

Ndjamba v Toyota Finance Australia Ltd [2010] NTSC 23

PARTIES: Edouard Ndjoku Ndjamba

v

Toyota Finance Australia

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21003602

DELIVERED: 19 May 2010

HEARING DATES: 12 May 2010

JUDGMENT OF: BLOKLAND J

APPEAL FROM: Local Court

CATCHWORDS:

PROCEDURE -- Miscellaneous procedural matters -- ex parte proceedings

Appeal from the Local Court against ex parte orders made by a Magistrate - whether matter ought to have proceeded ex parte - no error of law by Magistrate in proceeding ex parte - the appellant has a right to re-hearing before the Local Court - appeal dismissed

Consumer Credit Code ss 66, 70, 78, 80(1), 86, 87, 88, 89, 90, 92, 94, 111, 114, 145, 146,

Local Court Act ss 19(1), 20

Local Court Rule 36.01

The Owners of the SS Kalibia v Alexander Wilson (1910-11) 11 CLR 689 at 694

Cairns, Australian Civil Procedure, 407

REPRESENTATION:

Counsel:

Appellant:	Self
Respondent:	Mr Close

Solicitors:

Appellant:	Self
Respondent:	Vincent Close Solicitors

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

Ndjamba v Toyota Finance Australia Ltd [2010] NTSC 23
No. 21003602

BETWEEN:

EDOUARD NDJOKU NDJAMBA
Appellant

AND:

TOYOTA FINANCE GROUP LTD
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 19 May 2010)

Introduction

[1] This is an appeal against two orders made by a Magistrate in the Local Court on 4 February 2010 firstly, permitting Toyota Finance Australia Limited, (“the Respondent”) to proceed *ex parte* and secondly, authorising the Respondent’s agent to enter the garden area or garage areas of 79 Byrne Circuit, Moil for the purpose of taking possession of a 2003 Toyota Kluger Motor Vehicle, Registration No. (NT) 932-566. The grounds of appeal are:

1. That the matter ought not have been determined *ex parte*.
2. That given that it did the Appellant had no opportunity to defend the application.

- [2] The Appellant appeared in person to argue the appeal. He told the Court he had obtained legal advice to assist him drafting the grounds of appeal. The Appellant advised the Court he was originally from the Congo. He declined an opportunity to adjourn the hearing of the Appeal in order to attempt to arrange a French interpreter, despite an acknowledgment he may have been at a disadvantage due to language difficulties. In spite of the difficulties the Appellant sought to proceed.
- [3] Appeals from the Local Court lie to this Court on a question of law¹. In effect the issue raised by the Appellant is whether the Local Court was authorised as a matter of law to proceed ex parte. A procedural fairness issue is expressly raised by the second ground. If the Local Court was authorised as a matter of law to proceed ex parte, the second ground will fail as a consequence. Although it is unusual for a Court to proceed with a hearing in the absence of a party, there are some circumstances that permit it. Primarily this appeal examines the relevant circumstances in the context of access to goods subject to re-possession in exercise of a contractual right.

The Application Before the Local Court

- [4] The Respondent's application before the Local Court was for an Order seeking permission pursuant to s 92 *Consumer Credit Code* to authorise the Respondent's agent to enter the garden and garage area of 79 Byrne Circuit Moil for the purpose of taking possession of the vehicle . The Respondent

¹ Section 19(1) *Local Court Act*.

asserted it was entitled to possession of the vehicle. Section 92 of the *Consumer Credit Code* provides:

92. The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

Evidence before the Local Court in Support of the Application

[5] Before the Local Court in support of the application was a statutory declaration sworn 11 January 2010 of Susan Barnard, who described herself as the Account Executive for Computershare. Computershare are a firm who provide printing and mail processing services to the Respondent. Ms Barnard's statutory declaration attests to sending a default notice to the Appellant and to Mrs Therese Mabouyu, (the joint borrower who is the Appellant's wife). The Default Notices refer to the consumer loan between the Appellant, Ms Mabouyu and the Respondent. The Default Notice contained information notifying the Appellant that he had defaulted under the consumer loan agreement; that \$598.05 was the amount overdue; that with default charges the total Amount Due was \$598.58; and that the default could be remedied by paying the total amount due within 30 days. The Default Notice also advised that unless the default was remedied within 30 days the balance of the loan (\$26,974.07) would become immediately due and payable. Finally, it notified that pursuant to the agreement the Respondent may take possession of the mortgaged vehicle.

[6] Before the Local Court was an affidavit by a licensed bailiff Grant Eric Johnson. Mr Johnson's affidavit states the Appellant had not complied with the default notice; that on 7 January 2010 he visited the Appellant and his wife at 79 Byrne Circuit Moil; he sighted the vehicle in a fenced yard at the residence; he requested the Appellant and his wife sign a consent form to allow him to enter the premises. The consent form ("Form 7", *Consumer Credit Regulations*) facilitates written consent to a credit provider to enter premises to take possession of goods they are entitled to. His affidavit indicates the Appellant and his wife refused to sign the Form 7. His affidavit further provides that 79 Byrne Circuit is the residential address of "the borrowers" (the Appellant and his wife) as noted in the agreement. It also indicates he had previously repossessed a vehicle of "the borrowers" or one of them and believes it is unlikely they will consent to him entering the premises.

[7] Before the Local Court there was information indicating that the loan agreement was in arrears; the vehicle the subject of the mortgage was identified as being within private enclosed premises and the borrowers would not permit entry. Further, the Default Notices before the Local Court were issued on 13 November 2009, thus on the face of it, complying with s 80(1) *Consumer Credit Code* that provides 30 days notice must be given before enforcement action commences.

Should the Local Court have Proceeded Ex Parte?

- [8] In the circumstances outlined in my view the Local Court was authorised to make the *ex parte* order. Although His Honour did not give formal reasons, he reviewed the material and clearly relied on the material filed before making the Orders. In my view the circumstances as they were at the time of the hearing clearly give rise to a strong inference that on the facts known at the time, the Appellant would take action to prevent the repossession of the vehicle which on all of the material before the learned Magistrate was a legitimate recovery exercise pursuant to the loan agreement. I am mindful that courts proceed cautiously concerning *ex parte* applications. The primary considerations on whether or not to proceed *ex parte* concern whether there is urgency; whether irreparable damage would flow from making an *ex parte* order; whether hardship would flow to a party against whom an order is made and whether such an order can be set aside².
- [9] Given the failure to give consent when otherwise the evidence indicated a right of repossession, there was some urgency to preserve the subject vehicle or at least its whereabouts to enable its repossession. Given the failure to give consent to enter the premises, it was open in my view for an inference to be drawn that the Appellant may not cooperate if aware of the proceedings. This in turn gives rise to reasonable grounds to suspect the vehicle may be hidden or its position changed if notice of repossession proceedings were given. The Respondent consequentially may have suffered

² Cairns, Australian Civil Procedure, 407

harm or unnecessary expense in locating the vehicle and the debt may have remained unsatisfied.

[10] In balancing those factors against the hardship that may be occasioned to the Appellant, it must be noted that the Appellant is still able to reclaim the vehicle by payment of the arrears to the Respondent. The Appellant's rights to recover the vehicle after the payment of arrears owing and the reasonable repossession expenses are paid are preserved by s 94 of the *Consumer Credit Code* which provides:

94.(1) Notice to be given. A credit provider that has taken possession of goods under a mortgage must, within 14 days after doing so, give the mortgagor a written notice containing the following matters –

- (a) the estimated value of the goods;
- (b) the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual;
- (c) a statement of the mortgagor's rights and obligations in the form set out in the regulations.

(2) Goods not to be sold immediately. A credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the Court authorises the credit provider to do so.

(3) Effect of proceedings. If at the end of that 21-day period a stay of enforcement proceedings is in force under this Code or an application under section 70 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed.

(4) Payment during notice period. The credit provider must return the goods if –

- (a) the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21 day period and the debtor has not committed a further default of the same kind under the credit contract; or
 - (b) the credit contract is paid out.
- (5) Offence.** A credit provider that contravenes this section is guilty of an offence.

[11] Further, the Appellant has the right to bring an application for re-hearing to set aside the Local Court order. That right is not subject to a time limitation and the Respondent concedes the Appellant could still bring the application.

Section 20 of the *Local Court Act* provides:

20 Re-hearing

(1) Where, other than in a proceeding by way of appeal to the Court, an order is made by the Court against a person who:

- (a) did not file a notice of defence;
- (b) did not appear in the proceeding; or
- (c) consented to the making of the order but there are grounds on which to satisfy the Court that the order is to be set aside (for example on the grounds of fraud, duress, suppression of evidence or the giving of false evidence),

the person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and the proceeding be re-heard.

(2) On an application under this section, the Court may set aside the order subject to such terms and conditions, if any, as it thinks fit and re-hear the proceeding.

(3) Subject to subsection (4), an application under this section does not operate as a stay of the order unless the Court so orders.

(4) An application under this section in respect of an order for the payment of money operates as a stay of so much of the order as relates to the payment of money.

(5) If an applicant under this section fails to appear at the time fixed for the hearing of the application and the application is struck out, the applicant may re-apply only if the applicant first obtains the leave of the Court.

[12] Further *Local Court Rule* 36.01 provides a procedure to bring the application to set aside such an order. In my view the matters complained of by the Appellant when arguing the appeal before this Court are more appropriately considered in the context of an application to set aside as anticipated in the *Local Court Act* and *Local Court Rules*. Although the proceedings before the Local Court are brief, the material on which the orders were made in the context of a consumer loan is readily apparent. In my view the Orders were justifiable as a matter of law.

Issues Raised by the Appellant

[13] The Appellant's concerns outlined to this Court are directed to a considerable degree to a first repossession of the vehicle on 9 September 2009. He complains about procedure not being followed in relation to that re-possession. That is not material that can bear on this Appeal concerning the Orders of 4 February 2010. He complains that he has felt "harassed", discriminated against and has been the "victim of an unlawful judgment", "moral torture" and "human rights abuse" from a number of persons involved in the enforcement procedure.

[14] The Appellant complains s 66 of the *Consumer Code* was not complied with. Section 66 provides a debtor who for certain reasons is unable to meet their obligations, may apply for a change to the credit contract by extending the period of the contract or postponing dates for particular payments. That would appear to be a matter that needs to be examined well before repossession process or related proceedings place. It is not a ground of the Appeal, nor could it be in these proceedings. If the Appellant is suggesting that such an application was made by him but was not before the Local Court at the time the *ex parte* Orders were made, that question is more appropriately dealt with by way of re-hearing of those Orders before the Local Court. The re-hearing process in the Local Court reflects the principle “...that when a judicial order has been obtained *ex parte* the party affected may apply for its discharge...”³

[15] The Appellant has also sought to incorporate a number of principles and processes by raising ss 86, 87 and 88 *Consumer Credit Code*. These sections concern negotiation or postponement of enforcement proceedings. Once negotiations take place, the debtor may make an application to the Court to vary the enforcement. It would appear the Appellant is still able to make such an application either simultaneously with an *ex parte* review application or separately.

[16] The Appellant raised s 78 *Consumer Credit Code* concerning surrender of mortgaged goods. That would not appear to be relevant to these

³ *The Owners of the SS Kalibia v Alexander Wilson* (1910-11) 11 CLR 689 at 694

proceedings. He also relied on s 111 *Consumer Credit Code* that allows a Government Consumer Agency to apply to the Court to become a party to proceedings. That would not appear to be relevant at this time however it is a matter the Appellant could consider by informing Northern Territory Consumer Affairs about any future proceedings should he think it would be of assistance. The Appellant also raised s 70 *Consumer Credit Code* allowing the Court to reopen unjust transactions. Once again, that would appear to provide the Appellant with a further form of relief, but does not affect the correctness or otherwise of the Orders made in the Local Court.

[17] The Appellant submitted the following provisions should be considered: s 144 *Consumer Credit Code* dealing with false or misleading representations; s 145 *Consumer Credit Code* dealing with harassment by a credit provider and s 146 *Consumer Credit Code* dealing with canvassing of credit at home. None of these are relevant on whether or not as a matter of law the Local Court should have proceeded *ex parte*. Similarly the Appellant sought to rely on s 174 *Consumer Credit Code* that allows the Court to extend a period of notice of a document; s 89 *Consumer Credit Code* that permits a credit provider to apply for a variation or postponement of an Order; s 90 *Consumer Credit Code* concerning information to be given on the whereabouts of mortgaged goods and the notice procedures under s 94. None of these provisions in my view bear on the correctness or otherwise on the Orders the subject of this Appeal. Some of these provisions may allow separate relief for the Appellant but they do not bear on the question of law

before this Court. The Appellant complains that the Respondent's Agent did not wait for seven working days after notifying him about the collection for the car. This would appear to be a complaint after the Orders were made and cannot be dealt with in these proceedings. A significant part of the Appellant's complaints appear to be more relevant to the first repossession. Various other complaints concern allegations of the Respondent taking or stealing certain of the Appellant's goods. These are clearly not issues covered by the grounds of appeal and are not questions of law relevant to the Orders the subject of the appeal.

Conclusion

- [18] If the Appellant seeks to agitate the further information he has put before this Court concerning alleged irregularities in the process before or after the Orders were made, he should obtain legal advice with a view to seeking a re-hearing of the matter pursuant to s 20 *Local Court Act* and r 36.1 *Local Court Rules*. This procedure as conceded on behalf of the Respondent is not subject to a time limit. The Appellant still has the option, (as the Solicitor for the Respondent in these proceedings has indicated), to negotiate with the Respondent concerning return of the car, the loan agreement and repayments generally.
- [19] In my respectful view the Appellant should obtain further legal advice or Consumer Affairs advice. The Respondent's solicitor advised the Court at the hearing of the Appeal that the subject vehicle had not as yet been sold and the Appellant could still negotiate with the Respondent.

[20] The Appeal is dismissed.
