Cameron Ford's Supreme Court case notes

Detailed notes of all Supreme Court decisions are published on www.ntclr.org and in the Northern Territory Law Journal

CIVIL PROCEDURE

Pre-action discovery – Barnes v Addy Breach of trust

In *Skycity Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)* [2015] NTCA 4, the Court of Appeal held that the procedure for pre-action discovery under r. 32.05 of the *Supreme Court Rules* 1987 (NT) is beneficial in nature and has utility in enabling the court to penetrate obscurities and uncertainties in the interests of justice. To obtain an order, an applicant need not show there is reasonable cause to believe the cause of action will be made out, only that it might be made out. The elements of the cause of action of knowing receipt of trust property in breach of trust under *Barnes v Addy* are: (1) trust property was disposed of in breach of trust, (2) the proposed defendant received the trust property and (3), the proposed defendant had knowledge that the property was received in breach of trust. Knowledge that property has been received in breach of trust may be established by any one of the following: (1) actual knowledge, (2) wilfully shutting one's eyes to the obvious, (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, or (4), knowledge of circumstances which would indicate the facts of the breach of trust to an honest and reasonable person.

CIVIL PROCEDURE

Abuse of process – no genuine dispute underlying proceedings

In *JMT Builders Pty Ltd v Ryan & Others* [2016] NTSC 6, Master Luppino held that proceedings were an abuse of process where there was no genuine dispute underlying the proceedings. Parties settled a dispute before proceedings were commenced and recorded the terms in a deed of settlement which provided for the commencement of proceedings, the entering of an appearance by the defendants, and the payment of the settlement amount in instalments in default of which the plaintiff would enter consent default judgment against the defendants. The deed did not permit the plaintiff to sue on the initial dispute in the event of default. His Honour held at [20] that the proceedings were an abuse of process because the original dispute had been extinguished by the settlement. Any proceedings had to be on the deed if there was a breach of its terms.

MINING WITHOUT AUTHORITY

Prosecution – fine $150 000

In *Krucible Metals Pty Ltd v Department of Mines and Energy* [2015] NTSC 71, Riley CJ reduced a fine from $300 000 to $150 000 but preserved the recorded conviction for mining activities on an exploration licence without authority contrary s. 35(4) of the *Mining Management Act* 2001 (NT). Although the offending was deliberate, blatant and contumelious, after the offending the board of directors of the company was completely changed, the company cooperated fully and carried out satisfactory remedial work, pleaded guilty early, demonstrated contrition and was of otherwise good character. The maximum fine was $3 750 000.

MAGISTRATES

No power to dismiss for want of prosecution

In *O'Neill v Rankine* [2015] NTCA 3, the Court of Appeal held that the Court of Summary Jurisdiction does not have inherent or implied power to dismiss proceedings for failure to comply with pre-trial directions. A magistrate had dismissed a complaint for the prosecution's failure to comply with pre-trial directions made under the *Court of Summary Jurisdiction Procedure for the Listing of Summary Offences Hearings* to deliver a full brief of evidence.

MEDICAL PRACTITIONERS

Immediate suspension – code of conduct – duty to non-patients

In *Nitschke v Medical Board of Australia* [2015] NTSC 39, Hiley J held that a medical practitioner did not breach the clause 1 of the *Code of Conduct for Doctors in Australia* when he did not treat or investigate a man who was not his patient, who emailed the doctor about committing suicide. Clause 1 said "Doctors have a responsibility to protect and promote the health of individuals and the community" which Hiley J found at [117] to be of a general introductory nature and not to impose an obligation, standard or duty the breach of which would constitute professional misconduct or unprofessional conduct. To take immediate action to suspend a doctor under s. 156 of the *Health Practitioner Regulation National Law 2010* (NT), the medical board must be satisfied that the doctor (not his conduct) posed a serious risk to the health and safety of the public which could only be addressed by taking immediate action. Conduct referred to in s. 156 must be capable of being professional misconduct or unprofessional conduct to warrant immediate action.

OH&S LIMITATION PERIOD

Coronial inquiry or inquest

In *S. Kidman & Co Ltd v Lowndes CM and the Director of Public Prosecutions* (No 2) [6] NTSC 3, Southwood J held that a prosecution under the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) as within the time set by s. 232(1)(b). The time had not expired from the date the coroner delivered 'Coroner's reasons for decision not to hold inquest' after a coronial investigation, which were a 'coronial inquiry or inquest' within the meaning of s. 232. The complaint could be amended under s. 183 of the *Justices Act 1979* (NT) to include particulars of the offences alleged.

POLICE

Assault by, against woman – recording conviction appropriate

In *Field v Edwards* [2016] NTSC 5, Blokland J held that it was appropriate to record a conviction against a probationary police officer for aggravated assault of a woman he grabbed and then took to the ground during the course of his duties at night. Such offences are serious and are a breach of trust, are an abuse of power and undermine society's trust in police. General deterrence is needed for those reasons and also because of the prevalence of assaults against women. All circumstance are to be considered in deciding whether or not to record a conviction including whether the offender is of mature age, has led a blameless life and is a first offender, whether any ill health of the offender is related to the offence and that a conviction is significant additional penalty. All sentencing principles, punitive and benevolent, are relevant to recording a conviction, which may be appropriate where imprisonment is unnecessary but a community order is insufficient.

PROCEDURAL FAIRNESS

bias – magistrate's communications after judgment

In *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd* [2015] NTSC 23, Kelly J allowed an appeal on the basis of apprehended bias. A magistrate gave judgment in a matter where one party was the husband of a fellow magistrate and after judgment, asked his fellow magistrate whether her husband's lawyers had picked up that he was more or less inviting them to apply for indemnity costs. Kelly J agreed with the parties that the magistrate had properly heard the matter and given judgment but held that his comments after judgment cast a different light on earlier events, it being possible that a reasonable person would think he had favoured the magistrate's husband. Judicial conduct occurring after a case has been decided can give rise to an apprehension of bias during the case.

PROCEDURAL FAIRNESS

Court disclosing its intended orders to parties

Two decisions recently have considered when the court should disclose to the parties the orders it is considering making so as to accord procedural fairness. In Field v Edwards [2016] NTSC 5, Blokland J held at [48] that a court may need to disclose the fact that it is intending to reject a fact or submission but not that fact that it is considering a sentencing disposition customary for the particular offence. In Nitschke v Medical Board of Australia [2015] NTSC 39 at [143], Hiley J held that a person should be informed of the risk that an adverse finding may be made against them unless the risk necessarily inheres in the subject matter to be decided.

Robert Glade-Wright's family law case notes

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PROPERTY

No error in treatment of wife's redundancy entitlement as an initial contribution

In *Hearne* [2015] FamCAFC 178 (16 September 2015) the Full Court (Strickland, Ryan & Austin JJ) dismissed the husband's appeal in which he argued that Judge Harman at first instance mischaracterised the wife's redundancy entitlement as an initial contribution where she had no right to the redundancy when the relationship began. Strickland J (with whom Ryan J agreed) said (at [97]):

> "There is no doubt that when a trial judge comes to identify the property of the parties, accumulated service cannot be treated as an item of property, but, that is not what the trial judge is doing here. He is assessing the initial contributions of the parties which can comprise items of property such as real estate or chattels or bank accounts, but which are not limited to items such as that. Relevant contributions can equally be the bringing of benefits by a party to the relationship, and those benefits need not be crystallised as at the commencement of cohabitation. Thus, it was quite open to His Honour here, and indeed it has been a common occurrence throughout the entire operation of the *Family Law Act* 1975 (Cth) for accumulated service, which ultimately leads to a redundancy payment, to be taken into account as an initial contribution of a party. The only rider to this is that 'double dipping' cannot occur … by also taking into account the pre-cohabitation service when assessing the receipt of the actual redundancy payment subsequently."