

# SUPREME COURT OF QUEENSLAND

CITATION: *Robertson v Vlahos & Anor* [2011] QCA 243

PARTIES: **GERALDINE FOOI-FONG ROBERTSON**  
(appellant)  
v  
**LESLEY JOY VLAHOS**  
(first respondent)  
**ANASTASI VLAHOS**  
(second respondent)

FILE NO/S: Appeal No 13213 of 2010  
SC No 12451 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 3 August 2011

JUDGES: Margaret McMurdo P, Muir JA and Boddice J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDER: **1. The application to adduce further evidence be refused.**  
**2. The appeal be dismissed, with costs.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where primary judge found appellant had no real prospect of succeeding in proceeding challenging seizure of animals pursuant to *Animal Care and Protection Act 2001* (Qld) – where appellant appeals that decision on the ground that the primary judge erred in fact and law in giving summary judgment – whether primary judge’s finding should be set aside

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where the appellant sought leave to adduce new evidence in support of her claim – where the further evidence relates to documentation relevant to the dogs seized by the RSPCA and the dogs surrendered by the respondents – where the documentation sought to be adduced as new evidence relates to a factual finding previously determined adversely to the appellant – whether leave should be granted to adduce further evidence on appeal

*Animal Care and Protection Act 2001 (Qld)*, s 142, s 144, s 149, s 154, s 215

*Uniform Civil Procedure Rules 1999 (Qld)*, r 293

*AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, cited  
*State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423, applied  
*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL: The appellant appeared on her own behalf  
 B F Charrington, with R A Nichols, for the respondents

SOLICITORS: The appellant appeared on her own behalf  
 McCarthy Durie Ryan Neil Solicitors for the respondents

- [1] **MARGARET McMURDO P:** I agree with Boddice J's reasons for refusing the application to adduce further evidence and for dismissing the appeal with costs.
- [2] **MUIR JA:** I agree with Boddice J that the appellant failed to establish any basis for setting aside the primary judge's finding. I agree also that the appellant has no real prospect of succeeding on any part of her claim and that the appeal should be dismissed. I agree with the reasons of Boddice J except that, in the absence of an effective contradictor, I do not wish to express a view on the abuse of process ground.
- [3] In addition to the question of illegality addressed by the primary judge and Boddice J, there was overwhelming evidence that the subject four dogs were amongst 104 lawfully seized by the RSPCA. The RSPCA therefore had entitlement to possession of the subject dogs and their removal from the premises of the respondents was lawful. The removal gave rise to no cause of action against the respondents. Alternatively, the subject dogs were lawfully seized from the respondents pursuant to s 144 of the *Animal Care and Protection Act 2001 (Qld)*.
- [4] **BODDICE J:** In December 2008, the appellant commenced proceedings against the respondents claiming damages for breach of contract. On 12 November 2010, those proceedings were dismissed pursuant to r 293, *Uniform Civil Procedure Rules 1999 (Qld)*. The appellant appeals that decision on the ground that the primary judge erred in fact and law in giving summary judgment. The appellant also seeks leave to adduce new evidence in support of her claim.

### **Background**

- [5] In January 2008, the appellant was operating a business of breeding poodles. On 9 January 2008, a warrant, issued pursuant to the *Animal Care and Protection Act 2001 (Qld)* ("the Act"), was executed on the appellant's premises. An inspector of the RSPCA seized 104 dogs pursuant to s 144 of the Act. The appellant was given a receipt for those dogs. That receipt listed 100 poodles, two labradors and two pomeranians. The seized dogs were transported to the RSPCA's animal shelter. A count conducted at that shelter revealed only 100 dogs, all in very poor condition.
- [6] On 11 January 2008, the male respondent contacted the RSPCA and arranged to hand over four poodles. The male respondent swore that these poodles had been

provided to him by the appellant on the evening of 10 January 2008. The appellant told him the RSPCA had raided her premises and seized her poodles, and that she had hidden these dogs. She wanted the respondents to find homes for them. Upon request, the respondents executed a form headed “Written Consent to Seizure”. Part A of that form consented to the seizure of the four dogs. Part B purported to consent to a transfer of ownership of the four dogs to the RSPCA.

- [7] On 5 February 2008 and 14 March 2008, an authorised delegate of the Chief Executive of the Department of Primary Industries and Fisheries purported to forfeit, to the State, the 104 dogs seized pursuant to the warrant executed on 9 January 2008.
- [8] The appellant challenged the decision to forfeit the dogs. That decision was confirmed by way of internal review. The appellant appealed to the Magistrates Court. That appeal, by way of rehearing, was dismissed. An appeal to the District Court was struck out on the ground it did not raise a question of law or any arguable error of law. A subsequent appeal to the Court of Appeal was also dismissed. The appellant sought leave to appeal to the High Court. Leave was refused on 4 November 2010.

### **Present Proceedings**

- [9] In December 2008, the appellant commenced proceedings against the respondents claiming damages for breach of contract. Relevantly, she alleged that on 10 January 2008 she and the respondents entered into a contract whereby the respondents would care for four of her poodles for two days. Pursuant to that contract, the respondents collected the four dogs but failed to return them as a result of which she suffered loss and damage.
- [10] The respondents defended the proceedings on the basis that whilst they admitted taking possession of the four dogs on 10 January 2008, they denied doing so pursuant to the alleged or any contract. They alleged the appellant gave them the dogs to keep, or to re-home. They further alleged that the four dogs were among 104 dogs seized from the appellant’s premises by officers of the RSPCA on 9 January 2008, and that after the seizure the appellant retook possession of them and hid them from the RSPCA officers in breach of the Act, with the intention of defeating the purposes of the Act. Consequently any alleged contract was unenforceable.

### **Primary Decision**

- [11] The primary judge found:
- (a) If the four dogs were among those seized by the RSPCA on 9 January 2008, and if the appellant hid them as alleged so as to prevent them being taken away by the RSPCA, the appellant was unlawfully in possession of them contrary to s 149(2)(d) of the Act. If she made the alleged contract with the respondents, it was an underhand dealing, improperly interfering with the RSPCA’s right to possession of the dogs. Such conduct constituted tampering within the meaning of s 149 of the Act.<sup>1</sup>
- (b) Whilst the respondents bore the ultimate onus of persuading the Court that the appellant had no real prospect of succeeding on all or part of her claim

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<sup>1</sup> Judgment at [26].

and that there was no need for a trial, as the respondents swore that the plaintiff told them she hid the four dogs from the RSPCA, and led evidence that 104 dogs were seized but only 100 dogs admitted to the animal shelter, there was an evidentiary onus on the appellant to establish that the four dogs were not on her premises and among those seized on 9 January 2008.<sup>2</sup>

- (c) In the Magistrates Court proceeding in respect of the forfeiture of the dogs, the appellant gave evidence that the four dogs in question were not seized in a raid on 9 January 2008, but her evidence on that point was expressly rejected by the Magistrate, describing it as “intended to deceive the Court”.<sup>3</sup>
- (d) To allow the appellant to relitigate this question of fact would be an abuse of process. The question was a critical one in the proceedings before the Magistrate, and the plaintiff had had the opportunity to call evidence as to the whereabouts of the four dogs at the time of the raid but did not do so. Further, the Magistrate’s finding, made after the evidence had been thoroughly tested by cross-examination, was clear and unequivocal.<sup>4</sup>
- (e) In the determination of the application for summary judgment, there should be a finding of fact that the four dogs were among those seized by the RSPCA on 9 January 2008, and that the appellant hid them from the RSPCA officers to prevent them being removed from the property.
- (f) On the appellant’s own evidence, she entered into the contract with the respondents to prevent the RSPCA from taking the four dogs. A contract in the terms she alleges was therefore unenforceable.<sup>5</sup>
- (g) The appellant had no reasonable prospects of success on her claim and there was no need for a trial. The claim should be dismissed.<sup>6</sup>

### **Appellant’s Submissions**

[12] The appellant’s grounds of appeal assert that the primary judge made numerous errors of law and fact. In essence, the appellant contends the primary judge erred in:

- (a) accepting that factual findings made in prior proceedings were correct and in finding that to allow the appellant to relitigate those factual findings was an abuse of process;
- (b) finding that any alleged contract with the respondents was legally unenforceable;
- (c) finding that there was immunity from civil liability under s 215 of the Act.

The appellant also alleged there was judicial bias and conspiracy in the decisions made by the primary judge and by earlier judicial officers.

[13] Central to the appellant’s submissions on appeal is a contention that the four dogs provided to the respondents were not among the 104 dogs seized by the RSPCA inspector on 9 January 2008. The appellant contends they were dogs housed elsewhere at the time of the execution of the search warrant that were subsequently returned to her and then provided by her to the respondents. The appellant submits

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<sup>2</sup> Judgment at [27].

<sup>3</sup> Judgment at [28].

<sup>4</sup> Judgment at [32]-[33].

<sup>5</sup> Judgment at [37].

<sup>6</sup> Judgment at [40].

that as such, those dogs were not seized pursuant to the search warrant and were not lawfully entitled to be taken by the RSPCA. Further, the respondents had no authority to pass possession of them to the RSPCA inspector or to surrender them as they were not the respondents' dogs. The new evidence sought to be adduced by the appellant relates to documentation relevant to how many dogs were seized by the RSPCA, and whether the four dogs surrendered by the respondents, were among those dogs seized by the RSPCA.

### **Respondents' Submissions**

- [14] The respondents contend that the primary judge correctly held that the appellant's claim had no real prospects of success and that there was no need for a trial as any attempt to relitigate the issue of whether the four subject dogs formed part of the 104 dogs seized by the RSPCA on 9 January 2008 was an abuse of process. Further, the primary judge correctly held that the appellant had attempted to enter into an arrangement with the respondents for the purposes of defeating the seizure of the subject dogs by the RSPCA, and that any such contract between the parties as alleged by the appellant was unenforceable by reason of illegality. Finally, the respondents contend that insofar as the appellant contends that the primary judge misapplied the protection from liability provision contained in s 215 of the Act, the appellant misapprehends the effect of the primary judge's decision as the primary judge expressly declined to decide whether the protection afforded by that section applied in the circumstances of the case.

### **Discussion**

- [15] In dismissing the appellant's claim, the primary judge found that the central premise relied upon by the appellant, namely, that the four dogs provided by her to the respondents were not among the 104 dogs seized by the RSPCA on 9 January 2008, was factually incorrect; the four dogs were among those seized by the RSPCA on 9 January 2008, and the appellant hid them from the RSPCA officers to prevent their being removed from her property.<sup>7</sup> There was overwhelming evidence to support that finding.
- [16] Once that finding was made, the application for summary judgment was properly to be determined on the basis that the four dogs the subject of the appellant's claim were among the dogs seized by the RSPCA on 9 January 2008. That factual finding meant the appellant had no reasonable prospects of succeeding in her claim against the respondents. The primary judge correctly held that that claim had no real prospects of success, and that there was no need for a trial of the issues.

#### *New Evidence*

- [17] The documentation sought to be adduced as new evidence relates to that factual finding. The documentation does not affect that factual finding. I would refuse leave to adduce the documentation sought to be relied upon by the appellant.

#### *Abuse of Process*

- [18] In finding that the four dogs provided by the respondents were among those dogs seized by the RSPCA officers on 9 January 2008, the primary judge noted that this issue had been expressly determined in Magistrates Court proceedings appealing

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<sup>7</sup> Judgment at [34].

against the forfeiture decisions at which the appellant gave evidence that the four dogs in the possession of the respondents were not seized in the raid on 9 January 2008. That evidence was expressly rejected by the Magistrate. The primary judge further noted that whether the dogs in the possession of the respondents were among the dogs seized by the RSPCA was a critical question in the proceedings before the Magistrate, and that the Magistrate's clear and unequivocal finding was made after the evidence of the appellant, the respondents and the RSPCA officers had been thoroughly tested by cross-examination.<sup>8</sup> The primary judge found that in such circumstances it would be an abuse of process to allow that fact to be relitigated.

- [19] To allow a party to relitigate an issue decided between the party and a third party may constitute an abuse of process where it would be oppressive and unfair to the other party to the litigation, and would put in question the integrity of the system of administration of justice. Such an abuse can arise in the case of subsequent proceedings where they are initiated to mount a collateral attack on a final decision against the party made by another court of competent jurisdiction in which the party had a full opportunity of contesting the decision.<sup>9</sup> Whether there is an abuse of process depends on the circumstances. In *State Bank of New South Wales Limited v Stenhouse Ltd*,<sup>10</sup> Giles J said:

“The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are –

- (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or an ultimate issue;
- (b) the opportunity available and taken to fully litigate the issue;
- (c) the terms and finality of the finding as to the issue;
- (d) the identity between the relevant issues in the two proceedings;
- (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of –
- (f) the extent of the oppression and unfairness to the other party if the issue is relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
- (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process.”

- [20] Whether the four dogs surrendered by the respondents were among the 104 dogs seized by the RSPCA on 9 January 2008 was the central factual issue in dispute before the Magistrate in the appeal against the forfeiture decision. Evidence was given by the appellant, the respondents and relevant RSPCA officers in relation to

<sup>8</sup> Judgment at [32].

<sup>9</sup> *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at [33].

<sup>10</sup> (1997) Aust Torts Reports 81-423 at 64,089.

that factual dispute. That evidence was subject to detailed cross-examination. The Magistrate's finding was made after detailed consideration of all that evidence.

- [21] It is an abuse of process for proceedings before a Court, even if not giving rise to an estoppel, to continue if their continuance would be unjustifiably vexatious and oppressive by reason that it is sought to relitigate anew a case already disposed of by earlier proceedings.<sup>11</sup> To seek to relitigate the central factual finding in dispute before the Magistrate would arguably be oppressive and unfair. However, in circumstances where the appellant is not legally represented, and there is overwhelming evidence to support the primary judge's findings, it is unnecessary to express a concluded view on whether it is an abuse of process to attempt to relitigate an issue decided in earlier proceedings between the appellant on the one hand, and the RSPCA and the Chief Executive, Department of Employment, Economic Development and Innovation, on the other.

### *Illegality*

- [22] The primary judge further held that even if the appellant had been able to establish the existence of a contract in the terms alleged by the appellant, that contract would, having regard to the finding of that four dogs surrendered by the respondents were among those lawfully seized by the RSPCA on 9 January 2008, and the appellant's own evidence that she had entered into the contract in order to prevent the RSPCA from taking the four dogs, be unenforceable. Any such contract constituted tampering within the meaning of s 149 of the Act as it was an underhand dealing improperly interfering with the RSPCA's rights to possession of the dogs.
- [23] In reaching that conclusion, the primary judge correctly identified that as the respondents had charge of the four dogs at the time that they surrendered possession of them to the RSPCA, the respondents were lawfully able to consent to their seizure under s 142(2)(b) of the Act. The primary judge noted that whilst the form signed by the male respondent purported to also transfer ownership of the dogs, he was not capable of doing as he was not their owner, but in any event, the RSPCA had not agreed in writing to the transfer. Instead the Chief Executive of the Department had forfeited the dogs under s 154(2)(c) of the Act.
- [24] Having regard to the factual findings made by the primary judge, the finding that any such contract would be unenforceable was plainly correct. Such a finding meant the appellant had no real prospects of succeeding in her claim, even if she established the existence of the contract.

### *Immunity*

- [25] The appellant's contention that the primary judge erred in allowing reliance upon a claim of immunity from civil liability pursuant to s 215 of the Act is without substance. The primary judge expressly found it was not necessary to determine that issue.<sup>12</sup>

### *Judicial Bias/Conspiracy*

- [26] The appellant's contentions are devoid of merit. No material has been placed before this court to support such serious assertions.

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<sup>11</sup> *Walton v Gardiner* (1993) 177 CLR 378 at 393.

<sup>12</sup> Judgment at [39].

**Conclusion**

[27] The appellant has failed to establish any basis for setting aside the primary judge's finding that the appellant had no reasonable prospects of success on her claim, and that there was no need for a trial.

[28] I would order:

1. The application to adduce further evidence be refused;
2. The appeal be dismissed, with costs.