Supreme Court Notes

by Cameron Ford, Barrister at Law

ADMINISTRATIVE LAW - MA(C)A - prerogative relief where appeal available - MA(C)A ss12, 27, 29 and 42 - RSC 47.04 and 47.05.
Gardner v General Manager of TIO and Ors (Gray J) 27/6/91.
The General Manager determined to cease payments to the plaintiff which determination was confirmed by the Board. The plaintiff appealed to the Tribunal. Before that appeal was heard, the plaintiff applied in this proceeding for declarations and certiorari quashing the determination of the Board. Held (on a preliminary question and in dismissing the action) "If a statutory authority has power to affect the rights of a person it is fundamental that it must hear the person and otherwise act lawfully before exercising the power." However, here, as there was a full right of appeal, with a hearing de novo, before a Supreme Court Judge, the Court's supervisory role over administrative bodies was ousted. The Court had no power to grant prerogative relief against the Board and the General Manager. Action dismissed.
Counsel: T Riley QC and A Wyvill, Applicant/Defendant instructed by Ward Keller; C McDonald, Respondent/Plaintiff instructed by Cridlands.

PRACTICE - setting aside consent judgment - unilateral mistake.
Joseph Cielo v M G Kailis Gulf Fisheries Pty Ltd (Gray J) 14/6/91.
After negotiations which included reference to interlocutory costs orders, the solicitors for the parties signed a consent judgment for a fixed sum with no reference to interlocutory costs. The solicitor for the defendant then sought payment of those costs, and the solicitor for the plaintiff maintained that they were included in the judgment sum. On application by the plaintiff to set aside the consent judgment because of unilateral mistake. Held here there was no mistake, but there can be circumstances where a perfected judgment based on an agreement can be set aside for unilateral mistake. To do so, a separate action must be brought challenging the agreement on which the judgment is based. That agreement will be invalidated only if equity would set it aside, ie serious mistake of a fundamental term known to the other party who deliberately keeps the mistaken party ignorant. The Court will not lend its assistance to an order which ought not be made, even if consented to.
Counsel: J Waters, Plaintiff, instructed by the Legal Aid Coimmission; J Tippett, Defendant, instructed by Ward Keller.

ESTOPPEL - common law and equitable.
EVIDENCE - inferences from failure to call and to explain that failure.
McCraith v Fraser and Ors (Third Party Proceedings) (Gray J) 26/6/91.
Third defendant held liable to the plaintiff in damages, sought indemnity from TIO (third party). Third defendant had arranged insrance with TIO which had lapsed at the time of the accident. On receipt of the writ, third defendant spoke to TIO manager who told him he was covered. TIOs solicitors then conducted his defence for two years before telling him they could no longer act. Held because the policy had lapsed, third defendant's claim to an indemnity thereunder failed. But, because of the representation of cover and the conducting of the action by it, TIO estopped from denying its liability to indemnity. Enunciation of the elements of common law estoppel (p16) and distinguished from equitable estoppel. The detriment of not having the conduct of his action for two years was sufficient detriment. Establishment of common law estoppel (in pais) entitles the one party, as a matter of law, to have the other held to his representation. It is not a discretionary matter as with equitable estoppel. Common law or equitable estoppel continue to exist as separate categories of estoppel.
Where evidence was not called and where there was no explanation of its absence an inference was drawn that the evidence would not have helped the party who should have called it.
Counsel: O Downs, third defendant instructed by L Downs; T Riley QC and P Smith, third party, instructed by J Noonan.

COURTS AND JUDGES - bias - Judge previously appearing as counsel against party.
Precision Fabrications Pty Ltd v Roadcon Pty Ltd (Mildren J) 4/7/91.

As counsel, Mildren J had argued a Full Court appeal against Roadcon Pty Ltd in 1977 involving the same contract in issue in this proceeding. Roadcon Pty Ltd applied to his Honour to disqualify himself on the ground that he may be perceived to be biased.
Held: The Judge was not in fact biased and the principles concerning whether or not there was an apprehension of bias were:
1. whether the public and the parties might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the matter;
2. whether his participation might lead to that apprehension of prejudgment or bias;
3. regard must be had to the wishes of the other party so as not to abdicate the judicial function by immediately disqualifying oneself;
4. cases where the judge has an interest in the result, has indicated a prejudgment to the parties, is a relative or friend of a party or material witness, or holds some other position incompatible with his judicial function. But bias does not come in closed categories;
5. having regard to the objective facts

and legal history of the matter, but not indivudal knowledge of the particular judge;
6. he had acted for a party, but not in mere peripheral litigation.
None of these matters existed here.
Application to disqualify dismissed.
Counsel: J McCormack, Applicant/Defendant instructed by Ward Keller; J Waters, Respondent/Plaintiff instructed by David Francis and Associates.

APPEAL - FROM MASTER
RSC 3303, 33.07(1)(a), 33.08 - disclosure of letters seeking medical reports - legal professional privilege - express and implied waiver.
Coles Meyer Ltd v Bailey (Mildren J) 18/7/91.

Appellant sought inspection of Respondent's (plaintiff in the action) letters to medical experts seeking reports, on the basis that the letters formed part of the reports, or legal professional privileges had been waived. Held: question is whether it can be inferred that the expert intended another document/s to be read with the reports. Answer, 'yes'. The Respondent has thus failed to comply with R33.07(a) and 33.08. The consequences of that failure are that, unless there is an implied waiver of privilege, the Court cannot order the letters to be disclosed because they are clearly privileged and the privilege has not been expressly or impliedly waived. Examination of the history of legal professional privilege and rules of Court impinging thereon. There can be an implied waiver of privilege, where the disclosure or use of material renders it unfair to uphold privlege in associated material. Here, it is not unfair because non-disclosure of the additional material in the letters which the surgeon intended should be read with his reports will make his evidence inadmissible at trial without leave. The Appellant could also apply for a stay for non-compliance with rr33.07, 33.08(2) and possibly 33.10. There is no prejudice to the Appellant in non-disclosure of that material as it can obtain it in other ways. Order for inspection of those parts of the letters already disclosed. Otherwise, appeal dismissed with costs.
Counsel: A Wyvill, Appellant, instructed by Ward Keller; W Ryan, Respondent, of Cridlands.

ESTOPPEL - solicitor acting on information from local authority - solicitor had means to know of true facts.
RATES AND RATING - exemption where obligation to subdivide - defects in notices and publication - whether or not fatal.
The Corporation of the Municipality of Alice Springs v Surfers Paradise Nominees Pty Ltd and the Desert Springs Country Club Pty Ltd (Martin J) 27/6/91.

Action for declaration by Council that rates were lawfully levied. Argued exempt because obliged to subdivide (Crown Lands Act ss18 and 23E). Held: No obligation to subdivide here, so not exempt. Argued that Council estopped from demanding rates for the period before the date of an enquiry by solicitor's clerk as to whether land was known to the Council, to which the answer was "no." Held: The solicitor acted for both vendor and purchaser and should have known that merely because the land was not known to the Council did not mean that no rates were outstanding or that the land was not rateable. No estoppel. Argued that formal defects in notices and publications invalidated the levying of rates. Held: Look to the statute and ascertain Parliament's intention as to the consequences of non-compliance with formalities. Here, the defects in the notices did invalidate the levying, but defects in publication and notifying before publication were not fatal.
Counsel: A Wyvill, Plaintiff, instructed by Martin and Partners; J Reeves, Defendant, instructed by McBride and Doman.

APPEAL - Master - not necessary to specify grounds where hearing de novo.
COSTS - security - discretion - considerations - r 62.02(1)(b)
PRACTICE - further affidavit on appeal - r77.05(7)(b).
Wrenfeld Pty Ltd v Finch (Kearney J) 23/7/91.

On appeal from Master's refusal to grant security for costs, applicant sought to rely on further affidavit. Held: applicant may be required to prove by evidence why the new material was not before the Master. Further it is unnecessary to specify grounds of appeal in this type of appeal. To obtain security for costs, an applicant must establish, prima facie, that there is "reason to believe: the plaintiff has insufficient assets in the Territory. It is not necessary to show that the plaintiff is insolvent. The court has a general and unfettered discretion to order security, without any predisposition. It will take into account what is just and reasonable in all the circumstances of the case. A plaintiff corporation resisting an applicatiobn for security should place before the court a full and frank statement of its assets and liabilities as well as those of its shareholders. The Court should not investigate the prospects of the plaintiff's success in detail. Consideration of delay in applying, nexus between the claim and the plaintiff's financial position, frustration of the claim in ordering security, bona fides of claim, financial position of those who stand behind the company, as factors in the exercise of the discretion. Appeal allowed, security ordered of $12,000 ($33,000 sought).
Counsel: C Delaney, Appellant/Defendant of Elston & Gilchrist; J Duguid, Respondent/Plaintiff, of Waters James McCormack.

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