Supreme Court Notes

This section of ***Balance*** has for some time been prepared very expertly by Anita Del Medico. Gratitude is owed to Anita for her fine work. She leaves ***Balance*** because of the pressure of other responsibilities which include that of Editor of the ***Northern Territory Law Reports.***

Anita was kind enough to invite the writer to take over these notes. He, in turn, has turned to a number of other practitioners for assistance. Over the coming months the reader will notice a change in the format of the notes with the accent being on short *noting-up* of the cases, the purpose being to let the profession know of the decisions and allow them to make their own assessment of the cases and in particular, their relevance to their practices.

It is not intended that every written judgment or ruling of the Supreme Court or the Court of Criminal (or Civil) Appeal will be reported. There will also be a short separate section under the heading High Court Notes.

Reporters for this month include Gina O'Rourke, Jan Trier, Alastair Shields, Chris Rowe, Koulla Roussos and David Lisson. Those noting a public service concentration will be relieved to know that members of the private profession have agreed to contribute shortly.

RW

EXTENSION TO APPEAL

Edrick v Nayda

No. 219 of 1994

Judgment of Martin CJ delivered 22 December 1994.

The court considered an application for an extension of time within which to institute an appeal against a conviction imposed upon the applicant by the Katherine Court of Summary Jurisdiction. An extension was sought as an appeal had not been instituted within time because the applicant solicitors were originally of the opinion that an appeal had no merit. However, after subsequent consideration, they formed the view that it did. Martin CJ considered the two possible grounds upon which the court may grant an extension of time. After finding that Katherine in 1994 could not be considered *as remote* from the seat of the Criminal Court of Appeal, the question centred on whether the plaintiff had done whatever was *reasonably practicable* to comply with the *Justices Act* (section 165) within the time limit specified.

The court confirmed that the requirements of Section 171(1) and (2) as to the institution of an appeal are mandatory conditions precedent. (Following *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8.)

It was observed by the court (applying *Potter v Neave* [1944] SASR 19) that 'practicable' may be paraphrased in the context of s.165 *as capable of being done or accomplished within the available resources whatever they may be... it must at least be demonstrated as unreasonable to expect in the particular circumstances that exact compliance should be insisted on.* The difficulties of launching an appeal, whilst they may provide grounds why it has not been *reasonably practicable to give notice and enter into a recognisance in the prescribed month,* must be disclosed in the course of the application and cannot be assumed.

The applicant had not shown such grounds. The court dismissed the application. The case is another reminder of the need for practitioners to act promptly to protect client's interests.

Howse instructed by KRALAS for the applicant.

Wild QC instructed by DPP for the respondent.

GO'R

SENTENCING OPTIONS

O'Brien v Macskimin

No. 180 1994

Trenerry v Macskimin

No. 181 of 1994

Martin CJ, 22 December 1994.

Special case stated by Wallace SM pursuant to s.162 of *Justices Act:* The question of law, as amended following argument, was:-

> *"Whether, when a person has been convicted of an offence and sentenced by a Magistrate constituting a Court of Summary Jurisdiction to imprisonment, and that sentence has been suspended upon that person entering into a bond to be of good behaviour, and that person is brought before the Court constituted by a different Magistrate for breach of that bond, the second Magistrate may further suspend that sentence upon that person entering into a home detention order."*

The case required an examination by the Court of the provisions of the *Criminal Law (Conditional Release of Offenders) Act* ss.5(1)(b), 6(3)(e) and 19A(1).

The Court considered the distinction between part-heard proceedings and those arising from separate facts, and confirmed that proceedings arising from bond breaches need not be dealt with by the same tribunal that imposed the bond. After a consideration of the relevant provisions, the amended question was answered, ***Yes.***

Cato instructed by DPP for informants.

Sammon instructed by NTLAC for defendant.

RW

ONUS ON DEFENCE

Director of Public Prosecutions v Cole & Leggett

CA6 of 1994

Court of Criminal Appeal

Judgment of Martin CJ, Angel and Priestley JJ delivered on 16 December 1994.

This related to a point of law which arose in the trial of the respondents and which point was referred by the DPP pursuant to s.414(2)6 of the Code to the Court of Criminal Appeal for the consideration and opinion of the Court.

The point referred was:

> *"Whether the learned trial judge was correct in directing the jury that the Respondents having raised the defence set out in section 129(3) of the Criminal Code, the Crown was therefore required to prove beyond reasonable doubt that the Respondent did not believe on reasonable grounds that the female was of or above the age of 16 years?"*

At the conclusion of argument the CCA answered the question "No" and gave reasons.

S129(3) provides that it is a defence (to the charge) to prove that the accused person believed, on reasonable grounds, that the female was of or above the age of 16 years. The Court held that the onus of proving that the accused held

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the belief on reasonable grounds lies on the accused. The onus is not upon the Crown to establish beyond reasonable doubt the absence of the particular exculpatory matter, but upon the accused to show that the matter is, on all the material in evidence, established on the probabilities.

The CCA stated that s.31(1) of the Criminal Code has no bearing on the construction of s.129(3), since, s.31(1) could only arguably need consideration where the accused had carried out the act of having carnal knowledge of a female under 16.

As to sections such as s.32, where an issue as to mistake arises the onus of proof lies on the Crown to exclude, beyond reasonable doubt, the operation of mistake. However, where there is a specific Section such as s.129(3) and a general section such as s.32, both possibly applicable to the one situation, it is a matter of statutory construction whether the specific section is to operate notwithstanding the presence of the general one. To the extent that s.31(1) may be relevant to the language of s.129(3), the same applies to it.

R Wild QC instructed DPP for the appellant.

K Kilvington instructed by Crown Law Office for the respondents.

JT

THIRD PARTY DISCOVERY

Ezzy v Commonwealth Bank of Australia

No. 214 of 1994

Judgment of Martin CJ delivered 27 February 1995.

The plaintiff sought an order for discovery pursuant to Rule 32.05 of the Supreme Court Rules. Before doing so, she had caused a writ to be taken out in which the defendant was named as respondent, although there was no evidence that it had been served on the defendant.

Held, that because one of the conditions which must be satisfied before an order for discovery can be made under r32.05 is that the court must be satisfied that the applicant does not have sufficient information to decide whether to commence proceedings, and because the applicant in this case had already commenced proceedings, an order under the Rule was not available.

J Hebron instructed by De Silva Hebron for the plaintiff.

S Ludher for the defendant.

AS

PRACTICE SUSPENSION

Somerville v The Law Society of the Northern Territory

AP17 of 1995, Court of Appeal

Judgment of Kearney, Thomas and Gray JJ delivered 14 February 1995.

Application for an order pursuant to s.29(5) of the *Legal Practitioners Act* to revoke a 3 month suspension of the applicant's practising certificate.

The applicant had been convicted in October 1994 for a breach of s.269(1)(a) of the *Bankruptcy Act* (Cwth), and was sentenced to nine months imprisonment, suspended upon the applicant entering into a two year good behaviour bond. In suspending the certificate, the respondent had relied upon s.27(1)(b) of the *Legal Practitioners Act*, which empowers it to cancel or suspend a practising certificate where the holder "has been convicted ... of a crime, or of a simple offence involving dishonesty on his part".

Held, that the offence created by s.269 of the *Bankruptcy Act* is a "crime" for the purposes of s.27(1)(b) of the *Legal Practitioners Act*. Following a review of the facts of the case, the court refused the application. The court made general observations concerning the desirability of a revocation rather than suspension.

Note: on 2 March 1995, the court (Gray AJ dissenting) granted the applicant a stay of the order suspending his practising certificate, pending an application for special leave to appeal to the High Court.

S R Southwood instructed by De Silva Hebron for the applicant.

J Reeves instructed by The Law Society of the Northern Territory.

AS

WORK HEALTH ONUS

Kenny v Central Aboriginal Congress Incorporated

No. 36 of 1994

Judgment of Martin CJ delivered 13 December 1994.

This was an appeal by a worker from an interlocutory order of the Work Health Court. The respondent employer had cancelled weekly compensation payments to the worker pursuant to section 69 of the *Work Health Act* on the ground, *inter alia*, that the worker had ceased to be incapacitated for normal duties. The Court ruled that in the proceedings brought by the worker for resumption of her weekly compensation payments the employer bore the onus of proving only that the worker had ceased to be totally incapacitated. The worker appealed this ruling.

The Chief Justice observed that *"it can no longer be doubted that the employee bears the onus of establishing a change of circumstances warranting cancellation of compensation payments"*, and that if the employer is unable to discharge this onus *"Then it would seem that the compensation payable to the appellant has not been cancelled"*.

The Chief Justice rejected the lower Court's conclusion that *"as the employer accepted a claim for total incapacity, all the employer has to prove in justifying the cancellation of payments is a change in circumstances which amounts to the cessation of total incapacity"*, observing that this conclusion was based upon the false premise that the compensation claimed by a worker *"is to be determined by reference to matters other than those provided for in the legislation, for example, pleadings in later proceedings under the Act or evidence as to what the employer paid"*. His Honour stated that *"a claim for compensation is a claim for all benefits payable under the Act as the result of the injury"* and that *"once liability is fixed under the Act ... all relevant compensation flows by operation by the Act"*. His Honour was further of the view that a cancellation in terms such as those in the notice served upon the worker in this case is a cancellation of all benefits under the Act.

The Chief Justice rejected a submission by the employer that as payments were in this case cancelled on the basis that the worker had ceased to be toally incapacitated, the employer need only prove that the worker had ceased to be totally incapacitated. His Honour held that payments had been cancelled by the employer on the basis that the worker had ceased to be incapacitated at all, and it was this assertion in respect of

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which the employer bore the onus of proof.

G Hiley QC instructed by Cridlands for the appellant.

J Tippett instructed by Ward Keller for the respondent.

CR

WORK HEALTH ACT
In the matter of the
Work Health Act.
No. 207 of 1994.

Judgment of Kearney J delivered 20 January 1995.

This was a case stated by the Work Health Court for the opinion of the Supreme Court on the proper construction of section 87 of the *Work Health Act*, particularly the meaning and effect of the phrase *"until such time as the Court orders otherwise"*. Section 85(1) requires an employer to notify its decision to accept, defer acceptance or dispute liability for compensation within 10 working days of receiving a claim. Section 87 provides as follows:

> *"Where, within the time specified in section 85, an employer does not comply with that section, the employer shall, until such time as the Court orders otherwise, be deemed to have accepted liability for the compensation claimed insofar as the claim is in respect of compensation payable under subdivisions B and D of Division 3".*

The phrase "until such time as the Court orders otherwise" was inserted in the section by the 1993 amendment to the Act.

Six questions of law were reserved by the stated case for the opinion of the Supreme Court, viz:

1. *Does the Court, pursuant to s.87 of the Act, have the power to order that an employer may deliver a Form 5 notice disputing liability pursuant to section 85(1)(CD), after the [10 working days] time limits specified in section 85 have expired?*
2. *(a) Does section 87 of the Act give the employer a right to make an application to the Court for an order under that section permitting it to deliver a Form 5 notice after the time limits specified in section 85 have expired; and, if so, under what section of the Act may the employer bring such an application, and how is such an application made?*
   (b) Can the application be dealt with as a preliminary issue supported by affidavit evidence, or must it be dealt with at a substantive hearing?
3. *If "yes" to question 1, what factors should influence the exercise of the Court's power in so permitting an employer to deliver a Form 5 notice after the time limits specified in section 85 have expired?*
4. *Can the employer rebut the deeming effect of section 87 by establishing that:*
   (a) there is a serious question to be tried;
   (b) the balance of convenience is in favour of the employer not making payment of compensation pending the hearing of a claim to be made by the worker;
   (c) its failure to comply with section 85 was due to inadvertence or mistake?
5. *For an employer to rebut the deeming effect of section 87 is it necessary for an employer to prove on the balance of probabilities that, apart from the deeming provision of section 87, he is not liable for the claim. That is, must the employer prove that the basis on which liability would have been rejected had he disputed liability under section 85, excludes him from liability?*
6. *What is the meaning of the words "until such time as the Court orders otherwise" appearing in section 87 as amended of the Work Health Act.*

Kearney J observed that *"it is clear the fundamental question is that posed in Question 6"* and that *"answer to Questions 1 to 5 are subsidiary to or consequential upon the answer to Question 6, which involved the interpretation of section 87"*. His Honour considered that, in view of the ambiguity of the phrase *"until such time as the Court orders otherwise"* in section 87, *"in the context of that provision and the general scheme of the Act"*, it was permissible to have regard to the relevant paragraph of the report of the Work Health Dispute Resolution Committee and the relevant second reading speech to assist in ascertaining the mischief Parliament was seeking to remedy when amending section 87.

Kearney J accepted the worker's submission that *"the legislature by the 1993 amendment intended to place an employer deemed to be liable under section 87 in the same position under the Act as an employer found to be liable by the Court under section 94(1)(a) or which had accepted liability under section 85(1)(a)"*, so that *"on an application under section 87 an employer must satisfy the Court that the circumstances in which it failed to observe the time limit in section 85(1) were such that the Court should exercise its discretionary power to 'lift' the deemed acceptance of liability"*. His Honour observed that to hold otherwise would *"allow an employer effective to convert a provision which imposed liability on it (albeit deemed), into a procedural provision enabling it at any stage of a proceeding to apply to serve a Form 5 notice of dispute pursuant to section 85(1)(c)"*, and stated that *"the time limit in section 85(1) was a significant mechanism in the statutory allocation of rights and liabilities"* under the Act, being *"a sanction designed to ensure that an employer is expeditious in dealing with a worker's claim"*.

His Honour answered the questions reserved by the stated case as follows:

Question 1: *"No"*
Question 2(a): *"No"*
Question 2(b): *"The application must be dealt with at a substantive hearing of the worker's claim."*
Question 3: *"Not applicable"*
Question 4: *"The matters relevant to the exercise of the Court's discretion to 'order otherwise' under section 87 will vary from case to case."*
Question 5: *"No"*
Question 6: *"They have the effect than an employer deemed to have accepted liability for compensation under section 87 remains liable until it succeeds in an application under section 104(1) of the Act, to be heard as a preliminary issue in a hearing of the worker's claim for compensation, in obtaining an order from the Court that it is now no longer deemed to be so liable; if the employer's application succeeds the hearing is to continue, to determine the worker's claim for compensation, a hearing in which the worker bears the onus of proving his claim."*

Counsel for the Worker: S Southwood.

Counsel for the Employer: S Brown.

CR