15/11; [2011] VSC 221

SUPREME COURT OF VICTORIA

BROWN v TABRO MEAT PTY LTD

Kaye J

19, 24 May 2011

ACCIDENT COMPENSATION – CLAIM BY APPELLANT TO MAGISTRATES' COURT FOR PAYMENTS PURSUANT TO THE *ACCIDENT COMPENSATION ACT* 1985 – CLAIM DISMISSED BY MAGISTRATE – FINDING THAT APPELLANT UNTRUTHFUL AS TO OCCURRENCE OF WORKPLACE INJURY – WHETHER REASONS BY MAGISTRATE INADEQUATE – REQUIREMENT OF COURTS TO GIVE REASONS FOR DECISION.

1. A requirement to give reasons for decision is based on two principal considerations. First, a failure by a judge or Magistrate to provide adequate reasons for decision can give rise to a legitimate sense of grievance on the part of the losing party, which is left in ignorance as to why the decision, adverse to its interest, has been made. That consideration is closely related to the public interest in maintaining the community's acceptance of judicial decisions, and in maintaining the perception of the integrity of the judicial process. The second consideration is that, in cases in which an appeal lies, the provision of adequate reasons for judgment identifies to the appellate court the reasoning and basis upon which the decision, under appeal, is made. The provision of such reasons is thus important in ensuring that the losing party maintain its rights of appeal.

2. The nature and extent of the reasoning which is required of a court must necessarily depend upon the particular circumstances of the case.

3. There are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions, or ultimate findings, of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions), and reasons in applying the law to the fact so found.
***Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 440, applied.**

4. In the present case it is clear, from the Magistrate's reasons, that he did not rely on one single factor, alone, to conclude that the appellant was not a witness of truth but reached his conclusion, as to the credibility of the account given by the appellant, based on a combination of the six factors, which he expressly identified in the last sentence of paragraph 14 of his reasons.

5. Where a court assesses the credibility of the witness in the light of a number of different circumstances, generally that assessment of the witness's credibility is not conducted by a process, in which the various factors are considered and analysed in isolation from each other. Not uncommonly, it is the coincidence and concatenation of a number of factors, acting together, which constitutes the basis upon which the court ultimately makes its determination as to the credibility of a particular witness. In such a case, it is the united and combined force of a number of different items of evidence, and the coincidence of them in the particular case, which constitutes the basis for the finding in relation to a particular witness's credibility. In that process, while each particular factor, relied on by the court, might be susceptible of an explanation, it is the combined weight of them which ultimately produces the court's conclusion in relation to the particular witness's truthfulness.

6. In the circumstances of the present case, the Magistrate was not required to give reasons why he did not accept the evidence given by the plaintiff in respect of the six factors, on the basis of which the Magistrate concluded that the plaintiff was not a witness of truth. The Magistrate clearly identified the particular factors, on the basis upon which he rejected the appellant's truthfulness on the critical issue as to whether the incident of 5 February 2009, alleged by the appellant, in fact occurred. The identification of those factors, by the Magistrate in his reasons, was sufficient to satisfy the relevant legal principles.

7. As the appellant has not established that there was any relevant error of law by the Magistrate the appeal should be dismissed.

KAYE J:

1. At the relevant times to this proceeding, the respondent conducted an abattoir at Princess Street, Korumburra. The appellant commenced employment with the respondent as a farm hand on 21 January 2009. On 10 February 2009, the appellant lodged a WorkCover claim form with the respondent, in which he claimed that he sustained an injury to his right knee in the course of his employment on 5 February.

2. The respondent rejected the appellant's claim for weekly payments and for payment of medical and like expenses under the *Accident Compensation Act*. Consequently, the appellant commenced proceedings in the Magistrates' Court against the respondent, and against the relevant WorkCover insurer, QBE Workers Compensation (Vic). That proceeding was heard in the Magistrates' Court at Morwell on 15 April 2010. On 10 May, the Magistrate delivered his reasons for decision, dismissing the appellant's claim, and ordering the appellant to pay the costs of the respondent. The appellant appeals to this Court against that decision pursuant to s109(1) of the *Magistrates' Court Act* 1989.

The proceeding in the Magistrates' Court

3. The appellant was the only witness who gave *viva voce* evidence in the Magistrates' Court proceeding. He stated that, at the time at which he suffered injury, he was herding some cattle at the abattoir through a race to the washing area. One of the cows separated from the group, and commenced to chase him. The appellant attempted to lock the gate to the cattle yard, but the cow came too close to him. She started to run at him, so that he jumped onto the rail of the fence, in order to get out of the yard. As he did so, the cow clipped the appellant on the back of his right leg in the area of his thigh. As the appellant was getting onto the rail, he twisted his right knee. He remained on the rail until the cow settled down. The appellant continued at work for the rest of the day, and he worked on the next day, which was a Friday. Over the following weekend, his right knee was painful. He consulted his general practitioner, Dr Berghofen on 9 February, and she referred him to Mr George Owen, an orthopaedic surgeon. Mr Owen had previously seen the appellant in respect of a right knee injury, which he had sustained in 1999 in a motor bike accident.

4. The appellant was cross-examined by counsel. In particular, the following points were canvassed in cross-examination:

- The appellant had signed a claim form, in which he had stated that he was "chased and rammed by a cow several times".
- The appellant signed a statement for the WorkCover investigator, in which he stated that he could not recall if the cow had made contact.
- The appellant was cross-examined as to differing descriptions, which he gave to various medical practitioners as to the manner in which the incident, in which he injured his knee, occurred.
- Initially, the appellant was unable to recall having seen a doctor in the last twelve months. However, he acknowledged that he had been shown a document by his legal advisors that he attended a doctor in August 2008 complaining of pain in the back of his right knee.
- The appellant had signed a pre-employment and declaration form on 17 January 2009, in which he had not declared that he had any previous problem with his right knee. He agreed that the form was, thus, not accurate, and that it was deceptive and misleading.

5. The other evidence before the Magistrates' Court consisted of medical reports and other documents tendered to the court. The appellant tendered the following medical reports:

- A report by Dr Berghofen who stated that the appellant had consulted him on 9 February after he twisted his knee while jumping over a fence to escape from an irate cow. On examination, he had restricted movement in all directions, because of swelling and pain in the right knee. She considered that the injury "seemed to be clearly related to this incident". As the pain did not improve, Dr Berghofen referred the appellant to Mr Owen.
- A report by Mr George Owen (orthopaedic surgeon) who stated that when he saw the appellant on 6 March 2009, the appellant told him that he had twisted his knee escaping from an irate cow which he was driving into a race. Mr Owen considered that the appellant had a significant aggravation of the right knee as a result of his work at the abattoir, with locking of the knee due to a suspected medial meniscus tear.
- A report by Mr Stanley O'Loughlin (orthopaedic surgeon) who saw the appellant on 30 March 2010. The appellant told Mr O'Loughlin that a cow had charged him, the appellant had jumped onto a fence, but the cow struck him behind the right knee and caused the appellant to fall off the fence.

Mr O'Loughlin expressed the view that the appellant had sustained an internal derangement to the right knee, probably consisting of a meniscus tear in the presence of underlying anterior cruciate ligament instability. He stated that he considered that the appellant's injury arose in the course of his employment.

• A report of Mr Michael Dooley (orthopaedic surgeon) who examined the appellant on 19 March 2010. The appellant told Mr Dooley that he jumped up onto a rail to get out of the way of a cow which had turned on him, and as he did so, he twisted his right knee. He said that he fell and that he was also struck by the cow. Mr Dooley expressed the view that the mechanism of the injury described to him was consistent with a meniscal type injury to the knee suffered by the appellant in February 2009.

6. The respondent tendered one report, by Dr Andrew Miller (an occupational health consultant), who saw the appellant on 13 March 2009. The appellant told Dr Miller that he was being pursued by an aggressive cow at work. In order to avoid being hit by the cow, he jumped up on a fence, and, while on the top of the fence, he twisted his right knee and experienced acute pain in it. Dr Miller expressed the view that the appellant had a moderate disability of the right knee. He did not consider that the appellant's employment was a significant contributing factor to the injury claimed by him.

7. In addition, the respondent tendered a copy of the medical records of the Korumburra Medical Centre. Those records contained an entry, dated 17 August 2008, that the appellant had twisted his right knee two days previously, and that he was suffering pain in the back of his right knee.

The Magistrate's reasons for decision

8. In his reasons for decision, the Magistrate set out, in some detail, a summary of the evidence of the appellant, and a summary of the medical reports, to which I have referred. In a section of his reasons entitled "Conclusion", the Magistrate stated:

> "13. I did not find Mr Brown to be a credible witness. He told the Court that he sustained the injury when the cow 'clipped' him to the back of the right leg in the thigh area. In his signed claim form dated 10 February 2009 he described the mechanism of injury occurring when he was chased and rammed by a cow several times. The history he gave to Dr Berghofen on 9 February 2009 was that he injured his right knee when he was running away from an upset cow and while jumping the fence twisted his right knee. The history he has given to various doctors who have examined him has also varied as outlined above including a variation between being struck or not struck by the cow and a history to Dr O'Loughlin and to Mr Dooley that he fell off the fence.
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> 14. Additionally, Mr Brown failed to mention to the doctors that he had experienced right knee problems in August 2008 which necessitated a certificate of incapacity for three days, medication and an intention to seek medical review by Mr Owen. I do not accept the submission from Mr Brown's counsel that the precise mechanism of injury is unimportant. In circumstances where different histories are given on the initial claim form and to doctors who examine the injured worker, the worker's honesty and credibility becomes a fundamental determining issue. I accept that Mr Brown has meniscal damage to his right knee but the central issue to determine is causation. After considering the evidence he gave to the Court; the different histories he gave to doctors; his failure to report the injury to his employer on the day or the following day; his naming of 'witnesses' who did not in fact witness the 'incident'; his ability to perform normal duties on 6 February; his failure to call evidence in support of his allegation that he was bedridden on 7 and 8 February; and his admitted deception on his pre-employment application and declaration form, lead me to conclude that he is not a witness of truth.
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> 15. Accordingly, I am not satisfied that Mr Brown sustained an injury which arose out of or in the course of his employment with Tabro Meat Pty Ltd and I will dismiss the proceeding."

The appeal

9. The amended notice of appeal, filed on behalf of the appellant, contained two principal grounds of appeal. The first ground related to the question whether there was a sufficient evidentiary basis for the finding by the Magistrate that the appellant had not established that his injury arose out of or in the course of his employment. Mr R Gorton QC, who appeared with Mr J Goldberg for the appellant, did not pursue that ground of appeal. The second ground of appeal, which he did pursue, concerned the adequacy of the reasons given by the Magistrate for that finding.

10. Mr Gorton's fundamental submission was that the Magistrate failed to provide adequate

reasons for concluding that the appellant was not a witness of truth in respect of his evidence that he had sustained an injury to his knee in the course of his employment with the defendant on 5 February 2009. In particular, Mr Gorton submitted that, although the Magistrate reached that conclusion on the basis of a number of factors, stated by him in paragraphs 13 and 14 of his reasons, in doing so, the Magistrate failed to advert to the evidence of the appellant relating to each of those matters. Alternatively, Mr Gorton submitted that the Magistrate failed to give any reasons for implicitly rejecting the explanations given by the appellant in respect of those matters.

11. In elaborating that submission, Mr Gorton submitted that the Magistrate did not give any reasons for rejecting the explanation, given by the appellant for the differences between his evidence as to how the accident of 5 February 2009 occurred, and the accounts of the accident attributed to him in the claim form and in the medical reports referred to in paragraph 13 of the Magistrate's reasons. In cross-examination, the appellant stated that he did not fill in the relevant section of his claim form, but that it had been filled in for him by the investigator. His explanation for signing the claim form, containing the different version of the incident (namely, that the cow had rammed him several times), was that he was only semi-literate, and therefore he had not noticed the discrepancy when he signed the form. The appellant, in cross-examination, also stated that Dr Berghofen had misunderstood what he told her about the incident, when she recorded that he stated that he injured his knee "jumping the fence". The appellant said that he had told Dr Berghofen that he injured his knee while jumping onto the fence. Mr Gorton also pointed out that the appellant was not cross-examined as to the account attributed to him both by Dr O'Loughlin and Mr Dooley, namely, that he was injured when he fell off the fence. In those circumstances, Mr Gorton submitted that the Magistrate failed to provide any reasons as to why he rejected the appellant's explanations for the differing accounts attributed to him in the claim form and by the medical practitioners. Mr Gorton submitted that the Magistrate thereby engaged in a circular process of reasoning, in that he could only have rejected the appellant's explanations for the differing accounts, if he did not already consider the appellant to be a credible witness.

12. Mr Gorton addressed similar arguments in relation to the reliance by the Magistrate, in paragraph 14 of his reasons, on other factors, as leading him to the conclusion that the appellant was not a truthful witness. In cross-examination, the appellant stated that he did not mention to the doctors that he had experienced right knee problems in August 2008, because he had forgotten about them. Mr Gorton submitted that the Magistrate had failed to give any reason for rejecting that explanation by the plaintiff. In paragraph 14, the Magistrate referred to the fact that the appellant had named "witnesses" (in his claim form), who did not in fact witness the incident alleged by him. In cross-examination, the appellant had explained that the persons, nominated by him as witnesses, were present at the time at which the accident occurred, and that he had assumed that they would have seen what happened. Mr Gorton submitted that the Magistrate, again, erred, by failing to disclose why he rejected that explanation given by the appellant.

13. Mr Gorton then addressed the reference by the Magistrate, in paragraph 14 of his reasons, to the fact that the appellant was able to perform normal duties on 6 February. Mr Gorton submitted that, apart from Dr Miller, none of the other doctors had referred to that circumstance as being inconsistent with their conclusion that the appellant's knee injury arose out of, or in the course of, his employment with the defendant. Mr Gorton referred to the reliance by the Magistrate on the failure by the appellant, in his pre-employment application and declaration form, to disclose an earlier knee injury sustained by him in a motor bike accident in 1999. Mr Gorton submitted that the Magistrate, in relying on that circumstance, failed to give any reason why he did not accept the appellant's explanation for that omission, namely, that because his knee had been trouble free for some time, he did not consider that he needed to disclose the earlier injury in the pre-employment form.

14. Mr Gorton thus submitted that the Magistrate erred, because he failed to give any adequate reasons for not accepting the explanations given by the appellant for the various factors, which were specified by the Magistrate as the basis for his conclusion that the plaintiff was not a truthful witness in his evidence that the injury to his right knee was sustained in an incident which occurred in the course of his employment with the defendant on 5 February 2009.

15. In response, Mr M Fleming SC, who appeared with Ms B Knoester for the respondent, submitted that the Magistrate had not failed to give adequate reasons for his conclusion that the

appellant was not a witness of truth in relation to the happening of the incident of 5 February 2009. He submitted that the Magistrate, in reaching that conclusion, had considered the totality of the evidence before him. Based on the combined force of the various factors specified by him in paragraphs 13 and 14 of his reasons, he had concluded that the appellant was not a witness of truth. Mr Fleming submitted that there was no requirement that the Magistrate address, separately, the explanations given by the appellant for a number of the factors on which the Magistrate relied as impugning his credit.

16. Mr Fleming submitted that the question, of the adequacy of the reasons of the Magistrate, must depend upon the context of the particular case. In this case, the appellant already had sustained a pre-existing injury to his right knee, which he had not disclosed to his employer or to the doctors who examined him. In that light, Mr Fleming submitted that it was relevant that the Magistrate had before him a claim by the appellant to have sustained injury to the right knee just two weeks after commencing his employment with the respondent. He submitted that, given that timeframe, the failure to disclose a previous injury to the same knee was highly significant. In those circumstances, it was not requisite for the Magistrate to give reasons why he did not accept the appellant's explanations as to the various other factors relied on him. Rather, those additional factors added weight to the fundamental failure by the appellant to reveal his pre-existing injury, when he commenced his employment with the respondent.

Legal principles

17. Under s109(1) of the *Magistrates' Court Act* 1989, an appeal may only be brought to this Court from a decision of a Magistrates' Court on a question of law. The requirement, that a court give adequate reasons for decision, is well established and long standing. A failure to give such reasons may constitute an error of law.[1]

18. That requirement is based on two principal considerations. First, a failure by a judge or Magistrate to provide adequate reasons for decision can give rise to a legitimate sense of grievance on the part of the losing party, which is left in ignorance as to why the decision, adverse to its interest, has been made. That consideration is closely related to the public interest in maintaining the community's acceptance of judicial decisions, and in maintaining the perception of the integrity of the judicial process.[2] The second consideration is that, in cases in which an appeal lies, the provision of adequate reasons for judgment identifies to the appellate court the reasoning and basis upon which the decision, under appeal, is made. The provision of such reasons is thus important in ensuring that the losing party maintain its rights of appeal.[3]

19. The nature and extent of the reasoning, which is required of a court, must, necessarily, depend upon the particular circumstances of the case.[4]

20. In *Beale v Government Insurance Office of New South Wales*[5], Meagher JA, in considering an appeal from a decision of a District Court judge, stated that there are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions, or ultimate findings, of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions), and reasons in applying the law to the fact so found.

21. In *Hunter v Transport Accident Commission & Anor*[6], the Court of Appeal was concerned with a decision of a County Court judge dismissing the appellant's application for leave to bring a proceeding for the recovery of damages, in respect of an injury sustained in a transport accident, pursuant to s93(4)(d) of the *Transport Accident Act* 1986. Nettle JA (with whom Batt JA and Vincent JA agreed) stated:

> "... while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those finding are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which

> is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law."[7]

Conclusions

22. The question, which arises in this case, is whether the Magistrate failed to comply with the principles, to which I have just referred, by not stating the basis upon which he did not accept the explanations, given by the appellant in his evidence, for the matters relied upon by the Magistrate to find that the appellant was an untruthful witness.

23. That finding by the Magistrate was critical to the resolution by him of the claim by the appellant. It was on the basis of that finding that the Magistrate concluded that he was not satisfied that the appellant had suffered an injury which arose out of or in the course of his employment with the respondent. It is necessarily implicit in that conclusion that the Magistrate rejected the appellant's evidence as to the occurrence of an incident in the course of his employment with the respondent on 5 February 2009, which accounted for the injury to his right knee. The Magistrate was required, as a matter of law, to provide adequate reasons for reaching that conclusion.

24. In determining whether that requirement was complied with, it is important to bear in mind that the Magistrate expressly specified, in the last sentence to paragraph 14 of his reasons, the particular factors, on the basis of which he concluded that the plaintiff was not a witness of truth. In that sentence, the Magistrate identified six factors, which had led him to that conclusion, namely: the different descriptions of the incident which he gave to the doctors; his failure to report the injury to the employer on the day on which it occurred or on the next day; the fact that the plaintiff, in his claim form, identified witnesses who did not, in fact, witness the incident; the fact that the plaintiff was able to perform his normal duties on 6 February; the fact that the plaintiff did not call any witness to support his evidence that he was bedridden on 7 and 8 February 2009; and the plaintiff's "admitted deception" on his pre-employment application and declaration form, that he had not previously suffered an injury to his right knee. Thus, the appellant could not, in this case, complain that the Magistrate had not identified the particular grounds upon which he concluded that the appellant was not a witness of truth, and on the basis of which he rejected the appellant's account that his knee injury was sustained in an incident at work on 5 February 2009.

25. Rather, the complaint by the appellant in this case is that the Magistrate, in identifying those six factors for rejecting his credibility, failed to give reasons why he had not accepted the appellant's evidence, by which he had sought to explain them. In my view, in the context of the case which was before him, the Magistrate was not obliged, in his reasons, to descend to that level of particularity. It is clear that the Magistrate did not overlook the various explanations given by the appellant for the factors, on the basis of which the Magistrate ultimately rejected the appellant's credit. In paragraphs 5 to 7 of his reasons, the Magistrate summarised the evidence of the plaintiff in cross-examination. In doing so, he outlined the explanations given by the appellant for some of those factors, and thus demonstrated that he was mindful of that aspect of the appellant's evidence.

26. It is clear, from the last sentence of paragraph 14 of his reasons, that the Magistrate did not rely on one single factor, alone, to conclude that the appellant was not a witness of truth. If that had been the case, then there might be some force in the submission, made by Mr Gorton, that the Magistrate should have expressly given reasons for not accepting the appellant's explanation for that particular factor. Rather, it is clear, from the concluding paragraphs of his reasons, that the Magistrate reached his conclusion, as to the credibility of the account given by the appellant, based on a combination of the six factors, which he expressly identified in the last sentence of paragraph 14 of his reasons.

27. Where a court assesses the credibility of the witness in the light of a number of different circumstances, generally that assessment of the witness's credibility is not conducted by a

process, in which the various factors are considered and analysed in isolation from each other. Not uncommonly, it is the coincidence and concatenation of a number of factors, acting together, which constitutes the basis upon which the court ultimately makes its determination as to the credibility of a particular witness. In such a case, it is the united and combined force of a number of different items of evidence, and the coincidence of them in the particular case, which constitutes the basis for the finding in relation to a particular witness's credibility. In that process, while each particular factor, relied on by the court, might be susceptible of an explanation, it is the combined weight of them which ultimately produces the court's conclusion in relation to the particular witness's truthfulness.

28. In this case, it is sufficiently clear, from the Magistrate's reasons, that that was the process of reasoning undertaken by him. As I stated, it is evident that the Magistrate did not base his finding, as to the truthfulness of the plaintiff, on one particular factor standing alone. Rather, that finding was based on the combined force and effect of the six factors which he identified at the conclusion of paragraph 14 of his reasons.

29. In those circumstances, I do not accept the submission made on behalf of the appellant that the Magistrate was required to give reasons why he did not accept the evidence given by the plaintiff in respect of the six factors, on the basis of which the Magistrate concluded that the plaintiff was not a witness of truth. The Magistrate clearly identified the particular factors, on the basis upon which he rejected the appellant's truthfulness on the critical issue as to whether the incident of 5 February 2009, alleged by the appellant, in fact occurred. In my view, the identification of those factors, by the Magistrate in his reasons, was sufficient to satisfy the principles, to which I have referred.

30. For those reasons, the appellant has not established that there was any relevant error of law by the Magistrate. Accordingly, the appeal should be dismissed.

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[1] See for example *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8, 18-19 (Gray J); *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshal Pty Ltd (No 2)* [2002] VSCA 189, [99]-[106]; (2002) 6 VR 1, 30-34; [2002] VSCA 189; *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303, [18]-[19] (Chernov JA).
[2] *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 440, 442 (Meagher JA); *Sun Alliance Insurance Ltd v Massoud* (above), at 18.
[3] *Pettitt v Dunkley* 38 FLR 199; [1971] 1 NSWLR 376, 388; 5 Fam LR 137, (Moffitt JA).
[4] *Perkins v County Court of Victoria* (2002) 2 VR 246, 263; [2000] VSCA 171, [64] (Buchanan JA); *Wakool Shire Council v Walters* [2005] VSCA 216, [35] (Nettle JA).
[5] Above, 443.
[6] [2005] VSCA 1.
[7] See also *Fensford Pty Ltd & Ors v Nour Pty Ltd* [2006] VSCA 118, [24] (Nettle JA).

APPEARANCES: For the appellant Brown: Mr R Gorton QC and Mr J Goldberg, counsel. Slater & Gordon, solicitors. For the respondent Tabro Meat Pty Ltd: Mr M Fleming SC and Ms B Knoester, counsel. Minter Ellison, solicitors.
