Cameron Ford's Supreme Court case notes

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COMPANY "ORDINARILY RESIDENT"

In *NT Recycling Solutions Pty Ltd v Environbank NT Pty Ltd* [2016] NTSC 44 at [10], Master Luppino said that it may be inappropriately restrictive to simply say that a company is "ordinarily resident" in the place where its registered office is located. A significant enough nexus between the operations of the cow 2mpany and the jurisdiction may be more determinative of the company's "residence" for the purposes of SCR 62.02(1)(a) dealing with security for costs.

SECURITY FOR COSTS FACTORS

In *NT Recycling Solutions Pty Ltd v Environbank NT Pty Ltd* [2016] NTSC 44, in refusing an application for security for costs Master Luppino said that the factors in such applications are the same under SCR 62.02 and s 1335 of the *Corporations Act*: [15]; it was appropriate not to make an allowance for the possibility of settlement before trial in the amount sought: [8]; and the test is whether the plaintiff will have sufficient assets in the jurisdiction to satisfy any adverse costs order, not only that there is a risk of that occurring: [14]. Those assets are not income dependent nor limited to any particular type of asset: [20(j)]. His Honour said a plaintiff resisting an application should make full and frank disclosure of its relevant financial position to the extent necessary to rebut a "reason to believe" there would be insufficient assets: [18]. In the unusual situation of this case, the defendant concede it owed more to the plaintiff than it was seeking in security, so it had a form of protection for unpaid costs orders: [24].

PARTICULAR CIRCUMSTANCES FOR NO PRISON

In *Gibson v Spencer* [2016] NTSC 72, Kelly J held that a magistrate did not err in finding that the following were particular circumstances within the meaning of s 37(2) of the *Misuse of Drugs Act* (NT) to warrant no imprisonment on a charge of unlawful possession of a trafficable quantity (24g) of cocaine: the accused was an employed forty-two year old with many years since prior drug convictions; he was supporting four children and a mother; it was an early plea and he had spent two days in custody. Her Honour said at [26] that the magistrate had a wide discretion and all of the matters were appropriate to consider.

SOP PAYMENT CLAIM MUST BE VALID UNDER CONTRACT

In *ABB Australia Pty Ltd v CH2M Hill Australia Pty Ltd and others* [2017] NTSC 1 at [32], Kelly J held that to be a valid payment claim under the *Construction Contracts (Security of Payments) Act 2004* (NT), a claim for payment must comply with the requirements of the contract. A contractor made a claim for payment under a construction contract and the principal disputed that the amount was owing. The contractor made an application for adjudication which was dismissed by the adjudicator under s 33(1)(a) on the ground the application was out of time. He ruled that the claim for payment was a "payment claim" under the Act although it did not comply with the contractual requirements for making a claim for payment, and that time for making an application ran from the time the principal disputed the amount claimed, thereby creating a "payment dispute" under s 8. On a review under s 48, the contractor argued that there could be no "payment dispute" under s 8 unless there was a valid "payment claim" in accordance with the contract. The principal argued that time ran from the time the amount claimed was clearly disputed, whether or not the claim complied with the contract. Kelly J agreed with the contractor, applying K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd (2011) 29 NTLR 1.

LOCAL COURT REVIEW OF SOP DISMISSALS

In *ABB Australia Pty Ltd v CH2M Hill Australia Pty Ltd* and others [2017] NTSC 1 at [38], Kelly J expressed the tentative view, obiter, that a review by the Local Court under s 48 of the *Construction Contracts (Security of Payments) Act 2004* (NT) of an adjudicator's decision to dismiss an application is a review on the merits on the material before the adjudicator only. Her Honour said that whatever the width of the review, it would encompass review for an error of law.

DNA EVIDENCE OBTAINED IMPROPERLY BUT ADMISSIBLE

In *R v DA* [2017] NTSC 2, Southwood J held at [94] that DNA evidence obtained from an Aboriginal youth in contravention of ss 15 and 32 of the *Youth Justice Act* was admissible because it had significant probative value, the contraventions were not deliberate or reckless, it did not produce an unfair trial, and the rights of the accused were not prejudiced, namely the right to privacy, the dignity of the person, the privilege against self-incrimination and the right to fair trial. Police were invited by an elder of an Aboriginal community to take saliva swabs of men for DNA analysis to assist in identifying a perpetrator of sexual assault. DA was sixteen years old at the time and one of forty-two men who had samples taken by police at a community centre. His DNA was said to be 100 billion times more likely to be the perpetrator's than anyone else. The contraventions were the failure of police to tell him that if his DNA matched the male DNA obtained from the complainant he would be charged with sexual intercourse without consent and the evidence would be used against him, or even that he would be in serious trouble. He did not understand this and was therefore incapable of giving informed consent.

PRIVILEGE AGAINST SELF-INCRIMINATION AND REAL EVIDENCE?

In *R v DA* [2017] NTSC 2, Southwood J considered the origins of the privilege against self-incrimination and whether it extends to real evidence. He said at [87] that traditionally, the privilege is confined to testimonial evidence and does not extend to the tender of real evidence because that evidence is said to exist independently of any action of the accused. At [88] he said that it was arguable the ultimate basis of privilege is a principle against conscription, as was held in the Supreme Court of Canada in *R v Stillman* [1997] 1 SCR 607 considering the Canadian Charter of Rights and Freedoms. The law in Australia has not determined whether the privilege extends to real evidence, with recent comments of the High Court being made in the context of testimonial evidence: *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [42]; *Lee v New South Wales Crime Commission (Lee No 1)* (2013) 251 CLR 196 at [266]; *AFP v Zhao and Jin* [2015] HCA 5 at [18]; *Lee v The Queen* (Lee No 2) [2014] HCA 20 at [30] and [33]. His Honour was considering whether DNA evidence taken from an Aboriginal youth without his informed consent was admissible: see *DNA evidence obtained improperly but admissible* above.

PHOTO BOARD ADMISSIBLE – RECOGNITION, NOT IDENTIFICATION

In *R v AW* [2017] NTSC 3, Southwood J held that a photo board identification was admissible because the complainant's evidence on the voire dire made it clear she recognised the man as having been present at the relevant time. He said at [13] it was a matter of the complainant have recognised the accused rather than identified him. The accused argued that his was the only photo of a Torres Strait Islander with such distinctive feature and curly hair, with other photos being of men not Torres Strait Islanders or with shaved heads.

"THE RIGHTS OF ANY PERSON" S 59 YOUTH JUSTICE ACT

R v DA [2017] NTSC 2, Southwood J considered the meaning of "the rights of any person" in s 59(2) of the *Youth Justice Act 2005* (NT) which says: "However, the Court may admit the evidence if satisfied that admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights of any person". His Honour said at [86] the relevant rights were the right to privacy, the dignity of the person, the privilege against self-incrimination and the right to a fair trial. He considered the privilege against self-incrimination in more detail and whether it applied to real evidence as well as testimony: see *Privilege against self-incrimination and real evidence?* above.

POOR GROUNDS OF APPEAL AGAINST SENTENCE DETRACT FROM GOOD ONES

In *Schuelein v The Queen* [2016] NTCCA 7 at [4]-[8], Southwood and Hiley JJ said that poor grounds of appeal detract from good ones and that counsel should exercise proper discernment in formulating grounds of appeal and not raise footling arguments. Before pursuing leave from three judges to appeal sentence, counsel should give weight to single judge's view that it is plain the appeal cannot succeed. The test for a single judge to apply in considering granting leave to appeal sentence is whether a ground is reasonably arguable, and the judge should grant leave even if he or she considers that it would probably not be made out when it was fully argued or that the court of three would think that, even though it was made out, no different sentence should be passed. This means that if the single judge has refused leave to appeal, he or she has formed the view that the ground is not reasonably arguable.

SEARCH WARRANT MUST IDENTIFY OFFENCE SUFFICIENTLY

In *Jeremiah v Lawrie & Anor* [2016] NTCA 6, Kelly and Hiley JJ confirmed the approach of Mildren AJ below that a search warrant which identifies documents and things by reference to an offence must identify the offence with sufficient particularity to enable (1) the person executing the warrant to be able to determine on the premises whether documents and things fall within the warrant, and (2) the court to determine whether any discretion in the executor has miscarried. The warrant in this case referred to electronic records relating to the offence of making a false statement contrary to s 118 of the *Criminal Code*. The warrant did not state by whom the statements were alleged to be made or give any other particulars of the offence. The trial judge and Kelly and Hiley JJ held that this was too vague given the nature of an offence under s 118 which could be committed in numerous ways. The *Police* Administration Act under which the warrant was issued contains no power to remove things to determine if they are within the warrant. The person authorised to execute the warrant must form the judgment as to whether things are within it, and that judgment must be formed on the premises before the things are removed. Over 12 000 emails were identified, indicating there was no practical way of executing the warrant lawfully since that had to be done then and there.

SEARCH WARRANTS MUST MAKE GRAMMATICAL SENSE

In *Jeremiah v Lawrie & Anor* [2016] NTCA 6 at [24]-[31] and [59], Kelly and Hiley JJ said "it is of primary importance that the warrant sets out clearly and unambiguously what it is that the warrant authorises the holder to do." The punctuation in the warrant rendered it meaningless, or at the very best ambiguous. Officers preparing a draft warrant should read the draft to ensure it is intelligible, properly punctuated, and says what is intended to be said; and that it accurately and clearly sets out the things which it is intended that the warrant will authorise the officer to seize. If the electronic form is inadequate for the purpose, it should be redone manually if necessary to render it intelligible.

LEGISLATION NEEDED TO FACILITATE LARGE SCALE SEARCHES

In *Jeremiah v Lawrie & Anor* [2016] NTCA 6 at [31], [59] and [105]-[108], the Court of Appeal said that legislation was needed in the Territory to facilitate execution of warrants involving large quantities of documents and electronic records similar to ss 3L and 3K of the *Crimes Act 1914* (Cth). The *Police Administration Act* contains no power to remove things from the premises to determine if they are within the warrant. The person authorised to execute the warrant must form the judgment as to whether things are within it, and that judgment must be formed on the premises before the things are removed. Sections 3L and 3K empower officers to take equipment to premises, move something for examination, operate electronic equipment at premises, copy data, and seize equipment etc. which holds evidential material.