

Jenkins v Screening Authority [2016] NTSC 64

PARTIES: JENKINS, Trevor

v

SCREENING AUTHORITY

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21457818

DELIVERED: 8 December 2016

HEARING DATES: 21 November 2016

JUDGMENT OF: GRANT CJ

CATCHWORDS:

PROCEDURE – INFERIOR COURTS – MISCELLANEOUS
PROCEDURAL MATTERS

Application for leave to appeal against order of the Local Court setting aside summonses to give evidence and for production – summonses issued in proceedings for review of a decision by the Screening Authority – Local Court required to conduct the review *de novo* – Local Court not limited by the material before the Screening Authority – court will set aside a summons if not issued legitimately for the purposes of the proceedings concerned or if unnecessary for those purposes – no legitimate forensic or other purpose for the issue of the summonses – application for leave to appeal dismissed

Care and Protection of Children Act (NT) s 187, s 188, s 189, s 194, s 196
Local Court Act (NT) s 19(3)
Local Court Rules (NT) r 23.03(1), r 23.04 r 23.10
Supreme Court Rules (NT) r 83.22(2)

Alister v R (1984) 154 CLR 404, *Allesch v Maunz* (2000) 203 CLR 172, *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616, *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, *Commissioner of the Police Force (NT) v Cassidy* [2013] NTCA 1, *Bank of New South Wales v Withers* (1981) 52 FLR 207, *Botany Bay Instrumentation & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98, *Hudson v Branir Pty Ltd* (2005) 15 NTLR 35, *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555, *Morgan v Morgan* [1977] 2 WLR 712, *New South Wales Crime Commission v Hawes* (1992) 74 A Crim R 199, *R v Saleam* (1989) 16 NSWLR 14, *Senior v Holdsworth; Ex parte Independent Television News Ltd* [1976] QB 23

REPRESENTATION:

Counsel:

Applicant	In person
Respondent:	C Retallick

Solicitors:

Applicant:	
Respondent:	Solicitor for the Northern Territory

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

Jenkins v Screening Authority [2016] NTSC 64
No. 21457818

BETWEEN:

JENKINS, Trevor
Applicant

AND:

SCREENING AUTHORITY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 8 December 2016)

- [1] This matter concerns an order of the Local Court which was not a final order. The appeal provision then in operation required this Court's leave to bring the appeal.¹ That requirement notwithstanding, these proceedings have been conducted in substance as an appeal from the decision of the Local Court.
- [2] The applicant is a self-professed "homeless person".
- [3] The respondent Screening Authority is established pursuant to s 196 of the *Care and Protection of Children Act* (NT). The Screening Authority consists of one or more members appointed by the

¹ *Local Court Act* (NT), s 19(3) as then in force.

responsible Minister. Under the terms of that legislation, any individual who is engaged in child-related employment must hold a current clearance notice.² The Screening Authority is responsible for determining applications for the issue of clearance notices.³

[4] The Screening Authority must not issue a clearance notice if the candidate has been convicted of an offence, or has a criminal history, that is prescribed by regulation; or if the Screening Authority decides, having regard to the administrative guidelines, that the candidate poses an unacceptable risk of harm or exploitation to children.⁴

[5] The Local Court file discloses that on 11 August 2014 the Screening Authority determined not to issue a clearance notice in respect of the applicant.

[6] On 22 June 2015, the applicant applied to the Local Court for a review of that decision pursuant to s 194 of the *Care and Protection of Children Act* (“the review proceedings”).

[7] On 6 January 2016, the applicant issued nine summonses to give evidence and eight summonses for the production of documents in the review proceedings.

2 *Care and Protection of Children Act*, s 187.

3 *Ibid* s 188.

4 *Ibid* s 189.

[8] On 25 January 2016, the Local Court set aside all but one of those summonses.

The nature and scope of the appeal

[9] A Notice of Appeal was filed in this Court on 18 March 2016. That Notice annexed the transcript of proceedings before the Local Court on 25 January 2016. The handwritten grounds of appeal attached to the Notice may be summarised as follows.

- The applicant requires the primary witnesses who made the decision (ie the Screening Authority) in order to challenge their reasons.
- Those witnesses are required for cross-examination to determine why the applicant was deemed unsuitable.
- The applicant had been denied natural justice (by the Screening Authority) and an examination of who bears legal responsibility for the consequent defamation, damage and loss of earnings must be heard.
- The applicant is unable to run his case (the review proceedings) without “primary and first-hand evidence”.
- The Screening Authority’s refusal of the applicant’s application for a clearance notice was based in part on other legal proceedings involving the applicant, yet the applicant has been denied the

opportunity to “subpoena necessary documents and witnesses to those arrests, incidents and court cases”.

- The review before the Local Court is not *de novo* or new as it (presumably the applicant’s case) is based on a rejection of the grounds of evidence relied on by the Screening Authority.

[10] It may be noticed in that last respect that s 194(7) of the *Care and Protection of Children Act* provides:

The review:

- (a) must be conducted as a new hearing; and
- (b) is not limited by the material before the Authority.

[11] Identifying the scope and grounds of the proposed appeal is further confounded by the fact that on 10 October 2016 the applicant made and filed in these proceedings a document purporting to be an affidavit. It is unclear whether that document is intended to satisfy rule 83.22(2) of the Supreme Court Rules in respect of the first Notice of Appeal, or to bring a fresh appeal. That provision in the Rules requires that an application for leave to appeal be accompanied by an affidavit showing the nature of the case, the questions involved, and the reasons why leave should be granted. Whatever the purpose of the purported affidavit, its content may be summarised as follows.

- The applicant is appealing the “interim decision” of Judge Armitage made on 10 October 2016 ruling that evidence relevant to a fresh application for a clearance notice made by the applicant

in September 2016 was also relevant to the proceedings seeking review of the decision made by the Screening Authority in August 2014.

- The applicant originally applied for a clearance notice in 2012 and the Screening Authority delayed the determination of his application for two years, in circumstances where other applications were being processed within two weeks.
- By reason of that discrimination and resultant delay the applicant was not able to apply for any child-related employment during that time.
- The applicant seeks an order “stopping any submission from [the] new application as this will affect my new fresh appeal I have from that application”.

[12] It is not apparent from the Local Court file that the Local Court made any such ruling on 10 October 2016. What is apparent from the file is that the review proceedings were dismissed by the Local Court following the applicant’s failure to appear on 18 April 2016. The applicant subsequently made an application to set aside that dismissal.

[13] On 19 September 2016, the Local Court set aside the dismissal and ordered the Screening Authority to file and serve any material on which it relied in the review proceedings by 10 October 2016.

[14] The matter came back on for mention on 10 October 2016, at which time the Local Court ordered that it would be listed for hearing on 12 December 2016, and that the applicant was to file and serve any material on which he relied by 28 November 2016.

[15] Leaving aside the manifest procedural and substantive difficulties the applicant would face in prosecuting a further ground of appeal in the terms set out in the purported affidavit, or an application for an order from this Court prohibiting the Local Court from receiving any particular submission or evidence, the underlying premise (so far as it may be discerned) is entirely without merit. As has already been seen, the provisions of s 194(7) of the *Care and Protection of Children Act* make it plain that the review conducted by the Local Court must be conducted as a new hearing and is not limited to the material which was before the Screening Authority at the time of the decision in August 2014.

[16] The applicant has otherwise filed no affidavit material in relation to the proposed appeal.

[17] The applicant filed an Application for Leave to Appeal in this Court on 30 March 2016. That application for leave seems to comprehend that the appeal provision in operation at the material time required the appeal and the attendant application for leave to be brought within 14

days after the day on which the order complained of was made.⁵ It incorporates a handwritten document which provides relevantly:

I needed a written transcript from [the Local Court proceedings] as the registry previously asked [and] the Local Court took three weeks to a month to supply that.

...

I have applied previously.

[18] The reference to a previous application must be to the Notice of Appeal which was dated by the applicant and filed on 18 March 2016. The Supreme Court file does not contain any other notices or applications. The reference to transcript is presumably a reference to the transcript of proceedings before the Local Court on 25 January 2016 which is annexed to the Notice of Appeal. The applicant seems to be asserting that the delay in lodging the Notice of Appeal was occasioned by a delay in sourcing the transcript of the proceedings in which the relevant order was made.

The summonses

[19] On 6 January 2016, on application by the applicant the Registrar of the Local Court issued nine summonses to give evidence. During the hearing of this appeal the applicant identified the capacities in which, and the purposes for which, each of those persons to whom the summonses were directed were to be called. Counsel for the

⁵ *Local Court Act* (NT), s 19(3) as then in force.

respondent was able to give some further information in relation to those matters. Those indications may be summarised as follows in respect of each of the nine summonses. The spelling of the names of those persons is as recorded by the applicant in the summonses.

- Donna Quong is the Assistant Director of SAFE NT, an office which assists the Screening Authority in processing applications for clearance notices. That administrative assistance includes providing criminal history checks and recording steps taken in the assessment of applications. Ms Quong has made two affidavits which have been filed in the review proceedings. Those affidavits attach the materials considered by the Screening Authority and which are said to demonstrate the applicant's ineligibility for a clearance notice. Although the affidavit was not tendered during the hearing of the appeal, the applicant handed up a number of annexures to the affidavits. They included an internal file note annexing the applicant's criminal history and notes of the applicant's attendances at Top End Mental Health Services. As will become apparent, this was the one summons which was not set aside by the Local Court. Ms Quong is required by that summons to attend for the purpose of giving evidence during the course of the review proceedings, and will be available for cross-examination by the applicant.

- Ray Curran was formerly a Senior Policy Officer with SAFE NT who was acting as Assistant Director when the applicant first lodged an application for a clearance notice. He is no longer employed by SAFE NT. He was present when the applicant attended at the SAFE NT offices on 17 October 2012 and was subsequently removed by police. The applicant's purpose for requiring Mr Curran to give evidence is to establish in the first instance that his removal from the SAFE NT offices was unwarranted and unlawful, and ultimately to establish that police exerted an undue influence over the activities of SAFE NT (and presumably also over the determinations of the Screening Authority).
- Ian Forrest was a Customer Services Officer with SAFE NT who was present when the applicant attended at the SAFE NT offices on 17 October 2012 and was subsequently removed by police. The applicant's purpose for requiring Mr Forrest to give evidence is the same as for Mr Curran.
- Kristina Charles was allegedly one of the police officers who removed the applicant from the SAFE NT offices on 17 October 2012. The applicant's purpose for requiring Ms Charles to give evidence is the same as for Mr Curran.
- Kassandra Dunser was allegedly one of the police officers who removed the applicant from the SAFE NT offices on 17 October

2012. The applicant's purpose for requiring Ms Dunser to give evidence is the same as for Mr Curran.

- Tanith Blair was allegedly one of the police officers who removed the applicant from the SAFE NT offices on 17 October 2012. The applicant's purpose for requiring this person to give evidence is the same as for Mr Curran.
- Paul Faustmann was allegedly one of the police officers who removed the applicant from the SAFE NT offices on 17 October 2012. The applicant's purpose for requiring Mr Faustmann to give evidence is the same as for Mr Curran.
- There is a summons directed to "all members [of the] screening authority that screened [the] application [by] Trevor Jenkins from January 2013 – first screening". It may be noted at the outset that this summons was clearly defective as it failed to identify the individual or other entity with legal personality over whom it was intended to operate.⁶ The applicant's purpose for the issue of this summons is the same as for Mr Curran, and to challenge the basis on which the application for a clearance notice was refused.
- There is a further summons directed to "all members [of the] second screening authority that screened [the application by] Trevor Jenkins from 1st June 2013". It may again be noted at the outset that this summons was also clearly defective for the same

⁶ Although rule 23.03(1) of the Local Court Rules provided that a summons to give evidence could be addressed to one or more persons, those persons must be identified by name.

reason. The applicant's purpose for the issue of this summons is also the same as for Mr Curran, and to challenge the basis on which the application for a clearance notice was refused.

[20] On 6 January 2016, on application by the applicant the Registrar of the Local Court also issued eight summonses for the production of documents. They were all set aside by the Local Court on 25 January 2016.

[21] Seven of those summonses were directed to SAFE NT. It may first be noticed that SAFE NT has no legal personality.⁷ Leaving that matter aside, the summonses seek variously the names of all members of the Screening Authority at the relevant times; all documents "concerning police witnesses and dealings"; all correspondence between Ray Curran, police and the Screening Authority; and all documents explaining the delays in the assessment of the applicant's application.

[22] The applicant's purposes for seeking those documents include to demonstrate the undue influence he alleges is exerted by police over the Screening Authority, and to establish a conspiracy between police and the Screening Authority to unlawfully delay and refuse his application for a clearance notice.

⁷ Rule 23.04 of the Local Court Rules provided in effect that a summons for production may be addressed to a partnership, a corporation or to one person only.

[23] The other summons to produce documents was directed to Ray Curran. It sought all documents held by SAFE NT relating to the applicant from 1 June 2013 to the present time. As already recorded, Mr Curran is no longer employed by SAFE NT. For that reason, he does not have possession, custody or control of its documents.

The decision of the Local Court

[24] The Local Court file discloses that the review proceedings came on for mention on 21 December 2015. The applicant appeared at that time. The Screening Authority sought further time to file affidavit material. The Court ordered that the respondent was to file and serve its material by 11 January 2016, and adjourned the matter for further mention at 9:30 am on that day.

[25] The applicant appeared on 11 January 2016. The Screening Authority was represented. The transcript of the mention records that summonses had been issued in relation to a number of people and organisations. There was some discussion of their respective roles in the matter, and of the purpose for which the evidence or documentary material was sought in each case. Counsel for the Screening Authority confirmed that the incident on 11 October 2012 at the SAFE NT offices was not a matter on which the Screening Authority would be relying in the review proceedings in the consideration of the applicant's eligibility for a clearance notice.

[26] The Court gave some consideration to the nature of the review proceedings and made a preliminary indication that the summons to give evidence directed to Ms Quong would not be set aside, but the other summonses would be. That preliminary indication was subject to the qualification that the Court wished to afford opportunity to be heard to the police officers to whom summonses to give evidence had been directed, but who were not then represented. The Court adjourned the matter for that purpose to 25 January 2016 at 9:30 am. The applicant was present in court when that time and date was fixed.

[27] When the matter resumed on 25 January 2016 an appearance was announced on behalf of the four police officers to whom the summonses to give evidence had been issued. The matter was called and the applicant did not appear. The legal practitioner representing the police officers made an application to set aside the four summonses. The basis for the application was that any evidence which the police officers might give was limited to the incident which occurred on 17 October 2012, and was irrelevant to the review proceedings. Reference was made to a report of that incident contained at annexure 6 to the Quong affidavit. After hearing submissions the Court ruled that the evidence and documentary material sought by the summonses was not relevant to the review proceedings and set aside all the summonses for production and summonses to give evidence with the exception of the summons directed to Ms Quong.

[28] It is from that decision that the application for leave to appeal is brought.

Setting aside a summons

[29] In setting aside the summonses the Local Court exercised the power conferred by rule 23.10(2) of the Local Court Rules, which provided:

The Court may set aside a summons for production or a summons to give evidence or, in the case of a summons for production, may set aside a part of the summons.

[30] The provision does not itself identify the grounds on which a summons may or should be set aside, or the principles which govern the exercise of the power. In essence, a court will set aside a summons (or subpoena where that is the relevant process) if it is not issued legitimately for the purposes of the proceedings concerned, if it is unnecessary for those purposes, or if it is being used for an improper purpose.⁸

[31] In the face of an application to set aside a summons, it is necessary for the issuing party to show that the evidence or documents sought will weaken the other side's case or will support its case.⁹ The principles applying in criminal and civil proceedings are the same, although their application may vary in context.

⁸ *Senior v Holdsworth; Ex parte Independent Television News Ltd* [1976] QB 23; *Morgan v Morgan* [1977] 2 WLR 712; *Bank of New South Wales v Withers* (1981) 52 FLR 207 at 225–226. *Botany Bay Instrumentation & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98.

⁹ *New South Wales Crime Commission v Hawes* (1992) 74 A Crim R 199.

[32] The principles for setting aside a subpoena were considered by the Court of Appeal in *Commissioner of the Police Force (NT) v Cassidy* [2013] NTCA 1. The Court stated (at [13]-[15]):

When an application is made to set aside a subpoena as too wide, the party issuing the subpoena must establish three things. First, the party must show that the subpoena itself describes the documents being sought with sufficient particularity [*Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at p 570].

Second, the party issuing the subpoena must identify expressly and with precision the legitimate forensic purpose for which he seeks access to the documents [*R v Saleam* (1989) 16 NSWLR 14 per Hunt J at p 18] of that description. It is not sufficient that there may be a legitimate forensic purpose for production of some of the documents answering the description in the subpoena. The subpoena must not cast a net wider than is necessary to catch documents required for the identified forensic purpose [*Hudson v Branir Pty Ltd* (2005) 15 NTLR 35 per Martin (BR) CJ at p 43].

Third the party issuing the subpoena must show that it is “on the cards” that the documents would assist the party’s case [*Alister v R* (1984) 154 CLR 404 per Gibbs CJ at p 414; *Hudson*, above, per Martin (BR) CJ at pp 4748]. It is not sufficient for a party seeking production of documents to establish, merely that such documents are or may be relevant to the proceeding, for example because they may establish the case against the party issuing the subpoena or support the case of another party [*Alister*, above, per Gibbs CJ at p 414]. If it is not “on the cards” that the documents described in the subpoena would assist the issuing party’s case, the subpoena may be set aside as a “fishing expedition” [*Alister*, above, at p 414; *Hudson*, above, at p 46].

[33] In regard to the third consideration – that the party issuing the subpoena must show that it is “on the cards” that the documents would assist the party’s case – the Court in *Cassidy* observed (at [15], footnote 5) that additional considerations to those outlined by the

Court may apply where it is objected that the subpoena is otherwise oppressive or should be set aside for another reason.

[34] Although that case was concerned with a subpoena for the production of documents, the same general considerations apply to a subpoena to give evidence. In particular, a legitimate forensic purpose must be established. A number of observations may be made in relation to the summonses issued by the applicant in the review proceedings.

[35] First, some complaint was made by the Screening Authority in the proceedings before the Local Court to the effect that the summonses for the production of documents did not identify the documents sought with the requisite specificity or particularity. That complaint is valid. The descriptions contained in the relevant summonses are poorly expressed and broadly cast. To the extent the summonses are not defective on that ground, the descriptions do not suggest any legitimate forensic purpose for the issue of the process.

[36] Secondly, the purpose of the summonses – both *ex facie* and as identified by the applicant – is to garner evidence to establish a conspiracy between police and the Screening Authority to deny him a clearance notice, and to identify error on the part of the Screening Authority in its determination. The statutory command that the review proceedings “must be conducted as a new hearing” can mean nothing other than that the Local Court is required to deal with the matter *de*

novo and arrive at a fresh decision based on all of the evidence available at the time of its consideration.¹⁰ It is not a case in which the dispositive powers of the Local Court are exercisable only where it is demonstrated that the decision of the Screening Authority was affected by some legal, factual or discretionary error.¹¹ In fact, the question whether there was error on the part of the Screening Authority is largely irrelevant.

[37] Thirdly, no objective basis or material was proffered for the assertions that police exercised undue influence over the Screening Authority, and that there was some conspiracy between police and the Screening Authority. The applicant's purpose in that respect is a classic "fishing expedition".

[38] Fourthly, the terms of the Notice of Appeal suggest that a further purpose for the issue of the summonses may be to enable the applicant to conduct an examination of who he considers bears legal responsibility for the defamation, damage and loss of earnings he asserts he has suffered as a result of malfeasance on the part of various public officials. Although that might conceivably be a legitimate forensic purpose in differently constituted proceedings, it is not in the review proceedings before the Local Court.

¹⁰ *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616.

¹¹ *Allesch v Maunz* (2000) 203 CLR 172.

[39] It should also be noted for sake of completeness that the applicant's further complaint made during the course of the appeal proceedings is that the decision by the Screening Authority refusing to issue him a clearance notice was based entirely on anecdotal evidence without foundation. That concern may be answered shortly. In the conduct of the review proceedings the Local Court will bring its own consideration to bear on the question of the application and whether the applicant satisfies the statutory criteria for the grant of a clearance notice.

[40] The Screening Authority will bear the onus of establishing that the applicant has been convicted of an offence, or has a criminal history, that is prescribed by regulation; or that the candidate poses an unacceptable risk of harm or exploitation to children. It will be incumbent on the Screening Authority to provide cogent evidence in support of its contention that a clearance notice should not issue. That inquiry and determination is not in any way fettered by the previous determination in August 2014 or the evidence on which the screening authority relied for that purpose.

[41] As is apparent from the foregoing matters, the summonses in question were not issued legitimately for the purposes of the review proceedings concerned, and were unnecessary for those purposes. The applicant is unable to show that the evidence or documents sought will weaken the

Screening Authority's case or will support his case so far as it falls to be prosecuted in the review proceedings.

Disposition

[42] The appeal would be without merit. For that reason, the application for leave to appeal is dismissed. Had leave not been required, the appeal would have been dismissed in any event.
