Procedural fairness in probate proceedings

Amy Campbell reports on *Nobarani v Mariconte* [2018] HCA 36

The High Court held unanimously that a denial of procedural fairness sufficient to warrant a new trial had occurred in probate proceedings. A substantial wrong or miscarriage arose when the nature of a hearing was changed on short notice to include related proceedings to which a self-represented litigant had not previously been a party and in respect of which he had not taken any steps.

Background

The appellant claimed an interest in challenging a handwritten will made in 2013. The appellant had been the beneficiary of some personal property and jewellery in a previous will made in 2004. The appellant filed two caveats against a grant of probate without notice to the respondent. The respondent brought a motion seeking orders that the caveats cease to be in force. The respondent also brought proceedings seeking a grant of probate. The appellant was not a party to the probate proceedings, and although he was served with the statement of claim and filed an appearance, he was not directed to take any steps in the probate proceedings.

Three clear business days before the trial which the appellant had been told would be confined to the respondent's motion that the caveats cease to be in force, the appellant was told the trial would be of the claim for probate. The appellant, who was unrepresented, was given one clear business day to file and serve a defence and serve any supplementary evidence upon which he wished to rely in addition to the affidavits he filed in the caveat motion. The trial judge was not informed that the appellant was not a party to the probate proceedings or that the appellant's affidavits had been filed only in connection with the caveat motion.

At the trial, the appellant was joined as a party to the claim and a cost order sought against him. His defence was in disarray. His applications for adjournments were refused. The trial judge gave an oral judgment granting probate and made a costs order against the appellant: *Mariconte v Nobarani* [2015] NSWSC 667.

The appellant appealed to the Court of Appeal, arguing there had been a lack of procedural fairness: *Nobarani v Mariconte* (No 2) [2017] NSWCA 124. Ward JA dismissed the appeal, concluding that although the appellant had been denied procedural fairness, that denial did not deprive him of the possibility of a successful outcome. Emmett AJA dismissed the appeal on the basis that the appellant did not have an interest in challenging the will made in 2013. Simpson JA dissented. Her Honour concluded that the appellant had been denied procedural fairness and that the denial was a substantial miscarriage of justice warranting a new trial.

The High Court's decision

The court, comprising Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, delivered a joint judgment unanimously allowing the appeal. Their Honours held that there had been a material denial of procedural fairness and that the appellant did have sufficient interest to challenge the will made in 2013.

The court observed that it had the power to order a new trial on appeal pursuant to sections 75A(10) and 101 of the *Supreme Court Act* 1970 (NSW) (at [36]). To do so on the basis of a denial of procedural fairness required it, pursuant to rule 51.53 of the *Uniform Civil Procedure Rules 2005* (NSW), to be satisfied that some substantial wrong or miscarriage had been thereby occasioned (at [37]-[39]).

Denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome.

The court stated that the requirement of a 'substantial wrong or miscarriage' is that 'the error must usually be material in the sense that it must deprive the party of the possibility of a successful outcome' (at [38], [39]). Once that has been established, a new trial will be ordered unless the other party can show reason for the exercise of discretion not to order a new trial (at [39]). One reason that might be sufficient for that purpose is 'where no useful result could ensue because a properly conducted trial will not make a difference' (at [39]).

The court considered that there was a denial of procedural fairness to the appellant from the consequences, and effect, of altering the hearing on short notice from a hearing of the caveat motion to a trial of the grant of probate (at [40], [44]).

In reaching that conclusion, the court had regard to the fact that the appellant had little appreciation of court procedure or rules of evidence, his grasp of English was not strong, and he only had three days to: consider the statement of claim to proceedings to which he had not been joined; prepare and serve a defence; issue subpoenas; locate witnesses; and obtain supplementary evidence (at [43]). The court also observed that the abbreviated timetable had consequential effects, for example, the appellant did not give notice to cross-examine a key witness and was not able to locate another key witness, and the primary judge refused to consider an affidavit filed in the caveat proceedings where it was not read and the witness was not before the court (at [44]). The court considered that all of these matters in combination were 'manifestations of the material denial of procedural fairness to the appellant' (at [44]).

The court held that the denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome, observing that while the evidence from the respondent was strong, a grant of probate was not inevitable (at [46]). The court stated that it would be 'rare' that a submission that a properly conducted trial could not make a difference to the outcome would succeed (at [48]). In the circumstances before the court, the submission failed because it assumed the court should attempt an assessment of prospects by conducting a hypothetical trial, which required (among other things) speculation about evidence that might be called (but was not called) and potential cross-examination (at [48]).

The court also concluded that the appellant had sufficient interest in the will to challenge it, as the appellant was a person who had a right that would be affected by the grant of probate, given he was a legatee under the will made in 2004. The court considered the respondent's submission that the personal property and jewellery left to the appellant in that will was too insubstantial to found such an interest factually erroneous (as it was based only on a lack of reference to the items in an inventory) and legally erroneous (by suggesting rights of low monetary value cannot amount to a legal interest) (at [49]).

Accordingly, the court allowed appeal with costs and ordered a new trial.