37/92

SUPREME COURT OF VICTORIA

SIMONS v RITTERMAN and ANOR

Hayne J

9 July 1992

CIVIL PROCEEDINGS – CLAIM FOR WORK DONE – CROSS-CLAIM FOR COST OF RECTIFICATION – QUESTION WHETHER WORK TO BE PATCHED UP OR WHOLLY RE-DONE – PARTY NOT CHALLENGED AS TO FURTHER DEFECTS OR COST OF RE-DOING WORK – RULE IN *BROWNE v DUNN* (1894) 6 Co Rep 67 – NATURE OF – WHETHER APPLIES – STATEMENT OF EXPERT EVIDENCE NOT SERVED ON OTHER PARTY – WHETHER SUCH EVIDENCE MAY BE ADDUCED – DAMAGES BY WAY OF INTEREST – RELEVANT CONSIDERATIONS: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, O19; *SUPREME COURT ACT* 1986, S60.

S., a tradesman, claimed for the balance of monies due for work done; R. cross-claimed for damages for the cost of rectification. During the hearing, the Magistrate refused to allow evidence from an expert witness to be given, in view of the fact that a statement of expert evidence had not been served on the other party as required by the *Magistrates' Court Civil Procedure Rules* 1989, O19. In cross-examination, S. conceded that the work was defective but disagreed that it needed to be completely redone. As part of R.'s case, evidence of further defects together with the cost of re-doing the work was given; however, these matters had not been put to S. in crossexamination. The Magistrate dismissed S.'s claim and made an order in favour of R.'s claim plus interest and costs. Upon appeal—

HELD: Appeal dismissed.
(1) The rule in *Browne v Dunn* (1894) 6 Co Rep 67 is designed to ensure fair play at trial and fair dealing with witnesses and requires that the witness and the party calling the witness knows what part of the witness' evidence is challenged. It does not require that each and every witness should be confronted with the whole of the opposite party's case.

(2) In the present case, S. was challenged as to whether the job needed to be completely re-done. As to the cost of re-doing the whole job, it was not necessary for R. to challenge S. on this point in view of the fact that neither S. nor his witnesses gave evidence as to this cost. Whilst the evidence of the further defects should have been put to S., the failure to do so was immaterial in light of the Magistrate's finding that the job needed to be completely redone. Accordingly, there was no failure by R. to abide by the rule in *Browne v Dunn*.

(3) The Magistrate was not in error in refusing to allow S. to adduce evidence where O19 of the Rules had not been complied with.

(4) In view of the finding that there was no substantial completion of the contract, S. was not entitled to recover the balance of the price agreed upon.

(5) By virtue of s60 of the *Supreme Court Act* 1986, a court may award damages in the nature of interest unless good cause is shown to the contrary. The fact that a successful party is said to be wealthy or has not spent money in carrying out rectification works represents no good cause for denying the right to interest.

HAYNE J: [1] This is an appeal brought under s109 of the *Magistrates' Court Act* 1989 against orders made in the Magistrates' Court at Melbourne on the hearing of a claim, and cross-claim, arising out of painting done by the appellant at a block of flats at 95 Carlisle Street, St Kilda. The appellant (who was the plaintiff below) sought $4,200 as the balance of the price that he had quoted for work at the flats. The respondents cross-claimed at first for $17,470, but later for $13,450, as the amount said to have been incurred in rectifying work done by the appellant which, the respondents alleged, was defective. The Magistrate ordered that the appellant's claim be dismissed with no order as to costs, and that

> "There be an order on the defendants' cross-claim in the sum of $13,450, together with interest of $2,153.23 and costs of $4,877."

A master dismissed the appellant's application for an order under Rule 58.09 of the Rules of Court, and such an order was made only upon the appellant's appeal to a judge. The questions of law said to be raised by the appeal, and stated in the order under Rule 58.09, were in the following terms:

> "(a) Did the learned Magistrate err in law in permitting the respondents to adduce evidence contrary to the rule in *Browne v Dunn* (1894) 6 Co Rep 67?
>
> (b) Did the learned Magistrate err in law in construing Order 19 of the *Magistrates' Court Civil Rules* 1989?
>
> (c) Did the Magistrate err in law in finding the appellant terminated the contract in April 1990?
>
> **[2]** (d) Did the learned Magistrate err in law in allowing the respondents interest on the claim?"

In view of the terms of these questions, it is necessary to say something of the course of the matter on its hearing in the Magistrates' Court. The appellant's case was that he had substantially performed an agreement to paint the external and internal stairwell of the flats for a price of $7,700, of which only $3,500 had been paid. The defendants' case was that the work had not been done in a tradesman-like manner, and that because of this breach, they had suffered $13,450 damages as the cost of re-painting. Counsel for the appellant below, opened his case and the Court then adjourned to view the premises, the subject of the proceedings. There is then some dispute between the parties about what was and was not given in evidence below.

Although authority would have me look at the matter on a basis that would support the judgment below, I have in fact tested the matter against the case put at its highest from the point of view of the appellant, and I do not pause to note the differences between the parties in their account of the evidence that was given.

Mr Harry Simons, an employee of the appellant, gave evidence of his giving a quotation for the work and a description of the work that was to be done. He deposed to the performance of the work, and the payments that had been sought and made. In cross-examination, counsel for the respondents spent what was described in the affidavit in support **[3]** of this appeal as "a considerable time going through the report of Mr Sherwood, together with photos, for comment by Mr Simons". I interpolate that Sherwood was an expert whom the respondent proposed to and eventually did call.

At no time did counsel for the defendant put to the witness a quotation that had been obtained by the respondent from a Mr Tait, nor did counsel for the defendant put to the witness some defects in the work which Tait was later to give evidence about. The affidavit in support of the appeal made by counsel who appeared for the appellant below, said that "the effect of Mr Simons' evidence was that he did not agree that there was any defect in the painting works performed by the plaintiff at the flats".

The appellant called evidence from a Mr Adams about his observations of the state of the premises before and after the appellant performed the work, but the learned Magistrate refused to permit the plaintiff to adduce expert evidence from him. Complaint is made of this by the appellant, and the appellant says that he should have been permitted to adduce expert evidence from Adams.

In my view, that question was a question for the discretion of the Magistrate in the light of Order 19 of the *Magistrates' Court Civil Procedure Rules*, and it is not demonstrated that there has been any relevant error in principle made in this respect by the Magistrate in her exercise of what was a discretionary judgment. It is to be noted that the rules proceed upon the assumption that, save by leave, no expert evidence may be given without there first having been an Order 19 statement delivered. **[4]**

Expert evidence was led on behalf of the plaintiff from a Mr Clarke who, on being referred to the report of Sherwood, agreed that most of the defects described there in fact existed. He said in-chief that these defects were "of a nit picking nature", and that all were capable of individual rectification. On cross-examination, counsel for the respondent put to Clarke that the only way

of rectifying the defects identified in Sherwood's report, was for the job to be done again. Clarke denied this and said that the defects could be fixed individually. Again, no question was put to Clarke about the amount of the respondent's cross-claim, about how it was calculated, or about any quotation of Tait. No other evidence was called on behalf of the appellant.

The first respondent gave evidence about the appellant's quotation, about what had been paid for the work, and of various complaints which she alleged that she had made about the quality of the work. The proceeding was then adjourned for a month. On resuming, Sherwood gave evidence to the general effect of a report that had been annexed to a statement delivered on behalf of the respondent under Order 19 of the *Magistrates' Court Civil Procedure Rules*. Sherwood was asked questions in-chief about the quantum of the respondents' cross-claim, and counsel for the appellant objected, asserting that witnesses for the appellant, not having been cross-examined about the quantum of that cross-claim, it was not then open to the respondent to lead evidence of the amount (I add, presumably any **[5]** evidence of amount) in support of the respondents' cross-claim.

The learned Magistrate ruled against the appellant's submission, and ruled that the respondents should be allowed to call evidence on the quantum of their cross-claim. The appellant asserted in evidence on the appeal that Sherwood gave no such evidence, although the respondent says that he did. In the end, in my view, nothing turns on this point of difference between the parties.

Evidence was given on behalf of the respondent by Mrs Kuran, and by a Mr Sokolski, but it is unnecessary to refer to that evidence in any detail. The respondent then called Tait, and over objection from the appellant to the same effect as had been made about the evidence of Sherwood, the respondent tendered in evidence a quotation that Tait had given for the cost of rectifying the work. Tait's evidence was to the general effect that the only way to rectify the defects described in the report of Sherwood, was to re-do the whole work, and that it was for that work that he had quoted. Tait did concede in cross-examination that he had identified more defects in the appellant's work than had Sherwood, but I consider it important to note that his evidence in-chief had been to the effect that the defects identified by Sherwood were such as, in his opinion, to require the whole of the work to be re-done. Again, the accounts of the reasons for judgment of the learned Magistrate differ, but again I am content to proceed on the basis that the appellant's account **[6]** of those reasons is substantially accurate.

According to the appellant, the learned Magistrate said in part in her reasons for judgment:

> "I am satisfied that the proper construction of the contract was that the job was to be of a reasonable to good standard, done in a tradesman-like manner. Accordingly, I accept the evidence of Mr Sherwood that, in a job such as this, there should be no defect shown up within 18 months. Mr Sherwood gave evidence that the wood in the window frames was still rotten or, indeed, the putty and filler used was not ideal in the circumstances. It was consistent with a "clean-up job". Having determined this, I find that the defects that Mr Sherwood specified in his report did exist as at June 1990, and I find that the contract was terminated by the plaintiff in April 1990, when the plaintiff failed to rectify the defects. Although there was evidence that these defects were capable of rectification, and could have been picked up at a final inspection, I agree with Mr Sherwood that for the work to conform to the agreement, there still had to be a lot of work to be done and will require the woodwork and external re-filling and re-coating of the job in the terms of the quote of Mr Tait. Mr Tait's job quote does deal with a number of additional items that were not included in the report by Mr Sherwood. Some considerable time was devoted on whether he was doing a new job, or rectifying the job. In order to be satisfied that the work associated with the job was done in a workman-like manner, it is necessary that the work set out in Mr Tait's quotation be done. Accordingly, I propose to dismiss the plaintiff's claim and to award the defendants the full amount of their claim together with interest from the date of issue, and costs."

Several things are to be noted about these reasons given by the learned Magistrate. First, she accepted the evidence of Sherwood that for the work to conform to the agreement there still had to be a lot of work to be done, and she accepted further that that would require work of the kind described in the quotation of Mr Tait. She said that in order to be satisfied that the work associated with the job was done in a workman-like manner, it was necessary that the work set out in Tait's quotation should be done.

[7] The appellant, as is his right, appeared in person on the hearing of this appeal. The only appeal permitted by Parliament from a Magistrates' Court in these circumstances is an appeal on points of law, and it is not a general appeal by way of re-hearing; it is not an opportunity to bring fresh evidence; it is not an opportunity simply to re-assess the weight of evidence given at first instance.

I say, without any criticism at all of the appellant, that the appreciation of these facts does not come easily to the non-lawyer, yet, if I may say so, the appellant presented his argument, not only with care, but with considerable precision, and commendable economy. His appearance in person has, however, meant that I have perhaps not had as much assistance as I might have had in elucidating the points that go in support of his appeal. I have therefore sought, as far as possible, to search for arguable bases on which favourable answers might be given to the questions of law raised in the Rule 58.9 Order. I am, however, not persuaded that any error of law is shown in the decision below.

I deal first with the *Browne v Dunn* (1894) 6 Co Rep 67 point. The question as framed in the Rule 58.09 Order is cast in very general terms, and it might be said to assume that there was some breach of the so-called rule in *Browne v Dunn* (1894) 6 Co Rep 67. The only complaint made at trial was a complaint about the use made by the respondent of the evidence of Tait and, in particular, his evidence about defects that were different defects from those identified by Sherwood, and his evidence about the cost of the rectification works. The complaint was that these matters were not put **[8]** directly to the witnesses for the appellant.

In my view, it is important to identify, as far as one can, exactly what is the rule, or so-called rule, in *Browne v Dunn*. It is, at most, a rule of practice and procedure. It is, probably, also a rule of professional conduct, but whatever it is, it is a rule designed to ensure fair play at trial, and fair dealing with witnesses. Its purpose is best illustrated by consideration of the facts of the case of *Browne v Dunn* itself. There, six witnesses gave evidence that they had signed a document as a genuine retainer of a solicitor. No suggestion was made to any of them in cross-examination that that was not so. But the opposite party then sought to – and perhaps more remarkably did – persuade a jury that each of the six signatories should be disbelieved, though not one question had been put to any of them suggesting that their evidence was in any respect controversial.

The rule has been variously stated, and it is not necessary now to choose between those statements. For present purposes, it may be enough to quote two passages, first a passage from *Phipson on Evidence*, cited by Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 18, where the learned editors of *Phipson* say:

> "As a rule, a party should put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness, or in which he had a share. If he asks no questions he will in England, though perhaps not in Ireland, generally be taken to accept the witness' account, and he will not be allowed to attack it in his closing speech, nor will be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point... Where it is intended to suggest that the **[9]** witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation, and this probably applies to all cases in which it is proposed to impeach the witness' credit ... Failure to cross-examine, however, will not always amount to an acceptance of the witness' testimony, for example, if the witness has had notice to the contrary before-hand, or the story is itself of an incredible or romancing character."

His Honour also cited from the second Australian edition of *Cross on Evidence* where the authors stated the rule in the following terms:

> "Any matter upon which it is proposed to contradict the evidence in-chief given by the witness must normally be put to him, so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in-chief."

The rule relates to matters of which the witness has given evidence. In my view it does not require that each and every witness should be confronted with the whole of the opposite party's case. It is designed to ensure that the witness, and the party calling the witness, may know what part of the witness' evidence is challenged. Here, the appellant's witnesses gave evidence that patching was required to make good any defect in the work, rather than a complete re-doing of

the work. That view was challenged in cross-examination and there could be no doubt that the challenge was made.

In my view it was not then necessary for the respondent to challenge the witnesses on the cost of re-doing the whole job, for those witnesses had given no evidence of that cost. The witnesses had sought to cut the matter off at the logically prior point of whether re-doing the work was necessary. **[10]** Now, of course, the appellant was faced at trial by a difficult tactical choice, whether to run on the proposition that patching was enough, or to run on alternative bases, that patching was enough or, if it was not, that a complete redoing of the job would cost less than the amount claimed by the respondent. In fact, the appellant chose the former course and, if I may so, I well understood why that choice was made.

But there can be no question in my view that the applicant was taken by surprise by the case to be made by the respondent, and there is no question of the respondent later seeking to have the appellant's witnesses disbelieved on evidence which they had given, but which had not been challenged – for challenge was made, and was made squarely on the issue on which they had given evidence, namely, what work was necessary to repair what were admitted to be defects in the work done. Indeed, the terms in which the respondents made their claim, as well as the terms of Order 19 statements filed and served by the respondents made plain the kind of case that was to be made. I interpolate here that the fact that the Order 19 statements may have been late is, in my view, nothing to the point; it goes only to the question of adjournment and, so far as the evidence shows, no such application was made at trial. There was in my view, therefore, no failure to abide by the rule in *Browne v Dunn*. But even if, contrary to that view, there had been a failure it by no means follows that the course urged by counsel for the appellant below should have been followed, and the evidence tendered on behalf of **[11]** the respondents should have been rejected.

To quote from a judgment of Clarke J in the Court of Appeal in New South Wales, in *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551 at 556:

> "There is no universal rule laying down the consequences of a failure to comply with the rule in *Browne*. Obviously breaches of the rule may occur in many different circumstances, and it would be quite inappropriate for the courts to endeavour to lay down a specific procedure to remedy the problems flowing from a breach no matter in what circumstances the breach occurs. Different situations will call for different remedies, and ... the precise procedures to be adopted when a breach of the rule occurs lies within the discretion of the trial judge. It is for him to determine whether a breach has occurred and, if so, what steps should be taken to ensure that the trial does not miscarry. He may, for example, require the relevant witness to be recalled for further cross-examination before allowing the contradictory evidence to be given; he may decline to allow the party in default to address upon a particular subject upon which the opposing party was not cross-examined (see, for example, *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362). The decision will in each case involve a balancing of competing considerations, and lies essentially within the discretion of the trial judge."

See also *R v Birks* (1990) 19 NSWLR 677, especially at 689-692; (1990) 48 A Crim R 385, *Bulstrode v Trimble* [1970] VicRp 104; [1970] VR 840, *Precision Plastics Pty Ltd v Demir* [1975] HCA 27; (1975) 132 CLR 362; 6 ALR 311; 49 ALJR 281; *Seymour v Australian Broadcasting Commission* (1990) 19 NSWLR 219, *Reid v Kerr* (1974) 9 SASR 367; *Leydon v Thomlinson* (1979) 22 SASR 306-7, Supreme Court South Australia, Zelling J, 4 April 1979.

In my view, the learned Magistrate ought not in the circumstances to have rejected the evidence tendered on the part of the respondent; moreover, in my view, there was in this case, no occasion to have any re-opening of the appellant's case to allow further cross-examination, or the calling of further evidence. **[12]** In any event, the evidence before me does not show that any application was made to recall witnesses for further cross-examination, or to call additional witnesses. The only application that was made was an application in effect to bar the respondent from tendering any evidence in support of the cross-claim that had been made, and known to the appellant for a considerable time.

In my view, no different conclusion should be reached concerning the fact that further defects identified by Tait were defects that were not put explicitly to the appellant's witnesses. They should have been put to the appellant's witnesses, and a failure to put them may have

meant that the Magistrate ought to have accepted the appellant's witnesses in so far as the question was one of identification of defects. But, in the end, in this case, this failure does not matter, given the Magistrate's conclusion that the defects identified by the other witness called on behalf of the respondent, and which were put to the appellant's witnesses, had been accepted by the appellant's witnesses and, in the view of the learned Magistrate, formed on the whole of the evidence, warranted the complete re-doing of the job. Accordingly, in my view, question 1 does not raise any matter in which error is shown on the part of the learned Magistrate.

The question of construction of Order 19 of the applicable rules of the Magistrates' Court that is raised by question 2, does not raise any significantly different, or separate issue, from the issues that I have considered in question 1. **[13]** It is by no means clear to me what question of law is encompassed by the third of the questions presented in Rule 58.9 Order. Given the Magistrate's conclusion that the work must be re-done entirely, I am of the view that it then does not matter whether the contract was brought to an end in April 1990 or May 1990. Nor, in my view, does it matter whether the contract was brought to an end by the action of the appellant or the respondent.

The question that was presented was whether the appellant had so failed to perform the work as to require complete re-doing of the work and, if that were so, whether that meant that there had been no substantial completion of the contract. That, in my view, presented a question of fact, rather than of law (see *Zamperoni Decorators v Lo Presti* [1983] VicRp 28; [1983] 1 VR 338). In my view, it is not demonstrated that the learned Magistrate had no basis for reaching the conclusion which she did. If there were no substantial completion of the contract, as the learned Magistrate found to be the case, then it followed that the appellant was not entitled to recover the balance of the purchase price that had been agreed on.

As to the allowance of interest, it is enough to note that by s33 of the *Supreme Court Act* the rules of law enacted by Part V of the Supreme Court Act are to apply to all courts so far as the matters to which the rules relate are matters within the jurisdiction of those courts. Thus, the Magistrates' Court is bound by the terms of s60 of the *Supreme Court Act* to give damages in the nature of interest from the commencement of a **[14]** proceeding to the date of judgment in any proceeding for recovery of damages, unless good cause is shown to the contrary.

In my view, neither the asserted wealth of the defendant, nor the fact that the defendant has not outlaid the money in payment for repairs represents good cause for denying the right to interest given by s60. One other matter may be mentioned briefly, although it may perhaps not arise on the questions of law framed in Rule 58.09 Order. Some point was made of whether the proceedings before the Magistrate were going forward by way of arbitration, or by way of hearing in open Court, and it was suggested that this might affect the way the case proceeded.

I will not stay to look to the statutory basis for the distinction between these procedures; it is enough in my view to say that given that the cross-claim was one which had to be dealt with in open Court, and given, further, that the subject matter of that cross-claim was bound inextricably with the subject matter of the claim, both proceedings were, in my view, proceedings that were conducted in open Court according to the rules applicable in those circumstances.

In my view, no error of law is shown in the decision of the Magistrate below. Accordingly, it follows that I am of the opinion that the appeal should be dismissed.

APPEARANCES: The applicant Simons appeared on his own behalf. For the respondents Ritterman and Anor: Mr RMJ Lombardi, counsel. Romer & Co, solicitors.
