EVIDENCE ON INFORMATION AND BELIEF

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Introduction

1. This paper reviews the rules applicable to evidence tendered on information and belief in interlocutory applications in civil proceedings, using substituted service applications as an example. I choose substituted service applications as the vehicle for examining these rules for two reasons:

   (a) **First**, the rules are often ignored in substituted service applications; and

   (b) **Second**, substituted service applications are heard in the absence of the other side. This means that there is no one to take objections to inadmissible evidence or alternatively to decide not to object. This places a greater focus on the application of the rules of admissibility and the need properly to apply the law.

Substituted service: general observations

2. It is convenient to first brush up on the law applicable to substituted service applications.

3. Rule 116 UCPR provides:

> (1) If, for any reason, it is impracticable to serve a document in a way required under this chapter, the court may make an order substituting another way of serving the document.
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> (2) The court may, in the order, specify the steps to be taken, instead of service, for bringing the document to the attention of the person to be served.
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> (3) The court may, in the order, specify that the document is to be taken to have been served on the happening of a specified event or at the end of a specified time.
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> (4) The court may make an order under this rule even though the person to be served is not in Queensland or was not in Queensland when the proceeding started.

4. Rule 116(1) identifies the threshold condition as being that personal service is impracticable. Whether personal service is impracticable or not involves the application of an ordinary word in its ordinary meaning. Cases do not much assist. However, at the least it is necessary to demonstrate more than mere inconvenience.[1]

5. Once that condition is established, the Court's discretion under Rule 116(2) is enlivened. The discretion must be informed by the purpose of substituted service, which is to bring the proceedings to the attention of the other party. It is important to keep firmly in mind that substituted service is not a way to meet the formal requirements of service without effecting notice of the proceedings. If a party cannot be found, or if no reliable form of communication of the documents is established, then the proceedings cannot progress.

6. Bearing that in mind, it is unsurprising that the cases emphasise that there must be a high degree of probability proved on the evidence that the proceedings will come to the attention of the other party by the method of service ordered [2]:

> The object of substituted service, the primary object, is to bring to the knowledge of the person in respect of whom substituted service is sought the whole proceedings, so that he can take such steps as he thinks proper to protect his interests and rights. It is not proper to substitute service of process in a court of law when there is no belief that the service will bring the proceedings to the knowledge of the person in question or of any person representing his interests.

7. Substituted service applications are common. They are also frequently made on inadmissible evidence.

Evidence on information and belief: requirements for admissibility

8. I now move to the main topic of this address: the requirements for evidence on information and belief to be admissible in interlocutory applications in civil proceedings.

9. It has long been the case that evidence on the so-called "information and belief" basis can be adduced on interlocutory applications. Cases dealing with the issue reach back to the 19th century. In broad terms, evidence on information and belief comprises admissible hearsay evidence from the deponent. Such evidence may be adduced if certain requirements are met.

10. Those requirements are stated[3] in Rule 430(2) *Uniform Civil Procedure Rules* as follows:

> **430 Contents of affidavit**

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[1] *Permanent Custodians Limited v Smith* [2006] QSC 333
[2] *Miscamble v Phillips and Hoeflich (No 2)* [1936] St R Qd 272 at 274 per Starke J (HC)
[3] For summary judgment the rule is restated in Rule 295 UCPR.

> (1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally.
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> (2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief.

11. This rule permits statements to be given on information and belief by a deponent where three conditions are met:

    (a) The source of the statement must be able to give admissible original evidence of the fact asserted in the statement;

    (b) The deponent must state the identity of the source of the statement; and

    (c) The deponent must state their belief in the statement.

Only first-hand hearsay

12. The first condition for admissibility of information and belief statements is that the source of the information could give original evidence of the fact stated on a hearsay basis by the deponent. In practice, this means that only first-hand hearsay is admissible on information and belief. The rule itself does not say this is a requirement, but the requirement is established by Full Court authority in Queensland.

13. The leading case outside this State is *Savings & Investment Bank Ltd v Gasco Investments (Netherlands) B.V. & Others* (1984) 1 WLR 271 at 282. There the Court was dealing with a rule analogous to R. 430(2). The Court held that the rule should be limited to sources which were admissible because the purpose of the rule was to facilitate proof, by a less rigorous method, of what could be proved at trial.[4]

14. The requirement that the information be from a source who could give admissible as original evidence of the fact asserted was applied to the predecessor to R. 430(2) in the old Supreme Court Rules by the Full Court in *Deputy Commissioner of Taxation v Ahern (No. 2)* [1988] 2 Qd R 158 in a plenary way.[5] It was not limited to the situation where the evidence related to issues which would be proved at trial. Thomas J held:

> *To my mind the purpose of rule 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. What the sub-rule allows the deponent to state that he has obtained from another must, in my judgment, be limited to what is admissible as evidence.*

15. Although Rule 430(2) is formulated in slightly different terms to O. 41 r 3, the requirements for evidence given on information and belief identified in *Ahern* have been applied by the Court of Appeal to affidavits which rely on other rules and statutory provisions using the same language as Rule 430(2).[6] Furthermore, the

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[4] See p. 282

[5] See Thomas JA, with whom Ryan and de Jersey JJ agreed at 163

[6] *A-G Qld v Watego* **[**2003] QCA 512 at [8] dealing with s. 7 *Dangerous Prisoners Act 2003* in the same terms relevantly as Rule 430(2); *Hanson Construction Materials P/L v Davey & Anor* [2010] QCA 246 at [32] dealing

principles in *Ahern* have been applied in a judgment of mine to Rule 430(2) which has been followed in the District Court on a number of occasions. [7]

16. This requirement for admissibility of evidence adduced under R. 430(2) is breached in many substituted service applications. It can reach this extreme. A solicitor swears that she was told by a letter from a process server's supervisor, that the supervisor (unidentified) was told by the (often unidentified) process server, that the process server was told by an unidentified neighbour, something which is relied upon for its truth such as "*I know the defendant Mr X, he got home just before you knocked on the door*".

17. Only an affidavit from the process server could adduce the neighbour's statement for the truth of its contents pursuant to R. 430(2). This is more than a technicality. We all know that part of the effect of the hearsay rule is to guard against Chinese whispers. There is way too much opportunity for that to occur in the example I give.

18. Unless the source of the statement relied upon by the deponent could give original evidence of a fact, the statement of that fact by a deponent is inadmissible on an information and belief basis.

19. Put another way, Rule 430(2) permits evidence which is hearsay from the deponent but only if the source for the hearsay statement could give original evidence of the fact. No hearsay on hearsay is permitted.

Disclosing the source

20. Bearing that in mind, let us turn to the next requirement for information and belief statements to be admissible: that the source is stated. Rule 430(2) expressly requires that that the sources of the deponent's information be disclosed in the affidavit.

21. The cases tell us that the rule means what it says: the source of the information must be stated by the deponent. If the source is not sufficiently identified, the evidence is not admissible under R. 430(2). The point was made in *Savings & Investment Bank Ltd v Gasco* and adopted in *Ahern*. It was applied in *A-G v Watego* [2003] QSC 367. There Justice Muir explained that:

> [26] The requirements of subsection (2) are not met by a broad reference to unspecified documents and classes of documents. The object of the requirement to disclose the deponent's sources is to provide identification of those sources sufficient to enable the party against whom the evidence is adduced to investigate, assess and, where appropriate, challenge the evidence.
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> [27] To allow evidence of the nature of that contained in Dr Kar's report, to use the words of Thomas J in *Deputy Commission of Taxation v Ahern*, "would virtually permit trial by assertion in circumstances where no real check was available upon facile or erroneous assertion".

22. Again, substituted service applications provide a good example of why this is important. Though such an application is not served, it must be open to the defendant to test the validity of the sources of the information relied upon. The point also has significance for the Judge hearing the application, who must necessarily form a view as to the weight to be given to the information and belief evidence. The source of the information is a factor in assessing weight which a judicial officer might give to a source. I know I am more comfortable if the material

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with Rule 295(2) which is also relevantly in the same terms. And dealing directly with Rule 430(2): *Bendigo & Adelaide Bank Limited v Wilkin* [2018] QDC 16 at [15] to [18]

[7] *Sunshine Phone Systems (in liq) v Martens and Martens* [2021] QDC 36 at [10]; *Grow Asset Finance Pty Ltd v Bassi* [2022] QDC 23 at [11]

makes clear the name and relevance of the source relied upon by the deponent. It makes evasion in the event of error or mistake more difficult.

23. This requirement is also breached in many substituted service applications. An example is where managers for inquiry agents swear that one of their agents (unidentified) attended the address. That does not properly disclose the source of the information relied upon by the deponent. It does not name the person who is the source of the statement, nor contain information which would allow the person to be identified.

24. If the person served wants to challenge the matters alleged as service attempts, how can they test that source? They can ring the manager (if indeed they are named in the deponent's affidavit). But they are at the mercy of whether the manager wants to tell them. In most cases, the manager will not. And that is assuming that the person can get the manager who knows the name of the inquiry agent to come to the telephone.

25. Affidavits relied upon in interlocutory application which give secondary evidence of matters based on information from another person must sufficiently identify that other person.

Belief

26. Rule 430(2) requires the deponent to swear to their belief in the statement they are making.

27. Even in the best firms, a broad approach is taken to this requirement. Solicitors ordinarily swear an information and belief catchall at the end of their affidavits which together with detailed identification of sources of information in the body of the affidavit, are usually accepted as sufficient even in hotly contested commercial litigation.

28. Whether solicitors, searching their conscience, truly can say they believe the information is an open question. Generally, the conscience is salved, I suspect, with the idea that if they are given instructions and have no active reason to know or suspect the instructions are false or mistaken, that is enough to swear to belief.

29. Good solicitors often cannot help but flag their concerns in this regard where you see key parts of the case relied upon in an interlocutory application sworn to directly by clients. However, this also is sometimes a forensic tactic to persuade a Judge that the case is a serious one. Nothing like seeing the client or key manager go on oath to make evidence more persuasive.

30. It is not uncommon to see this condition butchered in an affidavit in a substituted service application. This can happen where the affidavit is prepared by a paralegal, untrained and unsupervised, who does not understand the significance nor importance of the need to state a belief in the information, and who makes comments which do not even colourably meet the requirement for statement of belief.

31. If reading the affidavit as a whole, it fails to state the belief in the truth of each the information and belief statement deposed to, it is not admissible under Rule 430(2).

Grounds of the belief

32. Strictly speaking, Rule 430(2) requires not only that the deponent attest to his or her belief in the statement repeated in the affidavit, but also that the deponent state the *grounds* of that belief. How could that be done? Here is a suggestion.

33. "*I am informed by Ms X, my client, and believe that she does not owe any money to the Bank and I believe that statement is true because*:

    (a) *I have always known Ms X to be a truthful person*; or perhaps

    (b) *I have asked her to give me all her statements of account with the Bank and none of the statements she gave me show a negative balance*"

34. However, I have never once in my whole career ever seen an affidavit of information and belief directly address the obligation to state the grounds of the belief. Is every affidavit ever filed on information and belief therefore inadmissible?

35. The answer is no. In *Phillips v Mineral Resources Developments Pty Ltd* [1983] 2 Qd R 138, the Full Court was dealing with an appeal from a summary judgment. At first instance, objection had been taken to the affidavits of the defendant's solicitor on every possible ground, including that the deponent had not stated the grounds of his belief in the hearsay statements contained in his affidavits. Ultimately, that point did not have to be decided. However, Kelly J (with whom Macrossan and Connelly JJ agreed), held relevantly (at 144-145)[8]:

> A matter on which there is, perhaps rather surprisingly, a paucity of authority is what is necessary in stating the grounds of the deponent's belief. In *Re Anthony Birrell Pearce & Co*. [1899] 2 Ch. 50, at p. 53, Kekewich J. said, *obiter*:
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> > "If the deponent had merely said, 'I am informed by Johnstone and believe that (setting out Johnstone's statements seriatim)' the affidavit would have been admissible, though it would have been difficult to determine its weight without cross-examination."
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> In *Concorde Enterprises Ltd. v. Anthony Motors Hutt Limited* [1976] 1 N.Z.L.R. 741, at p. 746, Somers J. referred to that statement as suggesting that the provision of the source of information is per se the provision of grounds of belief, but the learned Judge did not think that that accorded with the requirements of the rule which he was there considering and which was in identical terms to that which was considered by Kekewich J. The dictum of Kekewich J. does make the suggestion indicated by Somers J. and, with respect, I would consider that this does accord with the requirements both of the rule there being considered by Kekewich J. and of O. 18, r. 3. On my understanding of the matter it also accords with the view that has been generally adopted in practice for many years.

36. The effect of this decision is that so long as a person identifies the source and states his or her belief in the source, that is sufficient to identify the grounds of the belief. Seemingly this suggests the first of my suggested grounds: I know the person to be honest or reliable on the issue in question.

37. It might be doubted that this is sufficient to meet the requirement to state the grounds of belief, but it has been the law in Queensland since 1983 and there is no difference in the language of the modern rules to justify disregarding the reasoning in *Phillips*.

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[8]Applied by White J while a Master of the Supreme Court in *State Bank of New South Wales Limited v Ross* [1991] QSC 139 at p. 5

38. So it seems so long as the deponent says they believe the source, that indicates the grounds of belief sufficiently.

Can the Court act on inadmissible evidence?

39. I have now identified the three pre-conditions for admission of statements on information and belief. What if those conditions are not met? Does a judicial officer have a discretion to admit into evidence statements given purportedly on information and belief which do not meet the requirements of Rule 430(2). The answer in my opinion is no.

40. There is express statutory power in civil proceedings to permit the adducing of evidence, which is inadmissible, but the scope is confined. Section 129A *Evidence Act* provides:

> (1) This section applies in a proceeding that is not a criminal proceeding if either—
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> (a) the fact in issue is any of the following—
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> (i) the proof of handwriting;
>
> (ii) the proof of documents;
>
> (iii) the proof of the identity of parties;
>
> (iv) the proof of authority; or
>
> (b) a court considers—
>
> (i) a fact in issue is not seriously in dispute; or
>
> (ii) strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience in a proceeding.
>
> (2) The court may order that evidence of the fact may be given at the trial, or any other stage of the proceeding, in any way the court directs.
>
> (3) Without limiting subsection (2), the court may order that evidence of a fact be given by—
>
> (a) a statement on oath of information and belief; or
>
> (b) the production of documents or entries in records; or
>
> (c) the production of copies of documents or copies of entries in records.
>
> (4) The court may at any time vary or revoke an order made under this section.

41. It is therefore open to the Court to proceed on the basis of inadmissible evidence if it acts under s. 129A. Some points to note, however, which arise in relation to this section for substituted service applications:

(a) **First**, only the conditions in ss (1)(b) seem applicable to a substituted service application. In the absence of another party, it is a little difficult to see how a Court could be satisfied that the facts about service or any other relevant fact was not seriously in dispute as required by 1(b)(i);

(b) **Second**, as to the delay condition in (1)(b)(ii), it is difficult to see why it would be unreasonable to require evidence to be put in admissible form where the application is a set piece brought *ex parte* at the time convenient to the plaintiff; and

(c) **Third**, it is at least arguable that the Court must make an order about the nature and extent of the departure from the rules of admissibility which is to be authorised under the section. It is not a section which operates automatically. In that case, surely the applicant should raise it in their submissions. Frankly,

most solicitors who prepare defective forms of these applications would not know that s. 129A existed.

42. Presently it seems unlikely that section will properly arise on interlocutory applications (particularly ex parte applications).

43. Reliance might also be placed on Rule 371 UCPR. That Rule provides:

> **371 Effect of failure to comply with rules**
>
> (1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken, or order made in a proceeding, a nullity.
>
> (2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—
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> (a) set aside all or part of the proceeding; or
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> (b) set aside a step taken in the proceeding or order made in the proceeding; or
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> (c) declare a document or step taken to be ineffectual; or
>
> (d) declare a document or step taken to be effectual; or
>
> (e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or
>
> (f) make such other order dealing with the proceeding generally as the court considers appropriate.

44. The failure to comply with Rule 430(2) might arguably be a non-compliance with the Rules which can be treated as an irregularity. It might be argued therefore that no order made in reliance on such inadmissible evidence is a nullity. This section also does not operate automatically, though it might be used remedially if an interlocutory order is challenged because it was made on inadmissible information and belief evidence.[9]

45. However, Rule 371 does not assist where inadmissible evidence on information and belief is adduced because it does not apply to Rule 430(2). In *Ahern*, Justice Thomas found that the equivalent provisions in the old Supreme Court Rules to R. 371 did not authorise receipt of inadmissible information and belief evidence.

46. His Honour considered that the equivalent rule under the Supreme Court Rules prescribing the conditions for admissible hearsay are part of the rules of evidence which are part of the substantive not the procedural law and not amenable to the procedural process specified in the then equivalent of R. 371. His Honour said the rules of evidence (at 163):

> form a special part of our body of law. They are usually classified as "adjective law" laying down the means by which facts may be proved in a court of law. The rules were largely developed as part of the common law since the 17th century. In the ordinary case which involves substantive rights, failure to apply those laws is an error which will result in an appeal being allowed if the error may have affected the result. Although the rules themselves (such as the hearsay rule) are riddled with exceptions, and although there are exceptional discretionary areas such as the exclusion by a judge in a criminal trial of admissible evidence on the ground that its slight weight is outweighed by serious prejudice likely to result against the accused, there is no general discretionary power in a judge or court to change the rules on grounds of convenience or perceptions of justice.
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> [Underlining added]

[9] See Rule 372 which contemplates an application for an order under Rule 371 which must specify the failure to comply with the rules.

47. I see no reason why that reasoning would not continue to apply under the UCPR.

48. In civil, as a rule, evidence which is admitted without objection from the other side goes in for all purposes. I deal with that further below. However, where an application is brought ex parte, there is no opposing party who can choose to object or not object. So this principle is of no assistance in permitting inadmissible information and belief evidence to be tendered in substituted service applications and indeed any ex parte application.

49. There might be other ways that inadmissible information and belief evidence may be lawfully adduced in particular circumstances (though I have not identified any). I suspect that if it came to it, it would be hard to establish that a Court could lawfully act on inadmissible evidence adduced on information and belief either in ex parte applications or over the objection of the other side.

Is there some residual discretion? No.

50. I recognise that there is authority which might support the proposition that there is a residual discretion to permit a Court to admit inadmissible information and belief evidence.

51. The case is the High Court decision in *Hardie Rubber Company Pty Limited v The General Tire & Rubber Company*.[10] That case involved a claim in relation to the infringement of a patent. An application was brought in the High Court by the plaintiff for the issue of letters of request to the Courts of Japan for examination of witnesses in that country. Barwick CJ ordered that the letters be issued. The defendant applied to set aside those orders. At first instance, Gibbs J refused to set aside the orders, but varied them in procedural respects. On appeal, Walsh J (with whom the other Judges agreed) gave the leading judgment in which his Honour set aside the orders below and made fresh orders for taking of the evidence. The substantive issues do not need to trouble us, except to note that the defendant argued that the circumstances for the issue of the letters of request had not been made out on the plaintiff's evidence.

52. Part of that evidence included an affidavit filed by a solicitor, Mr Dowling, on information and belief. The sources of his information and belief were described variously as "officers" and "United States counsel" of the respondent. Mr Dowling also relied on information from an "unnamed officer of an unnamed Japanese company", who wished to remain anonymous because of its business dealings with the company whose officers were the overseas witnesses concerned and a named Japanese witness.[11]

53. In response to the challenge to admissibility of that evidence, Gibbs J observed (at 536):

> It is true that [Mr Dowling's] evidence is hearsay – indeed it is hearsay upon hearsay – but affidavit evidence on information and belief is admissible on interlocutory proceedings provided that the sources and grounds of that information and belief are stated: O. 39 r. 3 (3). Mr Dowling did state the sources of his information although in some cases he described and did not name his informants.

54. On appeal to the Full Court of the High Court, objection was made to the reliance that Gibbs J placed on Mr Dowling's affidavits on the basis that they were

[10] (1973) 129 CLR 521.
[11] See judgment of Gibbs J at 535

inadmissible as hearsay evidence. This argument was rejected Walsh J who observed (at 558 to 559):

> I am of opinion that a further submission that a great deal of the hearsay evidence upon which the respondent relied was not admissible in accordance with O. 39, r. 3 of the Rules of this Court or at all should not be accepted. Some of the evidence would have had greater weight if the "sources and grounds" of the deponent's information and belief had been stated more specifically but, in my opinion, the defects in the form of the evidence did not render it inadmissible.
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> [underlining added]

55. It would be possible to read Justice Gibbs' statement as inconsistent with the approach in Queensland which requires the source of an information and belief statement to be admissible as original evidence: see the Queensland authorities in paragraphs 14 and 15 above. Justice Walsh's observations however do not engage with that issue. Rather his Honour's position seems to be that the shortcomings that existed were in the identification of the "sources and grounds" of the information and belief.

56. Whatever his Honour meant by this, it was explained in *Ahern* and that decision sets the principle to be applied by Queensland Courts. Thomas J dealt with Walsh J's observations as follows (at 162):

> Our attention was drawn to the remark of Walsh J. in Hardie Rubber Co. v. General Tire & Rubber Co. (1973) 129 CLR 521, 558–559
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> …[*his Honour set out the passage at 54 above, including the underlining*]
>
> I have underlined the word which suggests that that was a case where some degree of disclosure of the source existed but where greater specificity would have been desirable [*his Honour underlined the work more from the above quotation*]. The report fails to reveal the degree to which the sources were revealed. This introduces a question of degree, and it is impossible to lay down any rule which will determine what is a sufficient disclosure of sources and grounds to overcome the hurdle of admissibility and enter the area where weight is assessed. However I find nothing in Walsh J.'s remarks which gives a general discretion to a court to admit evidence which would be otherwise inadmissible.

57. His Honour went on to recognise that whether an affidavit on information and belief sufficiently addresses the requirements for admissibility involves questions of degree and went on to observe at (167) that:

> In circumstances of great urgency a court may accept a general statement of sources as sufficient compliance with the rule, although this will more readily happen in the case of an interim rather than an interlocutory injunction. The question as to what is a sufficient disclosure of sources must be decided according to the exigencies of each particular case, and the court's discretion is not to be fettered.

58. However, these comments do not suggest in my view that there is any discretion in the true sense about admission of evidence under Rule 430(2). The clear statement of principle in paragraphs 45, 46 and 56 above, and indeed the gravamen of the whole judgment, stand against the interpretation. His Honour was merely observing that the extent of disclosure of sources required to meet the statutory test can vary with the circumstances of each case.[12]

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[12] In my respectful view, the extent of the scope for admitting information and belief evidence which does not properly disclose the source is not a broad as summarised by Derham AsJ in *Australian Gift and Homewares Association Limited v Melbourne Convention and Exhibition Trust (Ruling No. 1)* [2014] VSC 481 at [72]

To what applications does Rule 430(2) apply?

59. Having completed my analysis of the scope and nature of evidence admissible under Rule 430(2), I now want to make some observations about information and belief evidence. Some of this might be obvious but forgive me if you find it so.

60. Rule 430(2) is often described as applying to interlocutory applications, but it does not use that phrase. Rather it applies to an application for relief, "other than final relief". That expression was dealt with by the Court of Appeal *in Gallagher v Boylan* [2013] 1 Qd R 204 as follows:

> I would state the applicable test as being that hearsay evidence is not made admissible by r 430 if the grant of the relief claimed in the application would finally dispose of the rights of the parties as to the ultimate dispute between the parties, rather than merely as to the subject matter of the application itself.

61. That is perhaps easily stated but can be difficult to apply at the margins.

62. A summary judgment application, if successful, will finally dispose of the rights of the parties. There has in past been debate about whether it is an interlocutory or final judgment. However, that issue is resolved by Rule 295(2) which is in the same terms as Rule 430(2).

63. The same issues arise in a judgment by default, but as you might recall Rule 430(2) expressly applies to an "application because of default". Therefore, whatever doubt is resolved by the statute.

64. There are, however, many other applications which might be apt to bring proceedings to an end, but which are not applications for final relief. For example, refusal of leave to proceed will in effect bring proceedings to an end but does so by way of refusing to lift the statutory stay which arises under Rule 389(2) after 2 years without a step. It does not dispose of the underlying causes of action or defences of the applicant. Similarly, dismissal for want of prosecution[13] dismisses the proceeding but does not finally dispose of the rights of the parties because a further proceeding may be brought, at least in theory.

65. As a general guide, if you are hearing an application and the relief does not dispose of the cause of action which sustains the proceedings before the Court on the merits, then Rule 430(2) will apply.

66. There are of course some applications which are hard to characterise, even using that general guide. I grappled with one such example in *Freeman v Montgomery* [2021] QDC 210, where I was trying to decide if an application that a plaintiff be punished for contempt for failing to comply with Court orders was an application for final relief or not. There were arguments both ways and ultimately it was unnecessary to decide. However, the difficulties were identified as follows (footnotes omitted):

> [88] The question then arises as to whether contempt proceedings are brought by an application because of default or for other than final relief. It has been held in the English Court of Appeal that civil contempt proceedings could be either final or interlocutory depending on the circumstances in which the application was made, and that proceedings for contempt brought in support of interlocutory orders made in an extant proceeding were interlocutory. On the other hand, where the orders finalised a proceeding, contempt proceedings in respect of non-compliance with final orders would not be interlocutory orders. On that approach, these proceedings would be for final relief, even though brought formally in the existing proceedings, because the claims in the proceedings were resolved by, and merged

[13] In the Magistrates and District Courts express power is conferred to dismiss under s. 22 *Civil Proceedings Act*

> in, the consent orders. I find that distinction unsatisfactory. Firstly, the focus in the decision on civil, as opposed to criminal, contempt as comprising an important distinction is not applicable any longer in the Australian context. Secondly, it does not seem to me correct to characterise any proceeding for contempt of court orders as one incidental to those orders. Contempt is sui generis with a life independent of the proceeding in which it might arise. The Court considers whether contempt is established and if so, imposes punishment. The point was not argued, but my tentative view is that no contempt proceeding would be interlocutory in character so as to call up Rule 430(2) UCPR

67. Sometimes there will be no authority to assist you. In those cases, of course, you cannot go wrong if you err on the side of caution and require evidence to be in admissible form without reliance on Rule 430(2).

Evidence in domestic violence applications

68. The UCPR does not apply to proceedings under the *Domestic and Family Violence Prevention Act 2012* (‘**DFVPA’**) in the Magistrates Court.[14] The *Domestic and Family Violence Protection Rules 2014* regulate procedure for civil proceedings under the DFVPA in the Magistrates Court.

69. Rule 35 DFVP Rules relevantly provides:

> (1) This rule states—
>
> (a) what must be included in an affidavit; and
>
> (b) the form of an affidavit.
>
> …
>
> (6) An affidavit may contain statements based on information and belief if the person making the statement states the sources of the information and the grounds for the belief.
>
> (7) An affidavit must include a statement that—
>
> (a) either—
>
> (i) the contents of the affidavit are true; or
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> (ii) if the contents of the affidavit are stated on the basis of information and belief—that those contents are true to the best of the knowledge of the person making the statement; and
>
> (b) the person making the affidavit understands that a person who provides a false matter in the affidavit commits an offence.

70. I could find no case considering this provision. However, the operative terms of Rule 35(6) are identical to those in Rule 430(2). So the rule requires an affidavit to contain evidence admissible from the source, that the source be identified and that the deponent swear directly to belief in the statement. That last requirement is emphasised by Rule 35(7), though it does not seem to alter the substantive requirements.

71. One important difference between the two Rules however is that Rule 35(6) is not confined to interlocutory applications. Further, I could locate nothing in the DFVP Rules or Act, which confine that permissive provision to interlocutory applications. One might think that Rule 33 suggests the opposite, that it is intended that information and belief evidence may be led at trial.

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[14] Section 142(3) *Domestic and Family Violence Prevention Act 2012*

72. Those observations must be considered in the context of s. 145 DFVPA which provides:

> **145 Evidence**
>
> (1) In a proceeding under this Act, a court—
>
> (a) is not bound by the rules of evidence, or any practices or procedures applying to courts of record; and
>
> (b) may inform itself in any way it considers appropriate.
>
> (2) Despite subsection (1), the Evidence Act 1977, part 2, division 2A applies to a proceeding under this Act.
>
> (3) If the court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities.
>
> (4) To remove any doubt, it is declared that the court need not have the personal evidence of the aggrieved before making a domestic violence order.

73. There are two points to me made about this provision and its interaction with Rule 35.

74. **First**, provisions like s 145(1) have real limitations. While the section permits the court to admit into evidence material which would otherwise be subject to an exclusory evidential rule, it does not permit a Court to act on material which is irrelevant to an issue in dispute. Nor does it permit a court to ignore questions of probative weight.

75. Section 33 *Administrative Appeals Tribunal Act 1975 (Cth)* is a long standing provision in similar terms. As to that, Brennan J observed in *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492-3 that:

> The majority judgments in *Bott's* case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not...'

Material that tends logically to prove the existence or non-existence of a material fact may be admitted into evidence. However, it has also been observed of the same provision that[15]:

> The procedural flexibility afforded to an administrative tribunal freed from the rules of evidence does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide.

76. Those comments apply equally to s. 145(1) and have been expressed applied to the section by the District Court.[16]

77. Further, in assessing the weight to be given to evidence, the rules of evidence can provide guidance, sometimes essential guidance. In *R v War Pensions Entitlement Appeal Tribunal ex parte Bott* (1933) 50 CLR 228, where the Tribunal in that case was not bound by any rules of evidence, Evatt J stressed that the statutory exclusion of the rules of evidence did not mean that all rules of evidence may be ignored as of no account. His Honour considered that the common law rules (at 256):

> …represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth... In other words, although rules of evidence do not bind, every attempt must be made to administer "substantial justice".

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[15] (2014) 226 FCR 555, [97]
[16] *ADH v AHL* [2017] QDC 103 at [46]; *MNT v MEE* [2020] QDC 126 at [20]

78. These observations have also been applied to the section by the District Court.[17]

79. As delegated legislation, it seems clear that the requirements in Rule 35(6) cannot have the effect of excluding the adducing of evidence which does not comply with its requirements. However, those requirements are good examples of how the exclusory rules of admissibility provide indicators the probative weight of evidence given on a hearsay basis and provides a guide to the assessment of such evidence.

80. **Second**, given the terms of s. 145, one might wonder what the drafter of Rule 35(6) intended it to achieve. It might have been thought that Rule 35(6) identified a procedural, rather than substantive, requirements for an affidavit filed under the DFVP Rules, such that its requirements did not comprise part of the rules of evidence. However, the effect of the analysis in *Ahern* referred to in paragraphs 45 and 46 above seems to exclude such a construction. However, the requirements of Rule 35(6) as construed in other contexts do provide guidance as to how to assess the probative value of evidence which is given on an information and belief basis. And regard should be had to the Rule for that purpose.

Rule 430(2) in contested applications

81. In a civil hearing, where a party does not object to inadmissible but relevant evidence, the evidence may be adduced by the other party despite the exclusory rule and relied upon by the Court.[18] It is not the judge's task to rule on the admissibility of evidence to which a legally represented party does not object. This greatly relieves the burden of the Court to subject evidence tendered on information and belief to analysis in every case. This is the basis upon which large quantities of inadmissible (but uncontentious) evidence is tendered in civil applications and trials. Good counsel only bother a judge with objections that matter.

82. However, the situation can be different where unrepresented parties are involved, especially where there is one represented party and one unrepresented party. In my view, there is no general obligation on a judicial officer in a case involving an unrepresented party to consider all the objections that could be made to the material tendered on the other side.

83. However, nor do I consider that question of admissibility can be completely ignored. The obligation on a judicial officer in a litigant in person case is to try to ensure a fair hearing while at the same time remaining impartial and not depriving the represented party of their legal rights. The scope and content of the duty to assist the litigant depends on the nature of the case and the character and abilities of the litigant in person.

84. A frequently cited statement of general principle appears in *Rajski v Scitec Corporation Pty Ltd* .[19] There Samuels JA observed:

> In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers (1999) 166 ALR 129 at 137 to the unwary and untutored. But the court should be astute to see that it does not extend its

[17] *DWB v Protheroe* [2022] QDC 113 at [84]; *AVI v SLA* [2019] QDC 192 at [82] to [83]; *LDC v TYL & STP* [2017] QDC 197 at [44]
[18] *Robert Bax and Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476 at [35] – [36]
[19] (Unreported NSWCA No 146 of 1986) approved by the High Court in *Nobarani v Mariconte* (2018) 92 ALJR 806; (2018) 359 ALR 31

> auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent … At all events, the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement … An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent.

85. And similarly, Mahoney JA observed:

> Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

86. Another statement of general principle is that by Bell J in *Tomasevic v Travaglini* (2007) 17 VR 100 at [141] to [142][20] where his Honour said:

> 139 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> 140 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> 141 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.
>
> 142 The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.

87. There might be cases where evidence tendered under s. 430(2) is so clearly inadmissible and so fundamentally damaging to the litigant in person, that the Court has a duty to inform the litigant in person about his right to object. Even if that is not done, a Judge should be astute carefully to consider the weight to be given to evidence which is in an inadmissible form.

Other exclusory rules

88. In this discussion so far, I have focussed on the requirement that the source of the information relied upon by the deponent could give original not hearsay evidence. But obviously the principle is not limited in that way. If the source could give direct evidence of a fact repeated on information and belief, but that evidence would be

[20] Approved by the Victorian Court of Appeal in *McWhinney v Melbourne Health* (2011) 31 VR 285 at [25]-[26]

inadmissible if given by the source for some other reason, then that evidence is inadmissible from a deponent swearing to that statement on information and belief.

89. I had a recent example of this where a solicitor was swearing on information and belief to an opinion from his client on a matter of valuation. There was no basis to think the client had the necessary expertise or experience to give that valuation evidence. It was therefore inadmissible opinion evidence.

90. Examples could be multiplied.

Conclusion

91. Magistrates are called upon to decide many disparate matters every day. Perfection cannot be fairly expected. However, where cases are proceeding ex parte or where a party objects to evidence given on information and belief, it is the duty of the Court to determine the admissibility to that evidence according to law. I hope this paper assists in doing so.

Judge Bernard Porter QC
Brisbane
26 May 2022.