination, and submissions in relation to evidence given as a result of that cross-examination.

[25] There is no doubt that had the appellant been given an opportunity to make submissions in respect of the matter, the appellant would have required the respondent for cross-examination. The appellant specifically raised the question of when the respondent would be giving evidence at the conclusion of his cross-examination.[13] Despite raising that matter, the trial judge did not afford the respondent an opportunity to make further submissions in respect of the matter, or require the respondent to give evidence at the hearing. The trial judge simply noted

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8 AB 18/45.
9 *Kioa v West* (1985) 159 CLR 550 at 582; 615.
10 *Aluminium Louvres and Ceilings Pty Ltd v Zheng* [2006] NSWCA 34.
11 Cf *Ramsay v Australian Postal Corporation* (2005) 147 FCR 39 at 46-47 [26].
12 Rule 439(3) UCPR.
13 AB 33/40.

that no notice that she was required for cross-examination, had been given.[14] The fact the respondent did not raise it at an earlier stage in the proceeding is of no moment in the circumstances.

[26] The second aspect to the allegation of a denial of procedural fairness relates to the cross-examination of the appellant at the hearing. It is apparent from the transcript that the trial judge formed a view prior to the commencement of the hearing that the appellant should be available to participate in the hearing should he be required for cross-examination.[15] The trial judge had his associate make arrangements for the respondent to be available by telephone.[16]

[27] Whilst that arrangement may have afforded the appellant procedural fairness, in circumstances where his legal representative had been given leave to withdraw and an adjournment had been refused, the trial judge permitted the appellant to be cross-examined when the appellant did not have available to him relevant documentation, including copies of his affidavit and the affidavits filed by leave that morning. Whilst his answers in cross-examination revealed he had with him the respondent's affidavit,[17] he did not have his own affidavit.[18] His cross-examination included reference to his affidavit and other documents, some of which were tendered as exhibits during the cross-examination. This lack of access to documentation was squarely raised by the appellant on multiple occasions during the hearing.[19]

[28] To require the appellant to respond to cross-examination, and to conduct the hearing of the proceeding, without access to his affidavit material and the other documentation to be relied upon at the hearing, denied him the opportunity to properly present his case. He could not properly consider the issues to be addressed at the hearing. He was denied the opportunity to properly answer questions asked of him.

Conclusion

[29] Whilst the appellant has not established that the trial judge erred in failing to grant an adjournment, the conduct of the subsequent hearing was unfair in that the appellant was denied procedural fairness. Had the appellant been afforded the opportunity to cross-examine the respondent, and to have access to relevant documentation whilst himself being cross-examined, the trial judge's determination of what was a just and equitable determination of the distribution of property may have been different. The trial judge's determination of the proceedings cannot stand in such circumstances.

[30] The denial of procedural fairness renders it inappropriate for this Court to make any determination in respect of the appellant's contentions as to what is a just and equitable distribution of the assets of the relationship. The determination of the distribution of the property will have to be the subject of further hearing.

[31] I would allow the appeal, with costs, and set aside the orders below.

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14 AB 33/45.
15 AB 18/35.
16 AB 7/40.
17 AB 51/20-30.
18 AB 52/20.
19 AB 22/40, 27/40; 28/50; 29/40, 31/40-60.

[32] The appeal has succeeded on a question of law. The error of law was not due to the way the respondent conducted her case. The conduct of the hearing was not as a consequence of any objection by the respondent to being cross-examined by the appellant, or any refusal to provide documentation. The respondent's counsel indicated at the commencement of the hearing that he was ready to open the case and call his client.[20] I would grant the respondent an indemnity certificate under s 15 of the *Appeal Costs Fund Act*.

Orders:

[33] I would order:

1. The appeal be allowed.
2. The orders below be set aside.
3. A new trial.
4. The respondent pay the appellant's costs of and incidental to the appeal.
5. The respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act*.

[20] Cf *GAJ v RAJ* [2011] QCA 190.