Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd [2014] NTSC 28

PARTIES:	GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (STATUTORY MANAGER APPOINTED) v SKYCITY DARWIN PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	25 OF 2014 (21412662)
DELIVERED:	17 JULY 2014
HEARING DATES:	24 & 28 APRIL 2014
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Application for pre-action discovery against a prospective defendant – Requirements to be satisfied – Need to establish a reasonable cause to believe that a right of relief may be available – Elements of the cause of action proposed by the Plaintiff – Extent that Plaintiff must satisfy the Court in respect of proof of the proposed cause of action – Plaintiff not required to show that it can prove its case on the proposed cause of action – Plaintiff not required to show that it has a *prima facie* case – Over-riding discretion vested in the Court – Application granted

Evidence – Improperly obtained evidence – Evidence obtained in breach of secrecy provisions of the Gaming Control Act – Consideration of the

relevant factors in section 138(3) of the Evidence (National Uniform Legislation) Act – Where the balance of the desirability of admitting the evidence lays for the purposes of section 138(3) of the Evidence (National Uniform Legislation) Act

Supreme Court Rules, Rule 32.05
Gaming Control Act s 71
Evidence (National Uniform Legislation) Act s 138

St George Bank Ltd v Rabo Australia Ltd & Anor (2004) 211 ALR 147;
Waller v Waller [2009] WASCA 61;
Benchmark Certification Pty Ltd v Standards Australia International Ltd & Anor (2004) 212 ALR 464;
St George Bank Ltd v Rabo Australia Ltd & Anor (2004) 211 ALR 147;
Northern Territory of Australia v GRD Kirkfield Ltd & Anor [2003] NTCA 01;
Scarletti Pty Ltd v Millwood Printing Co Pty Ltd, unreported, Supreme Court, Victoria, 28 July 1994;
John Holland Services Pty Ltd v Terranova Group Management Pty Ltd [2004] FCA 679;
Telstra Corporation Ltd v Minister for Broadband Communications & Digital Economy [2008] FCAFC 7;
The New South Wales Solicitors Mutual Indemnity Fund v The Hancock Family Memorial Foundation Ltd (No 2) [2009] WASCA 146;
Hatfield v TCN Channel Nine Pty Ltd [2010] NSWCA 69;
Garth Barnett Interior Design Pty Ltd v Ellis [2009] NSWCA 193;
Morton v Nylex Pty Ltd [2007] NSWSC 562;
Barnes v Addy (1874) LR 9 Ch App 244;
Baden v Societe Generale pour Favoriser le Development du Commerce et de l'Industrie en France SA [1993] BCLC 325;
Farah Constructions Pty Ltd v *Say-Dee Pty Ltd* (2007) 230 CLR 89;
Grimaldi v Chameleon Mining (No 2) (2012) 200 FCR 296;
Westpac Banking Corp v The Bell Group (in liq) (No 3) (2012) 89 ASCR 1;
K & S Corporation Ltd v Sportingbet Australia (2003) 86 SASR 312;
Bendigo And Adelaide Bank Ltd v Crown Melbourne Ltd [2012] VSC 493;
Bunning v Cross (1978) 141 CLR 54;
R v Camilleri (2007) 68 NSWLR 720;
R v Hunt [2014] NTSC 14;
R v Versac [2103] QSC 46.

REPRESENTATION:

Counsel:

Plaintiff:	Ms S. Brownhill
Defendant:	Mr T. Anderson

Solicitors:

Plaintiff:	Roussos Legal Advisory
Defendant:	Ward Keller Lawyers

Judgment category classification:	B
Judgment ID Number:	LUP1402
Number of pages:	27

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd [2014] NTSC 28
No. 25 of 2014 (21412662)

BETWEEN:

Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)
Plaintiff

AND:

Skycity Darwin Pty Ltd
Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 17 July 2014)

[1] The Plaintiff seeks orders for pre-action discovery pursuant to Rule 32.05 of the *Supreme Court Rules*.

[2] The Plaintiff is the Trustee of a charitable trust known as the Groote Eylandt Aboriginal Trust ("the Trust"). The Plaintiff is presently subject to statutory management. The Defendant ("Skycity") is the operator of the Skycity Casino ("the Casino").

[3] Rosalie Lalara ("Lalara") was, until the appointment of the statutory manager, the Public Officer and a member of the Plaintiff's management

committee. She was heavily involved in the administration of the Trust and was a signatory on the Trust's bank accounts. She was also a beneficiary of the Trust.

[4] The Trust suffered a significant dissipation of its assets in the period from 1 January 2009 to 19 October 2012 when the statutory manager was appointed. Much of the dissipation was by expenditure from the Trust's bank accounts. During that time, large amounts were drawn from the Trust's bank account by cheques drawn to "cash". There were insufficient details recorded in respect of those cheques to enable validation of that expenditure. Those cheques were signed by Lalara.

[5] Lalara was a regular gambler at the Casino throughout the period referred to in the preceding paragraph. She enjoyed complimentary benefits as a regular patron through her membership, at a high level, of the Casino's loyalty program. Following an investigation into Lalara's gambling by the Territory's industry regulator ("the Regulator"), she was banned from the Casino.

[6] The Plaintiff has reason to believe that the dissipated funds were, at least in part, gambled by Lalara at the Casino. The Plaintiff seeks pre-action discovery to enable it to decide whether or not it should proceed against Skycity to recover those funds based on the cause of action discussed below.

[7] Rule 32.05 provides as follows:-

32.05 Discovery from prospective defendant

Where:

(a) there is reasonable cause to believe that the Plaintiff has or may have the right to obtain relief in the Court from a person whose description he has ascertained;

(b) after making all reasonable inquiries, the Plaintiff has not sufficient information to enable him to decide whether to commence a proceeding in the Court to obtain that relief; and

(c) there is reasonable cause to believe that the person has or is likely to have or has had or is likely to have had in his possession a document relating to the question whether the Plaintiff has the right to obtain the relief and that inspection of the document by the Plaintiff would assist him to make the decision,

the Court may order that the person shall make discovery to the Plaintiff of a document of the kind described in paragraph (c).

[8] The requirements for a successful application for an order for pre-action discovery were succinctly summarised by Hely J in *St George Bank Ltd v Rabo Australia Ltd & Anor*.[1] That case dealt with the equivalent of Rule 32.05 in New South Wales, which was then sufficiently similar to Rule 32.05 to validate comparison. Adopting the summary made by Hely J, the principles are:-

1. The rule is to be beneficially construed;

2. Each of the elements in the subparagraphs must be established;

3. The test to determine whether an applicant has "*reasonable cause to believe*", as required by subparagraph (a) is an objective one. Further the words "*or may have*" cannot be ignored and an applicant does not have to make out a *prima facie* case;

[1] (2004) 211 ALR 147

4. Belief requires more than mere assertion and more than suspicion or conjecture;

5. While uncertainty as to only one element of a cause of action might be compatible with the "*reasonable cause to believe*" required by subparagraph (a), uncertainty as to a number of such elements may be sufficient to undermine the reasonableness of the cause to believe;

6. The question posed by subparagraph (b) is not whether an applicant has sufficient information to decide if a cause of action is available but whether the applicant has sufficient information to make a decision whether to commence proceedings and therefore documents relevant to defences and quantum are also discoverable;

7. Determining whether an applicant has sufficient information for the purposes of subparagraph (b) also requires an objective assessment to be made and the subparagraph contemplates that an applicant is lacking information reasonably necessary to decide whether to commence proceedings;

8. Seeking documents which would be considered to be a "fishing expedition" in a regular discovery application is not prohibited in pre-action discovery applications.[2]

[9] In *Waller v Waller*,[3] Martin CJ said that that the nature of the jurisdictional threshold in pre-action discovery applications is to be seen in light of the purpose of the rule. That purpose is to enable a prospective litigant to obtain documents that may assist that plaintiff in making a decision as to whether to commence proceedings. He added that it would defeat the purpose to require a plaintiff to demonstrate the present existence of a cause of action as a condition to the exercise of the Court's discretion. He concluded that it would be wrong in principle to approach the rule with an undue focus upon

[2] (2004) 211 ALR 147 at para 26

[3] [2009] WASCA 61

the demonstration of the prospective cause of action but that something more than mere assertion, conjecture or suspicion is required.[4]

[10] Before dealing with the evidence and the merits of the application I wish to make some general observations about the requirements and the nature of the evidence which will satisfy the requirements. Importantly, as the foregoing demonstrates, a prospective plaintiff is only required to show that there is a reasonable cause to believe that the plaintiff has a right to obtain relief. It is not necessary for a prospective plaintiff to demonstrate that it has, or may have, the right to obtain the relief from the particular defendant or even that it can establish a *prima facie* case.[5] This aspect cannot be over emphasised. Much of the focus of Mr Anderson, for Skycity, in argument was directed to minutely analysing the currently available evidence against the elements of the proposed cause of action. Too much emphasis in this way runs the risk, as I think has occurred here, of blurring the sometimes fine line between a "*reasonable cause to believe*" and a *prima facie* case. The currently available evidence alone is not a good measure of the merits of the possible substantive proceedings as the whole purpose of seeking an order for pre-action discovery is to obtain documents, i.e., potentially

---

4 See *Benchmark Certification Pty Ltd v Standards Australia International Ltd & Anor* (2004) 212 ALR 464; *St George Bank Ltd v Rabo Australia Ltd & Anor* (2004) 211 ALR 147; *Waller v Waller* [2009] WASCA 61; *Northern Territory of Australia v GRD Kirkfield Ltd & Anor* [2003] NTCA 01; *Scarletti Pty Ltd v Millwood Printing Co Pty Ltd*, unreported, Supreme Court, Victoria, 28 July 1994; *John Holland Services Pty Ltd v Terranova Group Management Pty Ltd* [2004] FCA 679

5 *Waller v Waller* [2009] WASCA 61; *Telstra Corporation Lt v Minister for Broadband Communications & Digital Economy* [2008] FCAFC 7; *The New South Wales Solicitors Mutual Indemnity Fund v The Hancock Family Memorial Foundation Ltd (No 2)* [2009] WASCA 146.

additional evidence, to enable a decision to be made as to whether or not to proceed.

[11] As an example, Mr Anderson, argued in the course of discussion as to whether or not Lalara gambled with the Trust's money, that the Plaintiff's evidence at best established that Lalara regularly gambled at the Casino. He said that this was insufficient to satisfy the requirement in Rule 32.05(a) because it relied only on a suspicion that she gambled with the Trust's funds and that suspicion alone is insufficient. As the authorities discussed show, it is correct to say that suspicion alone is insufficient. However Mr Anderson went on to argue that it would remain a suspicion only until the Plaintiff could definitively determine the precise amount Lalara had fraudulently withdrawn from the Trust. That does not necessarily follow and that seems to lean more towards proving a *prima facie* case than showing a reasonable cause to believe.

[12] I also think that the full extent of available inferences has not been properly considered. For current purposes it is sufficient to show and rely upon inferences which are able to be drawn. There are many available inferences. Ms Brownhill, for the Plaintiff, ran through many of the relevant and available inferences. If proper regard is had to those inferences then what Mr Anderson describes as mere suspicions become more cogent.

[13] Dealing now with the requirements in Rule 32.05, the first requirement is that there is a reasonable cause to believe that the Plaintiff has, or may have, the right to obtain relief from Skycity.

[14] The reasonable cause to believe must be in respect of a recognised cause of action.[6] As the question to be determined by this Court is whether the Plaintiff has sufficient information to decide whether to institute proceedings, the range of available discovery goes beyond that related to the purpose of establishing a cause of action. It can for example, include documents relevant to available defences and to quantum.[7]

[15] The Plaintiff's proposed cause of action is knowing receipt of trust property in breach of trust. The cause of action derives from the case of *Barnes v Addy*.[8] There are two available limbs for this cause of action and the Plaintiff relies on the second limb. The elements of that limb are:-

1. Trust property was disposed of in breach of trust;

2. The defendant received the trust property;

3. The defendant had knowledge that the property was received as a result of a breach of trust.

[16] The knowledge of the defendant referred to in the third element can take a number of forms. Five categories were specified in *Baden v Societe*

---

6 *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWCA 69.

7 *St George Bank Ltd v Rabo Australia Ltd & Anor* (2004) 211 ALR 147; *Garth Barnett Interior Design Pty Ltd v Ellis* [2009] NSWCA 193; *Morton v Nylex Pty Ltd* [2007] NSWSC 562; *Barnes v Addy* (1874) LR 9 Ch App 244

8 (1874) LR 9 Ch App 244

Generale pour Favoriser le Development du Commerce et de l'Industrie en France SA ("*Baden*").[9] In Australia, the fifth category specified in *Baden* has not been recognised.[10] The remaining categories are:-

1. actual knowledge;

2. wilfully shutting one's eyes;

3. wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make;

4. knowledge of circumstances which would indicate the facts of the breach of trust to an honest and reasonable person.

[17] Skycity argues that on the available evidence the Plaintiff cannot establish the requisite level of knowledge on the part of Skycity. In this respect Skycity relies on the evidence contained in paragraph 15 of the affidavit of Bradley Morgan sworn 14 April 2014 namely, that no one associated with Skycity had any knowledge at the relevant times that Lalara was associated in any way with the Trust.

[18] Mr Anderson again argued that on the available evidence, the Plaintiff can only be said to have a <u>suspicion</u> that the Plaintiff may be able to obtain relief against Skycity. He submitted that this was fatal to the application because the absence of that connection, and therefore the absence of that

---

9 [1993] BCLC 325

10 *Farah Constructions Pty Ltd* v Say-Dee Pty Ltd (2007) 230 CLR 89; *Grimaldi v Chameleon Mining (No 2)* (2012) 200 FCR 296; *Westpac Banking Corp v The Bell Group (in liq) (No 3)* (2012) 89 ASCR 1; *K & S Corporation Ltd v Sportingbet Australia* (2003) 86 SASR 312.

knowledge, the Plaintiff cannot satisfy any of the four categories of knowledge set out in *Baden*.

[19] Ms Brownhill contended that the absence of actual documents can only rule out actual knowledge but notwithstanding that, circumstances may exist which would cause an honest and reasonable person to "know" the facts, referring I think to the fourth of the Baden categories. To illustrate her point, she referred me to *Bendigo And Adelaide Bank Ltd v Crown Melbourne Ltd*.[11] That case concerned the application of the same principles in the context of an application for leave to administer interrogatories. In that case the gambler was a bank employee who allegedly stole money from her employer and then gambled it at the defendant's casino. The allegations in that case were that the gambler was a casino VIP, was known personally to the VIP room attendants and duty managers and that she had told those persons that she worked at the bank. That knowledge of those employees was sought to be attributed to the defendant.

[20] By analogy Ms Brownhill argued that if Lalara gambled a lot of money at the Casino over a two to three year period, and she was a high status loyalty program member at the Casino, then she would have been known to Casino staff and thereby Skycity may have known that she was the person of

[11] [2012] VSC 493

ordinary means similar to the approach taken in *Bendigo And Adelaide Bank Ltd v Crown Melbourne Ltd*.[12]

[21] Accepting that actual knowledge on the part of Skycity is not necessary, and that in appropriate circumstances knowledge of employees can be attributed to an employer for this purpose,[13] I think that the available evidence can satisfy at least one of the categories of constructive knowledge in *Baden* in the substantive proceedings similarly as occurred in *K & S Corporation Ltd v Sportingbet Australia* ("*Sportingbet*").[14]

[22] In *Sportingbet* an employee electronically transferred $3 million from his employer's bank account to the bank account of the defendant. At the time the employee was indebted to the defendant, for gambling debts, in the sum of approximately $2.7 million. The plaintiff employer claimed against the defendant under the second limb of *Barnes v Addy*. Actual knowledge was ruled out but the Court found constructive knowledge based at least on the last of the *Baden* categories as the defendant had wilfully and recklessly failed to make the enquiries that an honest and reasonable man would have made.

[23] In *Sportingbet*, much turned on the size of the payments and the knowledge of staff of the defendant of the circumstances of the employee and that he was unlikely to be have the capacity to make payments of that magnitude.

---

12 [2012] VSC 493

13 *K & S Corporation Ltd v Sportingbet Australia* (2003) 86 SASR 312

14 (2003) 86 SASR 312

Given that the amount gambled by Lalara was in excess of $1 million and given that she held a high loyalty program status and that turnover of loyalty club members was monitored by Skycity, the case demonstrates how the requisite knowledge on the part of Skycity may be able to be established. That is sufficient to satisfy the requirement on the current application as I am satisfied that, on that basis, the Plaintiff has a reasonable cause to believe that it may have the right to obtain relief against Skycity.

[24] In concluding this I remind myself that I am not currently determining the merits of the proposed substantive proceedings or whether the Plaintiff or Skycity will succeed there. To require determination of that would require me to do even more than to find a *prima facie* case which is not required for current purposes.

[25] The second requirement that a prospective plaintiff must establish to obtain an order for pre-action discovery is that after making all reasonable enquiries the Plaintiff does not have sufficient information to enable it to decide whether to commence a proceeding to obtain that relief. Skycity concedes that the Plaintiff has made all the necessary reasonable enquiries required by Rule 32.05(b) and that the Plaintiff does not have the required sufficient information for the purposes of the Rule.

[26] The third requirement is that the Plaintiff must establish that there is reasonable cause to believe that Skycity has, or is likely to have, in its possession a document relating to the question whether the Plaintiff has the

right to obtain the proposed relief and that the inspection of the documents by the Plaintiff would assist it to make the decision to pursue the claim. This requirement is satisfied, at least in part on the Defendant's own evidence (see paragraph 30). However Mr Anderson argued that certain of the documents sought by the Plaintiff could not assist the Plaintiff to determine whether to proceed. This related to the documents sought regarding the dates and amounts gambled by Lalara, and indirectly, the documents relating to her membership of the Casino's loyalty program.

[27] He submitted that it is not possible to determine from those records whether Lalara won or lost on any occasion when gambled at the Casino. In other words he said that it was impossible to tell from available records whether, even if Lalara had misappropriated any money from the Trust, whether any of that money went to the Casino. He said this was on the basis that the records do not reveal whether she won or lost in any "session" of gambling.

[28] Ms Brownhill submitted that the documents sought do relate to the question of whether the Plaintiff has a right to relief. She submitted that the documents relate to whether the money gambled by the Lalara was Trust money or was Lalara's own money and that the documents also relate to the quantum of the claim. She submitted that the documents also relate to what Skycity knew about the source of the money gambled by Lalara. She said that if, over the relevant three-year period, Lalara had gambled only a modest sum which would be patently within her financial means, that would be indicative that she did not gamble with Trust funds. She submitted that

even if that was all that the documents revealed, then the documents would still relate to the question of whether the Plaintiff may have a right to relief to recover the money, in the negative in that instance, but notwithstanding that, it was still information relevant to the decision of the Plaintiff as to whether or not to commence proceedings. On the other hand, Ms Brownhill argued that if Lalara gambled a large amount of money which was patently outside her modest financial means, that would raise the possibility, coupled with other circumstances (set out and discussed below), that she gambled with the Trust's money.

[29] To put the submissions into context, I now summarise the evidence on the application. Firstly, the Plaintiff's evidence is:-

- Between 1 January 2009 and 19 October 2012 a significant dissipation of Trust assets occurred, of the order of $6 million, much of which was by expenditure of money from its bank accounts and largely by cash cheques signed by Lalara;

- At all relevant times, and currently, Lalara has been a person of only modest financial means;

- Lalara was a regular gambler at the Casino;

- Lalara had gambled in excess of $1 million at the Casino;[15]

[15] The admissibility of this evidence was challenged by Skycity, see paras 31-55.

- Lalara held a “high roller” or “platinum” gambler status at the Casino;

- Skycity provided certain details of Lalara’s gambling to the Regulator;

- Lalara’s gambling at the Casino was the subject of an investigation by the Regulator;

- As a result of that investigation Lalara was banned from the Casino.

[30] Skycity has also led evidence on the application, comprising the affidavit of Mr Morgan, which is summarised as follows:-

- Lalara was a member of the Casino loyalty program between 1 January 2009 and 30 April 2012;

- Skycity’s loyalty program consisted of members having different status levels which were based on the accumulation of points earnt based on the turnover of the member ;

- Skycity’s loyalty program had criteria for admission of members to the different levels and “platinum” status was previously a level in the loyalty program;

- Lalara received pro forma letters from Skycity from time to time as a member of the loyalty program;

- Skycity has records of gambling turnover and specifically holds records indicating the turnover of money gambled by Lalara on electronic gaming machines but only on occasions when her loyalty program card was inserted in the machine;

- The turnover is recorded for particular gaming machines and for particular sessions;

- Skycity's records do not distinguish the amount that Lalara won or lost on gaming machines or what she spent in gambling on gaming machines; the records are limited to the amount of money put into the machine as cash for each session of play plus whatever money was won while playing in that session;

- On 30 April 2012 Skycity banned Lalara from the Casino as directed by the Regulator;

[31] Before dealing with the evidence I need to deal first with a preliminary issue in respect of the admissibility of the evidence that the statutory manager was told by employees of the Territory Government that Lalara had gambled large amounts, in excess of $1 million, at the Casino. The subject evidence is contained in paragraphs 13(a) and (b) of the affidavit of Philip Timney sworn 13 March 2014 which is now set out in full:-

> *As a result of Mr Taylor's investigations into the dissipation of trust funds, he told me that he learned of the following information.*

(a) Shortly after the discussions Mr Taylor had with Mrs Lalara, referred to above, Mr Taylor spoke with Micheil Brodie, then the Executive Officer of the Office of Gambling and Licensing Services in the Northern Territory Government. Mr Taylor told me that Mr Brodie told him in substance, that Mrs Lalara had spent a very large amount of money, at least $1 million or more, gambling at Skycity Casino.

(b) After Mr Taylor's appointment, Karen Avery, a delegate of the Commissioner told Mr Taylor, at a time and place that he could not (when telling me) then recall, that:

(i) the Government had investigated Mrs Lalara's gambling in early 2012;

(ii) the Government had information of the amount of turnover in gambling revenue that Mrs Lalara had spent at Skycity's Darwin Casino; and

(iii) the Casino had accorded Mrs Lalara the status as of a "platinum" or "high roller" gambler.

[32] Skycity challenged the admissibility of that evidence based on the secrecy provisions contained in sections 71 of the *Gaming Control Act*. That section provides as follows:-

71 Secrecy

(1) Subject to this section, a person who is employed by the Territory shall not, either directly or indirectly, except for the purposes of this Act:

(a) make a record of, or communicate to a person, information concerning the affairs of another person acquired by the person under this Act by reason of that employment; or

(b) produce to a person or permit a person to have access to a document furnished to the person for the purposes of this Act.

(2) Nothing in this section prevents a person to whom it applies from disclosing information obtained under this Act, where:

(a) the person from whom it was obtained consents to the

disclosure; or

(b) the disclosure is to:

(i)-(iv) Omitted

(3) Omitted

[33] Section 138 of the *Evidence (National Uniform Legislation) Act* ("the UEA") also has application. It provides as follows:-

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Omitted.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

[34] At the time of argument I received the evidence *de bene esse*. I have now determined the evidence is admissible for the following reasons.

[35] The description of Mr Brodie's position in sub-paragraph 13(a) of Mr Timney's affidavit establishes to my satisfaction that he is an employee of the Territory. What is not obvious is where the information that he passed on to Mr Taylor came from, i.e., whether Mr Brodie "*acquired*" the information "*..under this Act by reason of that employment...*". The information would not fall within section 71 otherwise. I agree with the submission of Mr Anderson, counsel for the Defendant, that there is enough for me to infer that the information came to Mr Brodie in the course of his employment.

[36] In the case of paragraph 13(b), Karen Avery is described as being "*a delegate of the Commissioner*". This satisfies me that she is an employee of the Territory. Moreover in this instance, the specifics of the information that she conveys renders the inference that this is information which she obtained as a result of her employment a strong one.

[37] Ms Brownhill, relying on the description of Ms Avery as "*delegate of the Commissioner*" argued that the communication involving Ms Avery fell

within the exception built into section 71(1) namely, *"…except for the purposes of this Act*". Irrespective of what the title "*delegate of the Commissioner*" precisely means, I cannot accept that submission. On the evidence presented, although the investigations referred to in paragraph 13(b) were carried out for the purposes of the *Gaming Control Act*, and although the information obtained may have been obtained for the purposes of that Act, the evidence is insufficient to support a finding that the dissemination of that information to the statutory manager was for the purposes of that Act.

[38] For those reasons I am satisfied that the evidence in paragraphs 13(a) and (b) of Mr Timney's affidavit reflect a breach of section 71 of the *Gaming Control Act* . On its own however that does not conclusively make the evidence inadmissible. Section 138 of the UEA becomes relevant as the evidence in those two sub-paragraphs falls within section 138(1) of the UEA. It is therefore inadmissible unless, in the exercise of my discretion, I am of the view, having regard to relevant circumstances, including the factors in section 138(3) that *"…the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*".

[39] Although section 138 of the UEA has more frequent application in criminal matters, it applies equally to civil proceedings. The discretion it confers on

the Court involves a balancing of two competing public interests similar to that set out by the High Court in *Bunning v Cross*.[16]

[40] The fundamental concern of section 138, in the context of criminal proceedings, has been said to be that, "*if the law has been breached, or some other impropriety has been involved in obtaining the evidence, this is balanced against the public interest*".[17]

[41] In the context of civil proceedings the competing public interests are the desirability of a just result in proceedings based on all relevant evidence balanced against the undesirability of sanctioning unlawful conduct by admitting evidence obtained improperly in some way.

[42] Section 138(3) of the UEA sets out a number of matters which the Court must take into account in exercising the discretion conferred by section 138(1). They are not the only matters to be taken into account. Many of the specified matters are similar to those which courts would take into account at common law.[18]

[43] The "probative value"[19] of the evidence is in respect of it tending to demonstrate the extent of the gambling of Lalara and, given her otherwise modest means, it can support an inference that she gambled with Trust funds. It can also reveal that the Defendant has relevant information which is a matter which the Plaintiff must establish per Rule 32.05(c).

---

16 (1978) 141 CLR 54

17 *R v Camilleri* (2007) 68 NSWLR 720 at 727 approved of by Hiley J in *R v Hunt* [2014] NTSC 14

18 See for example the factors listed by Applegarth J in *R v Versac* [2103] QSC 46 at [6].

19 Section 138(3)(a)

[44] Mr Anderson challenged the probative value of that evidence based on the affidavit evidence of Mr Morgan that the only records of a customer's gambling held by Skycity are records of loyalty program members, (of which Lalara was one), and then of the "turnover" on a gaming machine and only while that person's membership card is inserted in the gaming machine.

[45] Mr Anderson submitted that the nature of the records rendered them inconclusive in establishing the amount that Lalara gambled. He said that the records could demonstrate for example that she gambled very little of her own funds but won a lot of money and reinvested those winnings. He argued that the evidence of Mr Morgan established that the records were not able to discriminate the source of the money gambled between a gambler's own funds or winnings and therefore were not probative as they could not assist the Plaintiff in respect of the decision whether or not to pursue a case against Skycity.

[46] The fault with Mr Anderson's submission and the examples he relied on to demonstrate his point is that they are based on small wagers over short periods. Although what he says may be true in respect of individual instances, the same might not be said where large amounts are gambled or the gambling is over extended periods. Although individual gamblers may win or lose on any individual occasions, over a sufficient enough period of time, the house does not lose. That is specifically so in the case of gaming machines as they are set to pay out a proportion of the amount wagered.

[47] Therefore if Lalara gambled over a three-year period and if, as the evidence suggests, she remains a person of modest means, an available inference is that overall she lost money through her gambling, irrespective of whether she had any wins on any one occasion or overall on any particular day. Therefore, the amount of turnover, even without distinguishing initial contributions or reinvested winnings, is relevant because the pattern may be evidence to disclose the wagering of a large amount contributed by her, as opposed to re-invested winnings.

[48] Therefore I conclude that the evidence is highly probative and this weighs in favour of its admission.

[49] Subparagraph (b) is relevant because there is no other evidence, whether of equal probative value or otherwise, which is apparently available to the Plaintiff.

[50] In relation to the factor in section 138(3)(d), I am of the view that there is considerable public interest in compelling compliance with secrecy and confidentiality requirements of legislation where public servants, undertaking regulatory functions, receive private information concerning citizens in the course of their employment. I think it is imperative that Government employees and office holders should be seen to comply with laws of the nature of the secrecy provisions in the *Gaming Control Act*. It is also imperative that Government agencies ensure that information received in that capacity is only disseminated according to law.

[51] I think it is also relevant to this factor that although the information obtained in contravention of section 71 of the *Gaming Control Act* concerns the extent of Lalara's gambling, it is not sought to be used against Lalara. This ties in with the factors in section 138(3)(d) and (e) dealing with the circumstances and nature of the impropriety. The impropriety was more inadvertent than deliberate or reckless and I do not consider it to be a grave impropriety within the meaning of section 138(3)(d). If the information was sought to be used in proceedings against Lalara, or if the circumstances of the impropriety were different, then this would have instead weighed against admissibility.

[52] As to the nature of the proceedings it is relevant that the Plaintiff acts by a statutory manager tasked with the purpose of investigating the dissipation of funds of a charitable trust. In the criminal law context the public interest in admitting evidence varies with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence. The nature and circumstances of the proposed action to recover the funds of a charitable trust dissipated through likely fraudulent conduct and in circumstances where the Defendant will otherwise unjustly profit, at least on equitable principles, renders the Plaintiff's proposed proceedings as equally important and meritorious.

[53] For the purposes of section 138(3)(f), Article 17 of the International Covenant on Civil and Political Rights provides that: "*No one shall be subject to arbitrary or unlawful interference with his privacy, family, home*

or correspondence, nor to unlawful attacks on his honour and reputation". For the same reasons as appear in paragraph 51 above, I think this would have significance if the improperly obtained information had been sought to be used against Lalara herself.

[54] For the purposes of section 138(3)(h), it is difficult to see how the evidence in question could have been obtained without impropriety or contravention of the law, given the prohibition in the *Gaming Control Act* and Skycity's refusal to voluntarily provide information to the Plaintiff's solicitors. This however needs to be considered very carefully as the law is there for a purpose and a too liberal assessment of this factor would effectively negate the utility and operation of that law.

[55] Balancing all of these factors, I consider that the desirability of admitting the evidence outweighs the undesirability of admitting it and I so order.

[56] Returning now to the merits of the application, the following briefly sets out the facts and basis on which the Plaintiff seeks pre-action discovery of documentary material which indicates how much money Lalara gambled at the Casino over a set period.

[57] During a period when Lalara was a regular gambler at the Casino, the Trust's funds were significantly dissipated by cash cheques signed by Lalara. There is evidence that Lalara gambled in excess of $1 million but was a person of limited means. Her gambling at the Casino was to such an extent that she qualified for membership of Skycity's loyalty program at a

high level. There were concerns about her gambling such that it was investigated by the Regulator. During the Regulator's investigation, the Regulator informed Skycity that Lalara, who was described as the Public Officer of the Trust, was under investigation "*with allegations of inappropriate use of monies for the purpose of gambling*".

[58] The Plaintiff relies on the inferences able to be drawn from the evidence. There are many available inferences. As an example the letter from the Regulator referred to Lalara's position within the Plaintiff and to "*inappropriate use of monies"*, enables an inference, for current purposes, that there was something inappropriate with the gambling and that there was some association between the gambling and the Trust or Lalara's position within the Plaintiff, else why mention her position at all. The investigation resulted in the Regulator directing Skycity to bar Lalara from the Casino. I agree that the many inferences which Ms Brownhill listed are properly available. As the Plaintiff does not have to prove the substantive case at this point, indeed it does not even have to establish a *prima facie* case and it need only establish "*reasonable cause to believe*", inferences establishing the substantive case need not actually be drawn at this stage. Only inferences necessary to make out the current application need be drawn at this stage and this evidence is fertile ground for drawing all the necessary inferences for current purposes.

[59] As a result I am satisfied that the Plaintiff has made out the requirement in Rule 32.05(c).

[60] Rule 32.05 also vests an over-riding discretion in the Court and the Plaintiff must additionally secure the favourable exercise of the Court's discretion. Mr Anderson referred me to the decision of Emmett J in *Benchmark Certification Pty Ltd v Standards Australia International Ltd & Anor*.[20] In that case it was said that in the exercise of the discretion, if the Court was in doubt, it would be relevant to consider the extent of uncertainty as to the various elements of the proposed cause of action. It was said that uncertainty as to the number of such elements may be sufficient overall to undermine the determination of whether there was "*reasonable cause to believe*". In submitting this, Mr Anderson was relying on what he said were the numerous shortcomings in the evidence of the Plaintiff. Although I agree with the principle, as I have said I have a different view of the sufficiency of the Plaintiff's evidence and I cannot agree that the application should be declined for the reasons already stated.

[61] In any case Ms Brownhill convincingly argued in favour of the exercise of the overall discretion by pointing out that this case involves the funds of a charitable trust being a trust with objects including the relief of poverty amongst aboriginal people. She pointed out that the recipient of the money was likely to be the Casino and it was the only entity which could give evidence about the extent of Lalara's gambling and about Skycity's knowledge. She therefore submitted that it would be appropriate to exercise

[20] (2004) 212 ALR 464

the over-riding discretion once the requirements of Rule 32.05 were satisfied for that reason and I agree.

[62] For these reasons, I propose to make an order for pre-action discovery. In that respect, there was some discussion as to what precisely was available for production and whether the report provided by Skycity to the Regulator fell within the wording of any of the orders in the summons. It is clear to me from the argument on the application that it was at least intended that the report was to be covered by one of the orders. It was argued on that basis and hence Skycity cannot claim to be surprised by that suggestion. Without deciding what is or is not covered by the wording, I am prepared to order the discovery specifically of that document in any case. If an amendment to the Summons is required, then I will give leave for that purpose. I also note that the Plaintiff no longer presses the order in paragraph 2(j) of the Summons.

[63] Subject as aforesaid, I will hear the parties as to the precise orders which should be made in accordance with these reasons and I will invite the parties to agree minutes if possible.

[64] I will also hear the parties as to costs and as to any other consequential orders.