Cameron Ford's Supreme Court case notes

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APPREHENSION OF BIAS

In *Lawrie v Lawler (No 3)* [2016] NTCA 3 at [77] and [461], the Court of Appeal (Doyle, Duggan and Heenan AJJ) held that the apprehension of bias principle requires first the identification of what it is said might lead a judge to decide a case other than on its merits. The second step is an articulation of the logical connection between that and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from impartial decision making, is articulated. The suggestion that the judge's wife became partisan because she was employed by the government and had some involvement in the grant of legal representation to a Commissioner should be rejected out of hand: [86].

INCREASING SECURITY FOR COSTS

In *Anchung Pty Ltd v Northern Territory of Australia (No 2)* [2016] NTSC 34 at [35], Master Luppino increased security for costs previously ordered because the defendant had misrepresented the value of its assets on the first application for security. The Master had reduced the amount of security to be given by the value of the plaintiff's assets at the time but found on the second application that the plaintiff had not complied with its obligations of disclosure. While the court had power to vary an order for security where circumstances materially changed, it also had jurisdiction where an unjust result follows from a party's failure to comply with its obligations: [11], [36]. Delay in making an application for security is very pertinent because the plaintiff incurs costs during the delay, and would have been fatal here had the application been based on changed circumstances: [32], [34].

JOINDER OF POLICE FOR PUNITIVE DAMAGES

In *Gaykamangu v Northern Territory of Australia* [2016] NTSC 26, Master Luppino granted leave to join two police officers to proceedings against the Northern Territory seeking damages for false imprisonment, assault, battery and malicious prosecution and punitive damages against the two officers under s. 148F(2)(b) of the *Police Administration Act*. The Territory was vicariously liable for the acts of the officers except for punitive damages. His Honour held that a prima facie case for punitive damages had to be made out to grant leave to be joined; the evidence had to be taken at its highest for the plaintiff and there mere fact

the defendants denied liability was not determinative: [20]. Punitive damages may be awarded where police act with conscious and contumelious disregard of a person's rights in order to punish that conduct, to deter future instances and to mark the court's condemnation of the conduct: [11].

NO JOINDER TO APPEAL OR AMICUS

In *Lawrie v Lawler (No 3)* [2016] NTCA 3 at [50] and [294], the Court of Appeal (Doyle, Duggan and Heenan AJJ) held that a person does not have a right to be joined to an appeal from an order to which they are not bound or only for the purpose of challenging the reasons for decision. Neither would they be heard as amicus where it would erode the underlying principle relating to joinder, where there was only an attack on the reasons rather than the ultimate order, and where it was not necessary for the appeal to be properly argued: [73] and [319]. Senior counsel appearing for a party had been strongly criticised by the trial judge and applied to be joined to the appeal or be heard as amicus curiae for the purpose of challenging the criticism. While reputation is an interest that the law will protect in a variety of circumstances, here there was no right to be joined: [54] and [300]. The court ultimately found that there was no necessity for the conduct of counsel to be considered or the findings to be made: [250]-[252], [457]-[458].

NATURAL JUSTICE UNDER *INQUIRIES ACT*

In *Lawrie v Lawler (No 3)* [2016] NTCA 3 at [179], the Court of Appeal (Doyle, Duggan and Heenan AJJ) held that the usual rules of procedural fairness applies to inquiries under the *Inquiries Act 1985* (NT), with the fundamental obligation being to give to a person whose interests might be affected by the decision, a reasonable opportunity to be heard before the decision is made. That would ordinarily require the inquirer to identify the subject matter of the inquiry and the relevant issues that arise; the nature and content of adverse material that may be considered by the inquirer and possible bases for adverse findings. The person must have opportunity to answer or respond to the matters and provide relevant material in support: [181]. It will not always, but may sometimes, be necessary to disclose proposed findings to a person affected, depending on the circumstances and the statute: [184], [189]-[190], [326], [333], [368], [404]. By majority the court found there was no obligation on the inquirer to notify participants of potential adverse findings when the issues were clear from the beginning: [207]-[209]; cf [386]-[387], [408], [415].

NO ABORIGINAL TITLE

In *Northern Territory Land Corporation v Rigby* [2016] NTSC 18 at [17], Barr J held that Aboriginal trespassers on a Crown Lease in Perpetuity had no Indigenous right to be there because the The Larrakia People do not hold any rights or interests in land in and around Darwin from which a right to occupy that land could derive. His Honour held that no Aboriginal nation has sovereignty over Australia continuing to the present, that The Crown's claims of sovereignty to Australia are valid, and that there is no Larrakia system of land tenure paralleling the *Land Title Act 2000* (NT) or the *Law of Property Act 2000* (NT).

TRIAL OF SEPARATE QUESTIONS

In *GEAT v Deloitte, Touche Tohmatsu & Ors* [2016] NTSC 39, Hiley J held that it was "just and convenient" to order the trial of separate questions under RSC 47.04 principally because of the enormous potential saving in time and cost: [104]. The questions were whether the plaintiff had the power to sue as trustee and whether the trust was a charitable trust. The plaintiff was suing three of its professional advisers for professional negligence relating to the defalcation of some $35m from the trust. The principal trial would take 1–2 weeks, possibly requiring a special listing over months (whereas the trail of the questions would take 1–2 days), judgment would take 1–2 months, and 90 000 documents had been produced in general discovery: [59]. Separate trials would not involve factual issues or controversial issues of law that would take long to prepare or argue: [105]. Even though an appeal from the separate questions was likely, that was not unusual and it would be relatively straightforward: [77]. In considering whether it was just and convenient to order a separate trial, it should only be done with great caution and in a clear case: [18]-[20]. Single-issue trials should only be embarked upon when their utility, economy and fairness to the parties are beyond question: [24].

POSITIVE PLEADINGS AND CONCESSIONS REQUIRED

In *GEAT v Deloitte, Touche Tohmatsu & Ors* [2016] NTSC 39 AT [84], Hiley J said "It is not appropriate in this jurisdiction for a party to simply deny or not admit an allegation without reasonable cause, particularly after proper particulars and disclosure have been provided." Parties should make concessions or explain why concessions are not being made to allegations in pleadings.