Theofylatos v Animal Welfare Authority [2013] NTSC 61

PARTIES:	THEOFYLATOS, Belinda v ANIMAL WELFARE AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 5 of 2013 (21315068)
DELIVERED:	4 OCTOBER 2013
HEARING DATES:	17 JUNE 2013
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

ADMINISTRATIVE LAW—Natural justice—Procedural fairness—Adjournment—Application by Animal Welfare Authority for disposal of seized animals—Adjournment sought by owner to file application for return of animals—Adjournment refused—Failure to ask whether evidence was to be called in defence—Subsequent refusal to allow owner to give evidence—Held denial of natural justice—Appeal allowed

Sali v SPC (1993) 116 ALR 625; *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42; *Escobar v Spindaleri* (1986) 7 NSWLR 51, applied

Bayram v Benton (1994) 98 NTR 1; *Kioa v West* (1985) 159 CLR 550, referred to

REPRESENTATION:

Counsel:

Appellant:	Self Represented
Respondent:	C O'Connor

Solicitors:

Appellant:	Self Represented
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Theofylatos v Animal Welfare Authority [2013] NTSC 61
No. LA 5 of 2013 (21315068)

BETWEEN:

BELINDA THEOFYLATOS
Appellant

AND:

ANIMAL WELFARE AUTHORITY
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 October 2013)

Background

[1] On 19 March 2013 the Animal Welfare Authority ("the Authority") seized 34 dogs and 3 horses belonging to Ms Theofylatos from her property in the rural area south of Darwin.

[2] On 17 April, the Authority served Ms Theofylatos with an application under s 68G of the *Animal Welfare Act* for an order that the animals be disposed of. The return date on the application was 22 April 2013.

[3] Section 68G provides:

Return or disposal orders

(1) This section applies if an animal or thing:

(a) has been seized under this Act; and

(b) has not been forfeited to the Crown; and

(c) has not been sold or disposed of under section 68F.

(2) On application by the Authority or any person entitled to the animal or thing, a return or disposal order may be made:

(a) by the appropriate civil court; or

(b) if a person has been charged with an offence against this Act with which the animal or thing is connected – by the court hearing the charge.

[4] Ms Theofylatos engaged a solicitor on 19 April. The matter was mentioned in the Local Court on 22 April and adjourned for 1 week to enable the solicitor to obtain proper instructions and to provide advice to the client.

The proceedings at first instance

[5] On 29 April, 10 days after the application had first been served, Ms Theofylatos appeared with her solicitor and the solicitor sought an adjournment to enable Ms Theofylatos to file an application under s 68G for the return of the animals and to file and serve supporting affidavit material.

[6] There was evidence that it was costing the Authority $5,253.50 per week to feed and house the animals. That cost was being met in the first instance by

the Authority, but there was an indication that the Authority would be seeking an order that Ms Theofylatos pay those costs if subsequent criminal proceedings against her were to succeed.

[7] The learned trial magistrate refused the adjournment. In doing so, he said:

> "I'm not prepared to adjourn the matter. This sort of matter does require prompt disposition. I don't have an explanation as to why an application, at least, hasn't been made with some supporting material filed by today. It was adjourned specifically for this purpose. And the material, the nature of the contest, involving the protection of the animals in the first place, requiring them to be taken away and then the cost of maintaining them is a continuing expenditure. You have to move rapidly to put a cap on that."

[8] In fact an explanation of sorts had been offered. The solicitor for Ms Theofylatos had said her client's position was that the animals should be returned to her care with a vet coming to check on their welfare on a regular basis, and that part of the reason for this was to minimise costs to the department. In reply, counsel for the Authority said:

> "There is an ability in the Act for an application to be made for the animals to be returned, but there's no ability for the court to order that they be supervised by a vet or there's no ability, unless under warrant, for the Animal Welfare Authority to check on the condition of those animals - or unless the respondent provides consent to enter her property."

[9] Shortly thereafter, the following exchange occurred between the trial magistrate and the solicitor for Ms Theofylatos:

> HIS HONOUR: There's not even an application before the court is there Ms Marsh?

> MS MARSH: No, that's correct, your Honour, and that's why I'm seeking the adjournment, so we can make that application.
>
> HIS HONOUR: Ms Marsh, I don't understand why it hasn't been done already, … you've … given that these matters were adjourned a week ago for that purpose.
>
> MS MARSH: I agree, your Honour, and I have, in all honesty, I have no response to you for that. Yes, it should have been made before now, but this has been quite a complex matter, we've spent the past week taking statements from vets that have been out to visit the property and from my client herself as well.

[10] So, at this point, the magistrate knew that Ms Theofylatos wanted the animals returned to her care, and was prepared to consent to a condition that they be regularly checked by a vet; that although an application for return of the animals had not yet been filed, work had been undertaken towards gathering evidence in support of the application to be made; but that the solicitors required additional time to complete that preparation. He also knew (having been informed at the outset of the relevant dates) that it had taken the Authority a month to prepare and serve its application for an order for the disposal of the animals, and that only ten days had elapsed since Ms Theofylatos had been served with that application. He did not enquire from Ms Theofylatos's solicitor how long an adjournment was being requested or what additional work needed to be done in preparation for the proposed application for the return of the animals.

[11] Having refused the adjournment, his Honour then ascertained that the solicitor had instructions to continue to represent Ms Theofylatos during the

hearing that was about to take place, and continued with the hearing of the Authority's application.

[12] The Authority called one witness: his affidavit was tendered, he answered some questions from counsel for the Authority and from the bench, and was briefly cross-examined by counsel for Ms Theofylatos. There was a brief discussion about the estimated value of the animals (which the Authority estimated to be in the order of $80,000) and whether the matter was within the jurisdiction of the Local Court, then his Honour said to counsel for the Authority:

"Yes, I'll hear your submissions now please, Mr O'Connor."

[13] He did not ask counsel for Ms Theofylatos whether she intended to adduce evidence. In fact Ms Theofylatos was in court and wanted very much to give evidence, but her counsel said nothing. Mr O'Connor made his fairly brief submissions and then the trial magistrate called upon counsel for Ms Theofylatos to make her submissions. Her counsel made brief submissions to the effect that she acknowledged that the ongoing costs of having the Authority house and feed the animals was prohibitive and it was for that reason that Ms Theofylatos wanted the animals returned to her care with a requirement that they have a vet regularly check on them, in much the same manner as is contemplated by s 67(2) of the Act.[1] She indicated that her

[1] This is a provision that enables the Authority to give to a person in charge of an animal a written notice requiring that person to provide (inter alia) veterinary care to the animal.

client was willing to bear the cost of having a vet regularly check on the animals.

[14] His Honour then proceeded to give judgment in favour of the Authority. In doing so he went through the formal requirements of s 68G(1), namely that the animals had been seized under the Act;[2] had not been forfeited to the Crown;[3] and had not been sold or disposed of under s 68F.[4] He pronounced that he was satisfied of those matters, and that the Local Court was the appropriate civil court for the purposes of s 68G(2),[5] and that a disposal order could be made whether or not a person is convicted of an offence.[6] He then said:

> "No other criteria are provided in 68G for the making of the order, and it is my assessment of the scheme of the legislation that the criteria have been met for the original seizure of the animals. No application has been made, as far as I'm aware, by the respondent, challenging the seizure of those animals or seeking to have them returned to her which could have been done under 68G(2)."

[15] In other words, having refused Ms Theofylatos's application for an adjournment for the purpose of filing an application for return of the animals, and completing preparation of the evidence on support of such an application, his Honour then went on to consider the Authority's application

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2 Section 68G(1)(a)

3 Section 68G(1)(b)

4 Section 68G(1)(c)

5 This simply provides that an order under s 68G may be made by "the appropriate civil court".

6 Section 68G(4)

for disposal on the basis that no such application had been[7] or would be made, and that effectively the only options were to order the disposal of the animals or leave them effectively indefinitely in the care of the Authority at a cost of $5, 253.50 a week. In his reasons, his Honour did not address at all the submission of counsel for Ms Theofylatos that the preferable course would have been to order that the animals be returned to her care on the condition she outlined.

[16] He went on to consider the affidavit material which deposed to some matters "of concern" in relation to the care and condition of the animals. In doing so, he made reference to a statutory declaration by Jason Theofylatos, Ms Theofylatos's son, which had been annexed to the affidavit of the officer of the Authority who had given evidence. Ms Theofylatos apparently takes great exception to this statutory declaration and she attempted to interrupt at that point but was ignored.

[17] Just as the learned magistrate was about to pronounce the order this exchange occurred:

> MS THEOFYLATOS: Please sir, can I please, I've got to be able to defend myself here, this is not fair. I have receipts, everything here. The lies that these people are saying I'm not tolerating, it's not fair, I need to be able to give you evidence, true, true evidence.
>
> HIS HONOUR: Unfortunately these steps were not taken in a timely fashion.

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[7] On one view of the matter, there being no prescribed form of application under s 68G(2), his Honour had before him an oral application by Ms Theofylatos for the return of the animals.

MS THEOFYLATOS: Well I'm ….

HIS HONOUR: Accordingly I make an order pursuant to s 68G(2)(a) of the *Animal Welfare Act*, permitting the Animal Welfare Authority to dispose of 33 dogs and 3 horses that were seized under s 67 of the *Animal Welfare Act.* [He then corrected that to 34 dogs]

The appeal

[18] Ms Theofylatos has appealed to this court claiming that she was denied natural justice by the learned magistrate's refusal to allow an adjournment; by his failure to ask her counsel if she wished to adduce evidence in defence of the Authority's application; and by his refusal to allow her to adduce that evidence when she indicated that she wished to do so.

[19] On 21 June 2013 I allowed the appeal and remitted the matter to a differently constituted Local Court for rehearing. I indicated that I would publish my reasons at a later date. These are those reasons.

Principles

[20] There is, of course, no doubt that the Local Court is bound to accord procedural fairness to litigants who appear before it: that is the very nature of a court. If it can be established that procedural fairness was not accorded to a party rendering the conduct of the proceeding unfair, that will amount to an error of law.[8] Procedural fairness does not, of course, require that every application for an adjournment must be allowed, even where, if

[8] *Bayram v Benton* (1994) 98 NTR 1 per Kearney J at p6; *Escobar v Spindaleri* (1986) 7 NSWLR 51

fairness as between the parties were the sole criterion, an adjournment would seem to be required.

[21] In *Sali v SPC Ltd*[9] Brennan, Deane and McHugh JJ said:

> In *Maxwell v. Keun*, the English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions (See, for example, *Walker v. Walker*; *Carryer v. Kelly*; *Bloch v. Bloch*). Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition: an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action (*Walker*; *Carryer*). However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become.
>
> In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. As Deane J pointed out in *Squire v. Rogers* this "may require knowledge of the working of the listing system of the particular court or judge and the importance in the proper working of that system of adherence to dates fixed for hearing". What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources. [Citations omitted.][10]

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9 [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841

10 at paras [10] and [11]; See also Toohey and Gaudron JJ at paras [21] to [23]

[22] Natural justice or procedural fairness, however, does require that a party be given a reasonable opportunity to present his or her case.[11]

Application to the facts

[23] It seems to me that in this case, by reason of a combination of all of the factors about which the appellant complains, Ms Theofylatos was not accorded such a reasonable opportunity to present her case.

(a) The learned trial magistrate refused to adjourn the matter to allow Ms Theofylatos to file an application for the return of the animals, and to complete the preparation of the evidence necessary to support such an application, although he knew that she wished to apply for an order for the return of the animals and that her solicitors had spent a week collecting statements for use in such an application. This was despite knowing that the Authority had spent a month preparing its application and it had been only ten days since its application was served on Ms Theofylatos. His Honour did not even enquire how long an adjournment was requested.

(b) His Honour did not treat her counsel's submissions (referred to above) as an oral application for return of the animals, and did not advert to them in any way in his reasons for decision. Rather he proceeded to deal with the matter on the basis that there was no application for

[11] *Kioa v West* (1985) 159 CLR 550 per Brennan J at 368

return of the animals, and that the only real issue before him was whether the criteria for the making of an order for the disposal of the animals had been satisfied.

(c) He did not ask Ms Theofylatos's counsel whether she wished to adduce evidence, but called upon counsel for the Authority to make submissions as soon as the Authority's evidence was complete. This, it seems to me was, on its own, a clear denial of natural justice.[12] Although Ms Theofylatos's counsel did not protest, there is no suggestion that Ms Theofylatos had positively waived her right to adduce evidence. Indeed, it is clear from her subsequent protests that if the learned magistrate had asked, and Ms Marsh had taken instructions (as she would have been bound to do), Ms Theofylatos would have given evidence. She was effectively denied this right.

(d) This was compounded when Ms Theofylatos protested as the learned magistrate was about to pronounce the order. It was clear to him then, assuming he was unaware of it before, that Ms Theofylatos wanted to give evidence: it was not too late to allow her to do so, but his Honour refused to hear her, simply saying, "Unfortunately these steps were not taken in a timely fashion."

[24] The appeal is therefore allowed.

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[12] See *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42 per Mildren J at p48 and *Escobar v Spindaleri* (supra). Both of these cases involved a failure to afford counsel an opportunity to make submissions before making a decision, but it seems to me that the principle is equally applicable to a failure to afford a party an opportunity to adduce evidence.