



In The Supreme Court of Bermuda

APPELLATE JURISDICTION No. 13 of 2022

BETWEEN:

MARGARET HARVEY

Appellant

And

CURTIS P RICHARDSON

Respondent

JUDGMENT

Date of Hearing: 18 July 2022
Date of Ruling: 08 September 2022

Appellant: In Person
Respondent: In Person

*Appeal from the Magistrates' Court
Constitutional entitlement to fair Court proceedings in civil cases
Entitlement to independent legal advice*

JUDGMENT of Shade Subair Williams J

Introduction

1. This is an application for leave to appeal the judgment of Magistrate Tyrone Chin in respect of the approximate sum of \$2,300.00 awarded in favour of the Respondent in the Magistrates' Court. During the course of the directions stage of these appeal proceedings, the parties were informed that the arguments which were to be made on this application would be treated as the substantive arguments on appeal, in the event of leave being granted.
2. At the close of the hearing I reserved judgment and informed the parties that I would deliver these written reasons.

The Relevant Facts

3. The facts of this case arise out of a landlord and tenant dispute, the Appellant, Ms. Margaret Harvey, being the landlord and the Respondent, Mr. Curtis Richardson, being the tenant. By Ordinary Summons (21CV00288) filed in the Magistrates' Court, the Respondent brought a claim for \$2,500.00 against Appellant for the return of his rental security deposit, having vacated the premises. Originally, the Appellant sought to defend the claim on the basis that the Respondent was responsible for the damage incurred to the rented premises to the valued sum of \$2,500.00 plus and additional amount of \$866.85.
4. On 14 May 2021, the parties appeared before Magistrate Chin who declared that he would recuse himself from adjudicating these proceedings. It is not known, nor is it material for present purposes, whether his recusal arose out of actual or apparent judicial bias. What is of relevance is that the magistrate encouraged the unrepresented parties to separately convene with Counsel, Ms. Arisha Flood (appearing *amicus curiae*), in order to resolve the otherwise disputed claim. (Notably, the Appellant is an elderly person who was routinely assisted by the presence of her daughter, Dr. Margot Harvey, in other previous and related Court proceedings where Ms. Harvey had claimed for the recovery of rental arrears from Mr. Richardson. However, on this particular occasion, 14 May, the Appellant's daughter did not accompany her to the Court hearing.)
5. In the Appellant's affidavit evidence she deposed [14] – [20]:

“On, or around 14 May 2021, the Respondent and I appeared before the Worshipful Magistrate Chin to answer the Respondent's Summons. The Worshipful Magistrate invited the Respondent and I to leave the Court in the presence of a lawyer, Arissa [sic] Flood, in an effort to try and settle the dispute.

I told Ms. Flood that I did not feel well; however, Ms. Flood tried to get us to settle on the spot. Ms. Flood showed the Respondent my photographs and invoices; to which the Respondent confirmed that he caused the damage, as I had alleged. The Respondent made a handwritten note dated 31 January 2021 confirming that a truck got stuck in the grass and caused damage, which he agreed to pay.

However, when we appeared at Court, the Respondent refused to pay the full amount owed for the damages (\$866.85). Rather, the Respondent suggested that we split that sum, which I agreed to, in an effort to bring about a quick resolution.

Ms. Flood communicated the agreement to the Magistrates Court on behalf of the parties. The Court made an order; however, I never saw that order to confirm that it was what the Respondent and I actually agreed.

I returned to the Magistrates' Court on, or around 9 July 2021, for the Respondent to give evidence in relation to an Assessment of Means. On this occasion, the Respondent stated that he did not owe the money that we have claimed as rental arrears. The Respondent stated that he owed \$2,943.00 less than what I claimed because of the Magistrates' Court decision 14 May 2021.

This was the first time that I understood that the Magistrates Court erred and awarded the Respondent a benefit that neither party agreed to, but which he was clearly trying to take the benefit of. Had I felt better and had I appreciated what was being discussed in Court, I would have made clear that the only concession that I was willing to make was to reduce the money owed to me by approximately \$400.00.

The Court then indicated that if I took issue with its prior judgment, I would have to file an appeal.”

6. While Ms. Harvey's evidence does not provide any further detail on how Ms. Flood engaged the parties, the parties agreed during the appeal proceedings before me that the Appellant spoke privately with Ms. Flood and that the Respondent also spoke privately with her. Following those two private meetings with Counsel in the Court precincts, and upon the return of the parties to the Court room, Ms. Flood confirmed that an agreement had been reached between both sides. The final effect of the terms of the agreement which were put to the magistrate entitled Mr. Richardson to a set-off in the sum of \$2,322.44 for his outstanding rental arrears.
7. The Appellant now seeks for this Court to quash that judgment entered by Magistrate Chin for the return of Mr. Richardson's rental deposit.

Decision and Reasons:

8. Regrettably, it seems that Ms. Flood was regarded and indeed acted as a hybrid between a Court-appointed mediator in some sense and advising Counsel in adversarial litigation in another sense. Plainly put, Ms. Flood ought not to have placed herself in the position of appearing to advise both of the opposing parties, whether or not she was acting on an *amicus* basis.
9. In the Appellant's evidence to this Court she stated [28] –[29]:

“It is clear that the Worshipful Magistrate misunderstood what the parties agreed and/or what Ms. Flood represented to the Court and did not clarify with me to confirm the true position.

In my opinion, the Worshipful Magistrate did not properly understand my position that I contested that the security deposit be returned...”

10. This Court is unable to bypass the Appellant’s evidence that her position was not properly put to or understood by the magistrate. Such an assertion would be dangerous to ignore particularly in these circumstances which involved Ms. Flood privately convening with the Respondent for reasons other than for the sole benefit of Ms. Harvey. At the bottom line, the Appellant’s case on appeal is that she did not properly understand the effect of Ms. Flood’s representation to the Court until she appeared for a subsequent hearing, ancillary to the proceedings for the rental deposit. A complaint of this nature is illustrative of the very risks that sections 22-24 of the of the Barristers’ Code of Professional Conduct 1981 was likely drafted to protect against. Those provisions state:

Impartiality and conflict of interest

22 A barrister or firm of barristers must neither advise nor represent both sides to a dispute. Save after adequate disclosure to and with the consent of all clients or prospective clients concerned, he or the firm should not act or continue to act in a matter when there is or there is likely to be a conflict of interest.

23 A barrister may appear for more than one party in a trial provided he satisfies himself that there is not and is not likely to be any conflict of interest.

24 A barrister shall not act for an opponent of a client, or of a former client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage.

11. In this case, I am unable to find that the parties truly consented to being collectively advised by Ms. Flood. Instead, the parties simply complied with Magistrate Chin’s direction for them to attempt to settle their dispute with the assistance of a shared Counsel. Notwithstanding, the right to independent legal advice is a hallmark of procedural fairness in litigation proceedings. These principles are all born out of section 6(8) of the Bermuda Constitution Order 1968 which provides:

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

12. I would add that in the present case, the terms of any agreement formed between the parties ought to have been recorded in a Consent Order signed and/or expressly approved by both parties in the open Court proceedings. Such a practice is standard in the Supreme Court and

protects the administration of justice from the kinds of complaints which have arisen on this appeal. The drafting of a Consent Order was particularly necessary in this case, given magistrate's confirmation of his own recusal.

13. In my judgment, these various factors all point to a sabotage of procedural fairness which has left this Court in real doubt that (1) the Appellant's true position was understood by the Court and (2) that she herself understood the terms of how this matter was disposed by Magistrate Chin. For these reasons this appeal must succeed.

The Application for Leave to Appeal:

14. Having considered the merits of the appeal and the Appellant's affidavit evidence filed in support of the application for leave to appeal in respect of the issue of delay, I find sufficient merit in the application for leave to appeal.

Conclusion:

15. Leave to appeal is granted.
16. The appeal is granted and this matter is remitted to the Magistrates' Court to be tried before a magistrate other than Magistrate Chin.

Thursday 8 September 2022

**THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**