Cameron Ford's Supreme Court case notes

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ATREFOIS CONVICT, AUTREFOIS AQUIT, DOUBLE JEOPARDY

In *Harris v Sanderson* [2016] NTSC 48, Hiley J held that charges of breaching bail and breaching an alcohol protection order were not the same or similar offences and were not precluded by s 18 of the *Criminal Code 1983* (NT) even though arising out of substantially the same facts. The elements of the two offences are not the same nor wholly included in the other. The court has ample powers to prevent such unfairness, for example under s 21 of the *Criminal Code* or under its inherent powers to stay proceedings and protect against double jeopardy when sentencing.

SECURITY FOR COSTS

In *NT Recycling Solutions Pty Ltd v Environbank NT Pty Ltd & Ors* [2016] NTSC 44, Master Luppino declined to make an order for security for costs under RSC 62.02 because he was not satisfied that there was a reason to believe the plaintiff did not have sufficient assets in the jurisdiction to pay the defendant's costs. He emphasised that that was the test under the NT rules and not the general financial position of the plaintiff; it is concerned more with what can be realised to meet costs and therefore the amount of immediately available cash alone is not determinative. A plaintiff defending an application for security for costs should make full and frank disclosure of its financial position, at least to the extent that it is relevant to the application. However, this requirement is tempered by the wording of the rule in only setting a 'reason to believe' as the required standard. A court will not undertake as thorough an examination of a plaintiff's finances as it would if the plaintiff's finances were an issue at trial. The defendant also had a measure of protection in the amount it virtually conceded it owed the plaintiff being paid into court as security.

CONSTRUCTION SECURITY FOR PAYMENT

In *CH2M Hill Australia Pty Ltd & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42, Kelly J quashed a determination under the *Construction Contracts (Security of Payments) Act 2004* (NT) because the adjudicator had merely accepted one expert's report over another without explaining why he had done so. Her Honour held the duty to determine liability on the application, response and other materials is an essential requirement under the Act, breach of which will render the determination void. A failure to address a party's contentions and supporting material

will render a decision void if there is a substantial failure to accord natural justice. The applicant had made two applications five days apart encompassing similar issues but on different payment disputes. Her Honour held that 'dispute' in s 8 means the dispute arising on non-payment etc. of each payment claim, and not merely an issue on which the parties disagreed. The plaintiff (respondent to the adjudication) also argued that adjudicator should have dismissed the application as being too complex. Her Honour held that The duty to dismiss an application under s 33(1)(a)(iv) arises not as a matter of objectivity but when the adjudicator is 'satisfied' that the matter is too complex, factual errors in an adjudicator's decision being satisfied that a matter is not too complex will not render the resulting determination invalid, and in any case parties may appeal to the Local Court from an adjudicator's decision under s 33(1)(a) to dismiss an application without making a determination.

DIFFERENTIAL COSTS ORDERS; COSTS ON INJUNCTIONS

In *CH2M Hill Australia Pty Ltd & Anor v ABB Australia Pty Ltd & Anor (No 2)* [2016] NTSC 43, Kelly J declined to make a differential costs order against a successful plaintiff. The defendant had argued that the plaintiff should not have its costs of the multiple grounds on which it did not succeed but her Honour held that parties may reasonably argue multiple grounds of a single contested issue and courts should not discourage parties from arguing all reasonable issues through the threat of an adverse costs award. Although parties generally bear their own costs in interlocutory proceedings, costs will commonly be awarded to the successful party in interlocutory injunction applications where it is also successful at trial.

SENTENCING – WHEN NO PAROLE APPROPRIATE

In *Emitja v The Queen* [2016] NTCCA 4 the Court of Criminal Appeal dismissed an appeal against a sentence of six years imprisonment without parole for unlawfully causing serious harm contrary to s 181 of the *Criminal Code 1983* (NT) for which the maximum penalty was fourteen years. The accused was a forty year old Aboriginal man who had entered his former wife's home at 2 am contrary to a domestic violence order, remonstrated with her and ultimately kicked her to the bottom of the leg causing closed compound fractures of the lower tibia and fibula. He had sixteen prior convictions for offences of violence – many of which were perpetrated against the victim – a further twelve offences involving breaches of restraining orders or domestic violence orders, and a raft of other offences involving property, alcohol, motor vehicles, offensive weapons and breach of bail. The court held that rehabilitee of the offender and protection of society – particular vulnerable people such as Aboriginal women and children – were important aspects of sentencing and the protection of the community will take precedence over offender rehabilitation, unless those goals are mutually achievable. The court summarised five guiding principles of parole as:

1. A non-parole period is fixed in circumstances where considerations of mitigation or rehabilitation make it unnecessary or undesirable that the whole of that sentence should actually be served in custody.
2. The non-parole period, if fixed, is the marker of the minimum time that the sentencing judge determines that the offender must serve having regard to all the circumstances of the offence.
3. In making that determination the sentencing judge takes into account the same considerations which inform fixing the head sentence, including antecedents, criminality, punishment and deterrence, although different weightings may be applied to those considerations for the purpose of determining whether a non-parole period should be fixed and, if so, of what duration.
4. In the consideration of those matters the court may only determine not to fix a non-parole period if the sentencing judge forms the view that it would be inappropriate to fix a non-parole period having regard to the nature of the offence, the past history of the offender or the circumstances of the particular case.
5. In determining that the fixing of a non-parole period would be inappropriate a sentencing judge is exercising a sentencing discretion with the consequence that the ordinary principles governing sentencing appeals will have application; that is, it is necessary for the appellant to show that the exercise of the discretion miscarried to such an extent that it did not constitute a valid exercise.

CONDITIONS OF SUSPENDED SENTENCE

In *Garling v Firth* [2016] NTSC 41, Hiley J allowed an appeal against the imposition of a condition of a suspended sentence that a driver not consume alcohol for twelve months when alcohol did not feature in the commission of the offence other than that the driver was driving to buy alcohol while disqualified. His Honour said the power under s 40 of the *Sentencing Act* to impose conditions is not unlimited and must be construed in the context in which it is conferred as part of a sentencing regime. Even where a condition may be relevant to offending, it must not constitute additional or different punishment

to the suspended sentence. There must be a nexus between conditions imposed under s 40 and the character of offending or the purpose of punishment, including deterrence and rehabilitation, of the offending. Where offending is not connected to an offender's drug and alcohol issues, courts will not generally have the power to make related conditions in an attempt to rehabilitate the offender. Conditions must be certain and reasonably precise in proscribing prohibited conduct and must not be unduly harsh, unreasonable, or needlessly onerous.

PROCEDURAL FAIRNESS IN SENTENCING

In *Garling v Firth* [2016] NTSC 41, Hiley J held that an accused had not been denied procedural fairness in the sentencing judge's not warning him that she was considering imposing a condition of a suspended sentence that he not consume alcohol for twelve months when alcohol did not feature in the commission of the offence. His Honour said that it was reasonable that his counsel should have anticipated such a condition and made him aware of it before the hearing. Unless there is a clear legislative intent to the contrary, a statutory power conferred on a court which may destroy, defeat or prejudice a person's rights and interests or legitimate expectations must be exercised with procedural fairness. Procedural fairness applies in the sentencing process. Orders which do not comply with obligations to apply procedural fairness or the intent of ss 101 and 102 of the *Sentencing Act* may be set aside. Regardless of statutory requirements, offenders should be made aware of a court's intention to apply conditions and their nature.

FIT AND PROPER FOR UNRESTRICTED PRACTISING CERTIFICATE

In *Connop v Law Society Northern Territory* [2016] NTSC 38, Hiley J held a practitioner not to be a fit and proper person to hold an unrestricted practising certificate due to his failure to comply with special conditions of his practising certificate, failing to exercise oversight of his trust account, failing to provide trust account and CPD declarations, failing to provide trust account statements to clients for lengthy periods, providing misleading costs agreements to clients, failing to adequately prepare his client's case, misleading and lying the court and swearing false or misleading affidavits in these proceedings. His Honour said the holder of an unrestricted practising certificate must be a person who is suitable to conduct a law practice as a principal and be qualified to engage in unsupervised legal practice and be capable of supervising other practitioners such as holders of restricted certificates. To be a fit and proper person to hold a practising certificate requires demonstrated honesty and competence in dealing with clients, other practitioners and the court. It also extends to the assessment of a practitioner's 'character' in order to maintain the continuing confidence of the public in the performance of the duties of legal practitioners, given the central role the profession plays in the administration of justice. A practitioner is expected to deal with the court openly and honestly and not "…knowingly make a misleading statement to the court on any matter." If a practitioner becomes aware that a misleading statement has been made to the court, he or she must rectify this error as soon as practicable after becoming aware that such a statement is misleading. A legal practitioner should not give an undertaking that he or she is not confident of being able to fulfil. A failure to honour a personal undertaking given in a lawyer's professional capacity will often amount to misconduct.