
# Cameron Ford's SupremeCourt Case Notes

## ALCOHOL PROTECTION ORDERS

- ***When "issued"***
- ***How served***
- ***Direct notice***
- ***Not "in force" if not issued***
- ***No contravention if not in force***

In Nummar v Pennuto & Ors [2014] NTSC 34 at [33]-[34], Riley CJ held that, to be validly "issued" under s 6 of the Alcohol Protection Orders Act 2013 (NT), the existence and consequences of an Alcohol Protection Order (APO) must be brought to the direct notice of the affected person. Physical delivery of the APO will usually be enough but may not be required where other steps have been taken which are reasonably calculated to bring to the attention of the affected person the fact an APO has been made and its consequences. If an APO has not been validly issued, it is not "in force" under ss 3(2) and 7 and its alleged contravention cannot be an offence under s 23 (at [36] and [44]).

## CONSTRUCTION

- ***Security of payment***
- ***Denial of procedural fairness***
- ***Determination reviewable***
- ***Determination made on issue not in dispute***
- ***Parties not given opportunity to be heard***

In *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, Barr J quashed a determination under the *Construction Contracts (Security of Payments) Act 2004* (NT) for a denial of procedural fairness. The adjudicator based his determination on a matter not in dispute without informing the parties or giving them an opportunity of being heard (at [17]). His Honour held at [33] that an adjudicator's determination is reviewable by the court where there has been a substantial denial of natural justice which is a distinct ground for review to review on the basis of jurisdictional error. At [38], his Honour held that "within the bounds of rationality, a decision maker is generally not obliged to invite comment on his evaluation of an applicant's case", but "a party to a potentially unfavourable decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them".

## CONSTRUCTION

- ***Security of payment***
- ***Time for determination***
- ***Time for registrar's extension***
- ***Procedural fairness required***
- ***More than one payment dispute per application***

In *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25, Southwood J partially quashed a determination under the *Construction Contracts (Security of Payments) Act 2004* (NT) because of the absence of a relevant payment dispute. His Honour said at [33] that s 34(3)(a) does not require the Registrar's decision to extend the time for a determination to be communicated to the parties within the time set by s 33(3). Since there is no provision for a reply under the Act, an applicant may ask the adjudicator to exercise powers under s 34(2) to seek further information (at [42]). His Honour said at [47] that more than one payment dispute may be included in a single application.

## CONSTRUCTION

- ***Security of payment***
- ***Whether "construction contract"***
- ***Not reviewable unless error of law or unreasonable***

In *Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor* [2014] NTSC 22 at [38], Hiley J held that an adjudicator's determination as to whether a contract exists and whether it is a construction contract within the definition of the *Construction Contracts (Security of Payments) Act 2004* (NT) is a matter for the adjudicator and is only reviewable by the court if the decision was the result of an error of law or was unreasonable. A mere error of fact would not invalidate the determination unless the finding was unreasonable. At [57] his Honour said an applicant has a right of appeal to the Local Court under s 48(1) if it asserts the adjudicator incorrectly determined a contract was not a construction contract.

## COSTS

- ***Family provision***
- ***Appeal***
- ***Settlement offer***
- ***Imprudently and unreasonably rejected***
- ***Court's discretion***

In *Simonetto and Anor v Dick* [2014]

The Supreme Court of the Northern Territory Case Notes are produced by Cameron Ford. Cameron has been the Editor-in-Chief of the Northern Territory Law Reports for the past 10 years and the Executive Editor of the Northern Territory Law Journal since its inception in 2007. He has a keen interest in professional education and law reporting, having taught Civil Procedure at Charles Darwin University and being instrumental in establishing the Australian Capital Territory Law Reports in 2008 and their first Editor-in-Chief. He says he appreciated the value of authorised reports after preparing for a case using respected unauthorised reports, and copying the authorised version on the morning of hearing only to find that a crucial "now" in the unauthorised version was "not" in the authorised report. The effect of the decision was completely different but fortunately in his favour. For a number of years he was the Territory editor of the Australian Insurance Law Bulletin and of the text *Family Law in Australia*. He was a partner in Cridlands before going to the Bar at William Forster Chambers and then moving in-house to NAB in Melbourne. He is now with Rio Tinto in Singapore but keeps a strong interest in the Territory profession and cases.

NTCA 4, the Court of Appeal by majority (Riley CJ and Southwood J, Barr J dissenting in the result) allowed a cross-appeal against a "no costs" order on an application under the *Family Provision Act 1970* (NT). Southwood and Barr JJ agreed with Riley CJ as to the principles to be applied, that is the "overall justice of the case" was the determining costs principle, that the trial judge was exercising a broad discretion to be exercised judicially and was required to consider an offer for settlement even though he had determined that the claims were not frivolous or vexatious, and the imprudent refusal of an offer of settlement may be significant in determining costs as a factor in determining the "overall justice of the case" (at [81], [82], [92] & [93]). Riley CJ held at [84] (with Southwood J agreeing) that the respondent should have costs after a settlement conference at which an offer was put because "the respondent was successful in the proceedings and the appellants had imprudently and unreasonably rejected an offer of settlement." Barr J disagreed in the outcome because he considered the conditions for appellate interference in a discretionary costs order had not been established ([94] and [101]).

## COSTS

- ***Pre-action discovery***
- ***Principles***
- ***Practice direction 6***
- ***Unreasonable respondent***
- ***Complete capitulation***
- ***Contractual entitlement to documents***

In *Trepang Services Pty Ltd v Sodexo Remote Sites Australia Pty Ltd* [2014] NTSC 23 at [17], Master Luppino held that costs in proceedings for pre-action discovery under r 32.05 of the *Supreme Court Rules* are in the full discretion of the court and that no one order can be ruled out. Generally the respondent will be awarded the costs of complying with the order for pre-action discovery (at [18]). His Honour reviewed authorities and summarised the principles as follows at [28]: (1) costs are discretionary; (2) the particular circumstances of the case and how the parties conducted the preliminary discovery litigation are relevant; (3) it may be appropriate not to award costs against a party unless that party has acted unreasonably; (4) a respondent's taking an adversarial approach may result in an adverse costs order; (5) an order deferring costs to subsequent proceedings should not routinely be made because those proceedings may not issue. At [48] his Honour said the respondent would pay costs of the application because it acted unreasonably in claiming to misunderstand the applicant's initial request, it breached its obligation under contract and Practice Direction 6 to provide the documents, and it completely capitulated upon the commencement of proceedings. At [51] his Honour made costs of compliance with the order costs in the substantive proceeding because the applicant's contractual entitlement to the documents needed to be determined.

## COSTS

- ***Indemnity costs***
- ***Hopeless case***
- ***Wilful disregards of known facts or settled law***

In *CGKRJK Pty Ltd ATF the C Keating Family Trust & Ors v Port & Ors* [2014] NTSC 24, Kelly J refused an application for indemnity costs by a successful defendant to an application for an injunction, holding that the application was not in wilful disregard of known facts or settled law. Her Honour said at [5]-[6] that costs are in the absolute and unfettered discretion of the court and will normally follow the event on the standard basis. To award indemnity costs, more is required than the plaintiff being unsuccessful.

## COSTS

- ***Proceeding unresolved***
- ***Commenced to satisfy perogative relief discretion***
- ***Necessary step in ultimate resolution***

In Nummar v Pennuto & Ors [2014] NTSC 34 at [49], Riley CJ awarded a plaintiff costs of a proceeding which was ultimately not resolved because it was not unreasonable to commence the proceeding to avoid losing a prerogative relief challenge on discretionary grounds [ie, that all other avenues of relief have been pursued]. Although the issue raised in the process was not resolved on its merits it was a necessary step in the proceedings that did resolve all issues between the parties. Costs of the proceeding in the Local Court were awarded at

50% of the Supreme Court scale because of lack of complexity.

## DISCOVERY

- ***Pre-action***
- ***Principles***
- ***"Reasonable cause to believe"***
- ***Less than prima facie case***

In *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28, Master Luppino granted an application for pre-action discovery under r 32.05 of the *Supreme Court Rules* by an employer against a casino where a former employee of the applicant was suspected of gambling funds stolen from the applicant. His Honour set out the principles from *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 and said that an applicant need not show the present existence of a cause of action but something more than mere assertion, conjecture or suspicion, citing *Waller v Waller* [2009] WASCA 61. An applicant does not have to show a prima facie case, and nor should a determination of the "reasonable cause to believe" be limited to the presently available evidence (at [10]). Regard may be had to the full range of inferences (at [12] and [58]). The reasonable cause to believe must be in respect of a recognised cause of action (at [14]).

## EVIDENCE

### Judicial discretion

- ***Evidence obtained by impropriety***
- ***S 138(1) Uniform Evidence Act***
- ***Mutual Assistance in Criminal Matters Act***

In *R v Hunt* [2014] NTSC 19, Hiley J admitted evidence over the objection of the accused who said the Australian Federal Police (AFP) had obtained the evidence by impropriety in its (1) failure to act under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (MACMA), (2) failure to inform Indonesian police of a search of his home in Jakarta, (3) manner of conducting that search at 6 am, (4) search and questioning of him in Darwin, and (5) subsequent conduct while giving evidence at the committal and on the voire dire. His Honour held that:

(1) MACMA is not a code and does not provide an exhaustive mechanism for seeking international assistance. The AFP may, but are not required to, use the mechanisms under MACMA: [57], [59].

(2) The AFP misled but did not lie to the accused's wife when searching the home. It was improper to deliberately convey misleading information to his wife knowing that she may not consent to a search if she were told important and relevant facts, in particular that her husband was a suspect albeit on the basis of generalised assumptions: [111]. Evidence obtained as a result was obtained as a consequence of impropriety: [112].

(3) The accused was "under arrest or a protected person" under s 23F(1) of the *Crimes Act 1911* (Cth) and should have been cautioned. Evidence obtained in the absence of that caution was obtained as a consequence of impropriety: [115], [134].

(4) There is very considerable public interest in compelling law enforcement officials to act honestly and with a high level of probity: [140]

(5) Improprieties or illegalities for the purposes of s 138 of the *Evidence (National Uniform Legislation) Act 2001* (NT) are to be viewed cumulatively and not disjunctively: [141]

(6) Conduct occurring well after impugned searches is relevant to the public interest in ensuring that facts leading up to and during the searches are revealed and examinable by others: [149]

(7) The public interest in admitting evidence increases with the gravity of the offence: [153].

(8) The public interest in admitting evidence obtained in the Jakarta home search outweighed the undesirability of admitting it: [170].

(9) The public interest in requiring investigating officers to comply with important and fundamental obligations, relevantly to provide the suspect with a caution, outweighs the public interest in allowing the use of the materials and information obtained following and as a consequence of that impropriety. Evidence obtained on the Darwin search was excluded: [171].

## EVIDENCE

- ***Criminal Law***
- ***Exculpatory statements***
- ***Hearsay***
- ***Whether accused is "available to give evidence"***
- ***SS 65, 66 Uniform Evidence Act***

In *R v Ashley* [2014] NTSC 26 at [11], Blokland J held that an accused who indicates he will be giving evidence is "available to give evidence" within the meaning of s 66 of the *Evidence (National Uniform Legislation) Act 2001* (NT) and therefore hearsay is admissible although exculpatory.

## FAMILY PROVISION

- ***Appeal***
- ***Whether "adequate provision"***
- ***Grandchildren***
- ***Considerations***

In *Simonetto and Anor v Dick* [2014] NTCA 4, the Court of Appeal dismissed an appeal from a dismissal of an application under the *Family Provision Act 1970* (NT). Southwood and Barr JJ agreed with Riley CJ that:

(1) The jurisdictional question as to whether adequate provision had been made under the will was one of objective fact which involved the making of value

judgments. An appeal against this decision is governed by principles concerning appellate review of a discretionary decision as in *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ: [34]

(2) It is not for the court to rewrite the will in accordance with its own ideas of fairness and justice. The court is to restrict itself to ensuring that adequate provision is made for the proper maintenance and support of an applicant: [39]

(3) In the case of an adult son who is, prima facie, able to maintain and support himself, some special need or some special claim is required before the court will intervene: [39]

(4) The size and nature of the deceased's estate, the nature of the relationship between the applicant and the deceased, the relationship between the deceased and other persons who have claims upon his or her bounty and the applicant's financial position are all relevant considerations: [39]

(5) Grandparents, even generous grandparents, do not generally have an obligation to provide for grandchildren. A moral obligation may be created by, for example, care and affection of the grandchild for the grandparent. [40], [54]

(6) To determine whether no provision under the will was adequate provision the court must evaluate the needs of the applicant which could not be met from his or her own resources: [44]

(7) The continuing support of a parent who would normally be expected to have assumed direct responsibility for the grandchild's advancement and welfare is a relevant consideration: [46]

(8) The trial judge had applied the correct principles, had considered all relevant matters and had not considered irrelevant matters.

## JUDICIAL REVIEW

- ***Natural Justice***
- ***Decision on issue not argued***
- ***Duty to invite comment***

In *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, Barr J quashed a determination under the *Construction Contracts (Security of Payments) Act 2004* (NT) for a denial of procedural fairness. The adjudicator based his determination on a matter not in dispute without informing the parties or giving them an opportunity of being heard (at [17]). His Honour held at [33] that an adjudicator's determination is reviewable by the court where there has been a substantial denial of natural justice which is a distinct ground of review to review on the basis of jurisdictional error. At [38], his Honour held that "within the bounds of rationality, a decision maker is generally not obliged to invite comment on his evaluation of an applicant's case", but "a party to a potentially unfavourable decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them".

## JURIES

- ***Discharge***
- ***Note from juror***
- ***Dealt with by directions***

In *R v Ashley* [2014] NTSC 26, Blokland J gave reasons for her decision not to discharge a jury after receiving a note from a juror. Applying the test in *Webb v The Queen* [1993-1994] 181 CLR 41, her Honour held at [24] that the note was merely the reported impression or perceptions of one appropriately sensitive juror about some other jurors. The concerns were not shared by the 13 other jurors and the concern did not arise again in the trial. Directions were given to deal with the concern.

## LEGAL PRACTITIONERS

- ***Admission***
- ***Fit and proper person***
- ***Good fame and character***
- ***Worthiness and reliability for the future***
- ***Prior convictions***
- ***Fraud***
- ***Incomplete disclosure***

In *In the matter of an application by Valvo* [2014] NTSC 27 at [37], Barr J refused an application for admission because the applicant lacked the necessary candour and disclosure of the full extent of his prior moral culpability, he failed to persuade that the insights, beliefs and views he claimed in his affidavit were his rather than his lawyers', and he gave unsatisfactory evidence in cross-examination. His Honour was not satisfied of the applicant's "worthiness and reliability for the future", citing Isaacs J in *Incorporated Law institute of New South Wales v Meagher* (1909) 9 CLR 655 at 681.

## LEGAL PRACTITIONERS

- ***Admission***
- ***Fit and proper person***
- ***Academic dishonesty at university***

In *In the matter of an application by Giles* [2014] NTSC 30, Mansfield J declared the applicant a fit and proper person to be admitted as a legal practitioner despite a count of academic dishonesty four years ago while at university committed by substantially copying an assignment of another student and claiming it as his own independent work. His Honour found at [27] that the applicant had been fully candid with the Admissions Board, realised the gravity of his collusive conduct and its relevance to admission and the nature and extent of professional obligations as a practitioner, and was genuinely contrite.

## PLEADING

- ***Amended defence***
- ***Arguable***
- ***Prejudice***
- ***Contrary to previous public statements in court***

- ***Whether doomed to fail***
- ***Whether evidence to support***

In *Amoonguna Community Inc & Ors v Northern Territory of Australia & Anor* [2014] NTSC 33, Barr J allowed amendments to a Defence some years into the litigation and eight months before trial as the amendments were arguable and there was no prejudice to the plaintiffs (at [9]). His Honour disallowed other amendments as being bad in law and not raising an arguable defence (at [12]). His Honour allowed an amendment by the Territory which appeared to be contrary to a statement by the Solicitor General for the Territory in the High Court six years previously. His Honour said at [25] that the statement would be evidence or material against which any other evidence or material led by the parties would be considered, citing French J in *Sea Culture International v Scoles* (1991) 32 FCR 275 at 279.8. His Honour disallowed an amendment alleging that the sole purpose of certain amendments to local government legislation were to secure the adequate advancement of Aboriginal people (and therefore not contrary to the *Racial Discrimination Act 1975* (Cth)) because there was no evidence on the public record or elsewhere to support that assertion and it was doomed to fail (at [34]-[37]).

## SENTENCING

- ***Appeal***
- ***Assault Police Officer***
- ***Spitting***
- ***Use of past offences***
- ***Proportionality fundamental***

In *Dodd v Byrne* [2014] NTSC 31, Blokland J allowed an appeal against a sentence of 12 months' imprisonment for spitting in a female officer's face, holding that it was manifestly excessive after reviewing comparable sentences at [25]-[29]. Her Honour said at [37] and [40] that proportionality is fundamental in sentencing and that past offences should not be used to impose a penalty which is disproportionate to the gravity of the instant offence. Her Honour imposed a sentence of six months at [43] after taking the plea into account, with a starting point of seven to eight months.

## SENTENCING

- ***Appeal***
- ***Supply 67 KG cannabis***
- ***4 years 2 months manifestly inadequate***
- ***Increased to 8 years***

In *R v Indrikson* [2014] NTCCA 10, the Court of Criminal Appeal allowed a Crown appeal against a sentence of four years and two months imprisonment for supplying 67 kg of cannabis as manifestly inadequate. Their Honours said at [26] that the respondent was clearly a principal of a significant commercial enterprise that involved the importation and sale of large amounts of cannabis in the Territory. He financed, organised and executed the importation and distribution of the cannabis and he engaged others to assist him. The Court said at [25] that the offence of supplying cannabis was a very serious offence and at [27] that the quantity is an important factor in fixing sentence. The respondent was re-sentenced to eight years imprisonment with a non-parole period of four years, allowing a 20% discount for the plea.

## STATUTES

- ***Regulations restricting statutory rights***
- ***Validity***
- ***"includes"***
- ***Planning Act S 177 and regulations***

In *Perry v Attorney General & Ors* [2014] NTSC 17 at [29]-[30], Hiley J held that regulations which limited the right of third party appeals under s 117 of the *Planning Act 1999* (NT) from determinations of the Development Consent Authority were valid because the section expressly contemplated regulations which circumscribed the right of appeal. His Honour said at [28] that "there is nothing objectionable in principle about a statute that delegates to the executive the power to make regulations circumscribing a right that otherwise exists under the statute", citing French CJ in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at [18]. His Honour also conducted an extensive review of the interpretation of the word "includes" at [31]-[43], holding at [44] that it "will generally have an expansive, illustrative and or explanatory meaning, unless the statutory context in which it appears indicates that it must have an exhaustive meaning".

## TIME

- ***Extension***
- ***Statutory time limit***
- ***S 162 Police Administration Act***
- ***Can be extended under S 44 Limitation Act***

In *Johnson v Northern Territory of Australia* [2014] NTSC 18, the Full Court (Riley CJ, Blokland and Barr JJ) held that the court has jurisdiction under s 44(1) of the *Limitation Act 1981* (NT) to extend the two-month time limit under s 162(1) of the *Police Administration Act 1978* (NT) for bringing a proceeding against the Territory for actions of police officers. The court held at [17]-[18] that the time limit is not part of the right of action, does not go to the survival of the right, and the right is not extinguished on the expiry of the time limit. Their Honours said at [23] that s162 bars the remedy rather than extinguishing the right. ●