CITATION: *Guerra & Towler v Schaber & Northern Territory of Australia [2007] NTMC 051*

PARTIES: MARIO GUERRA
&
HOLLY TOWLER

v

BENTON SCHABER
&
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: The Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20210558

DELIVERED ON: 21 August 2007

DELIVERED AT: Darwin

HEARING DATE(s): 1 March 2007 & 31 May 2007

JUDGMENT OF: V Luppino SM

CATCHWORDS:

Crimes Victims Assistance - Appeal by respondents in the primary court from a decision of the Judicial Registrar in relation to the order for the issue of an assistance certificate – Nature of Appeal – Whether appeal by way of rehearing or an appeal in the strict sense.

Turnbull v NSW Medical Board (1976) 2 NSWLR 281; Coal & Allied Operations Pty Ltd v AIRC (2000) 203 CLR 194; McCullin v Crawford (1921) 29 CLR 186; Clarke & Walker Pty Ltd v Department of Industrial Relations (1985) 3 NSWLR 685; Enterprise Gold Mines NL v Mineral Horizons NL (2) (1998) 52 NTR 23; Allesch v Maunz (2000) 203 CLR 172; Eastman v R (2000) 172 ALR 39; Ex Parte Currie, Re Dempsey (1968) 70 SR (NSW) 1; Compensation Fund v Brown (2003) 201 ALR 260.

Crimes (Victims Assistance) Act s 15A; Local Court Rules rr 4.04, 37.01-37.09

REPRESENTATION:

Counsel:

Appellant: Mr Buckland
First Respondent: Mr Clift
Second Respondent: Not represented (excused)

Solicitors:

Appellant:	Anthony Buckland
First Respondent:	De Silva Hebron
Second Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID number:	[2007] NTMC 051
Number of paragraphs:	22

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

No. 20210558

BETWEEN:

MARIO GUERRA

and

HOLLY TOWLER
Appellants

AND

BENTON SCHABER
First Respondent

and

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

REASONS FOR DECISION

(Delivered 21 August 2007)

Mr VM LUPPINO SM:

1. This is an appeal from a decision of the Judicial Registrar sitting at Alice Springs on 3 October 2006. The Judicial Registrar ordered the issue of an assistance certificate pursuant to the Crimes (Victims Assistance) Act ("the Act") in the sum of $25,000 in favour of the first respondent.

2. The matter has had an unfortunate history since the commencement of this appeal. The hearing of the appeal was transferred to Darwin on the application of the appellants. The order for transfer of venue was made by Mr Borchers on 31 January 2007. It was clear from the discussions before Mr Borchers in the course of that application that a preliminary hearing on

the issue of the nature of the appeal (as well as the related point of the intention of the appellants to lead fresh evidence) was both necessary and contemplated. However, thereafter the Registrar made an order on 6 February 2007, specifically that "the hearing of the appeal will be held in Darwin Magistrates Court at 10am on 1st March 2007".

3. The first respondent's solicitors were under the impression that the hearing on 1 March 2007 was for the purposes of determining the preliminary issues. The matter was brought on before me on 28 February 2007 when I was satisfied that the order made by the Registrar on 6 February 2007 should have been confined to an order in relation to the aforementioned preliminary issues. It is regrettable that in the process of the transfer of the venue, the discussion concerning a preliminary hearing on the nature of the appeal and the need for that preliminary was lost in the process or overlooked. The appellants, having appeared unrepresented before Mr Borchers on 31 January 2007, upon receipt of the order of 6 February 2007 assumed wrongly, but honestly I think, that the appeal proper was to be heard in Darwin on 1 March 2007. Accordingly they arranged legal representation and both appellants travelled to Darwin to attend at the hearing on 1 March 2007.

4. Ultimately, on 28 February 2007, I confirmed that the issue of the nature of the appeal would be heard and determined as a preliminary point. Mr Clift, counsel for the first respondent presented his argument on the following day. Thereafter Mr Buckland, for the appellants presented his argument on 31 May 2007.

5. I have now obtained a transcript of the hearing before Mr Borchers on 31 January 2007. That confirms that argument on the nature of the appeal was to be heard as a preliminary point. Bearing in mind the various factors involved, including the fact that the appellants were unrepresented before Mr Borchers and that the administrative orders made thereafter overlooked

the need for a hearing on the preliminary point, I have indicated to the parties that I am prepared to recommend an *ex gratia* payment be made to all affected parties for any costs thrown away.

6. Now follows my ruling on the nature of the appeal. As a preliminary, I set out extracts of the relevant legislation. Firstly, section 15A of the Act. This provides as follows:

> 15A. Appeal from order of Judicial Registrar or Registrar
>
> (1) A party to proceedings in respect of an application under section 5 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar that an assistance certificate is, or is not, to be issued.
>
> (2) A party to proceedings commenced under section 21 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar –
>
> (a) that the Territory is entitled to recover from an offender a specified amount; or
>
> (b) that the Territory is not entitled to recover any amount from an offender.
>
> (3) An appeal under subsection (1) or (2) is to be in accordance with Part 37 of the Local Court Rules.
>
> (4) A party to proceedings under this Act may appeal to the Court constituted by a magistrate against an order in those proceedings made by a Judicial Registrar or Registrar.
>
> (5) An appeal under subsection (4) is to be in accordance with rule 4.04 of the Local Court Rules.
>
> (6) A party to proceedings under this Act is not entitled to appeal to the Supreme Court against a determination or an order to which this section applies.
>
> (7) An appeal under this section does not operate as a stay of the determination or order appealed against unless a magistrate orders otherwise.

7. Relevant Court Rules are rule 4.04 and Part 37 (rules 37.01 to 37.09 inclusive) of the Local Court Rules ("the Rules"). They provide as follows:

> 4.04 Appeal from Registrar
>
> (1) A person affected by an order made by a Judicial Registrar, acting Judicial Registrar, Registrar, Deputy Registrar or acting Registrar may appeal to the Court.
>
> (2) An appeal under this rule is to be –
>
> (a) by application under Part 25;
>
> (b) heard by a magistrate; and
>
> (c) by way of a hearing de novo.
>
> (3) Unless a magistrate orders otherwise, an appeal does not operate as a stay of the order appealed against.
>
> (4) Except with the leave of a Registrar or magistrate, an appeal under this rule is to be commenced not later than 14 days after the date of the order appealed against.
>
> 37.01 Application of Part
>
> This Part applies in relation to an appeal to the Court under an Act.
>
> 37.02 Definitions
>
> In this Part –
>
> "appellant" means a person who appeals to the Court under an Act and includes a person joined as an appellant under rule 37.03;
>
> "respondent" means the decision maker in relation to whose decision the appellant appeals and includes a person joined as a respondent under rule 37.03.
>
> 37.03 Persons who may be joined
>
> Omitted
>
> 37.04 Notice of appeal

(1) Unless an Act provides otherwise, an appellant commences an appeal by filing, not later than 28 days after a decision is made, a notice of appeal in the Registry of the office of the Court at a proper venue as specified in rule 5.01.

(2) A notice of appeal is to –

(a) be in accordance with Form 37A; and

(b) state –

(i) the name and address of the appellant;

(ii) the name and address of the respondent;

(iii) the decision in respect of which the appeal is brought;

(iv) the date on which the decision was made; and

(v) specifically and concisely, the grounds of appeal.

(3) As soon as practicable after filing a notice of appeal, the appellant must serve a copy on the respondent.

37.05 Notice of appearance

Omitted

37.06 Prehearing conference

Omitted

37.07 Amendment of grounds

The Court may give leave to amend the grounds of appeal.

37.08 Representation

Omitted

37.09 Hearing of appeal

(1) The Court may give the directions it considers appropriate in respect of the hearing of an appeal.

(2) If a respondent fails to attend the hearing, the Court may hear the appeal if it is satisfied that the notice of appeal was properly served on the respondent.

(3) If an appellant fails to attend the hearing, the Court may dismiss the appeal or make the orders it considers appropriate.

(4) If neither party attends at the hearing, the Court may make the orders it considers appropriate.

8. turning now to the determination of the nature of the appeal in this case, it was held in *Turnbull v NSW Medical Board* (1976) 2 NSWLR 281, and approved by the High Court in *Coal & Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194, that there are six different types of appeal namely:-

1. Appeals to supervisory jurisdictions;
2. Appeals on questions of law only;
3. Appeals after a trial before Judge and jury;
4. Appeals in the strict sense;
5. Appeals by way of rehearing;
6. Appeals by way of a hearing de novo.

9. Clearly the first three types of appeals listed above have no application to the current matter. Of the remaining three types of appeals the difference between them is as follows:-

1. In an appeal in the strict sense (appeal *stricto sensu*) the question is whether the decision appealed from was correct or not based on the law at the time it was given and on the material then before the Court and without any additional material;
2. In an appeal by way of rehearing, if errors of law or wrong findings of fact have occurred in the decision appealed from, the appellant

court will try the case again on the evidence used in the Court below together with such additional evidence as it thinks fit to receive. The applicable law is the law as it existed at the time of the original hearing.

3. In an appeal de novo, all of the issues must be retried. The matter is reheard over as if it was the first time the matter was before the Court. There is no restriction on the evidence which may be presented (subject only to the normal rules of admissibility) and the applicable law is the law at the time that the appeal is heard.

10. The term "appeal" is a term loosely employed to denote a number of different litigious processes (*Turnbull* supra). It is a term with a flexible meaning and is capable of more than one meaning (*McCullin v Crawford* (1921) 29 CLR 186). An appeal is not a common law right, it is a remedy given by statute. The nature of the appeal is determined by construing the provision confirming the right to appeal, specifically per *Clarke & Walker Pty Ltd v Department of Industrial Relations* (1985) 3 NSWLR 685, "the primary rule is that the search being for the legislative meaning, each case depends upon its own facts: the language used, the indications of meaning from other provisions and from the structure and history of the legislation and the achievement of the apparent policy objects involved in affording the appeal facility."

11. Accordingly, determining the nature of the appeal requires consideration of the Act generally in an attempt to ascertain what particular type of appeal would achieve the apparent objectives that Parliament had in mind in affording the parties an opportunity to appeal. Regard must be had to the principles of statutory construction and to all other relevant surrounding circumstances.

12. The question of whether the appeal is an appeal by way of hearing de novo can be quickly dealt with as I think it is clear on principles of statutory

construction that that is to be excluded as a possible type of appeal in this matter. Section 15A of the Act awards a party to the proceedings the right to appeal to this Court against a determination made by a Judicial Registrar in relation to the "issue of an assistance certificate". Such is the case here. Section 15A(3) specifically provides that such an appeal is to be in accordance with Part 37 of the Rules. Section 15A(4) provides another right of appeal, again to this Court, against "an order" in the proceedings made either by a Judicial Registrar or a Registrar. Section 15A(5) specifically provides that such last mentioned appeal is to be made in accordance with rule 4.04 of the Rules.

13. Clearly therefore rule 4.04 of the Rules does not apply to the current appeal. That rule in turn has a specific provision relating to the nature of the appeal. It specifies that an appeal pursuant to that rule is a hearing a de novo. Part 37 of the Rules has no provision which specifically fixes the nature of the appeal. Rules of statutory construction have the ultimate objective of determining the intention of Parliament. I think the intention of Parliament is clear in the current situation. In specifying different types of appeals between rule 4.04 on the one hand and Part 37 on the other, it is clear that Parliament intends a different type of appeal in each case. Precisely, appeals regulated by rule 4.04 are hearings de novo. If it were intended that appeals pursuant to section 15A(1) of the Act were also to be hearings de novo then there would be no necessity for any reference to Part 37 of the Rules in section 15A(3) of the Act.

14. The nature of the appeal in this case is therefore limited to being either a rehearing or an appeal in the strict sense. The principles I have extracted from the authorities relevant to the determination of this issue are:-

    1. The use of the word "appeal" is not determinative of the nature of the appeal (*Allesch v Maunz* supra);

2. The grant of an appellate jurisdiction does not carry with it the power to receive fresh evidence which itself must come from a grant of legislative power (*Eastman v R* supra);

3. The absence of a specific power to receive fresh evidence on appeal is usually indicative that the appeal is intended to be an appeal in the strict sense (*Enterprise Gold Mines NL v Mineral Horizons NL No 2* (1998) 52 NTR 23);

4. Conversely, the express conferral of the power to receive fresh evidence on appeal usually indicates that the appeal is a hearing de novo (*Allesch v Maunz* (2000) 203 CLR 172 and *Coal & Allied Operations Pty Ltd v AIRC* supra);

5. Although the power to receive fresh evidence on appeal is usually given expressly, the power does not need to be expressively given and can be implied (*Ex Parte Currie, Re Dempsey* (1968) 70 SR (NSW) 1);

6. The power to receive fresh evidence will readily be implied where the Act conferring the appellate jurisdiction describes the appeal as a "rehearing" (*Eastman v R* (2000) 172 ALR 39);

7. The conferral of an express power to regulate procedure on appeal does not confer the power to change the nature of the appeal (*Ex Parte Currie, Re Dempsey* supra);

8. The nature of the appeal does not differ according to the nature of the decision appealed from (*Coal & Allied Operations Pty Ltd v AIRC* supra); therefore it should not matter whether the appeal is an appeal within a court structure or to a separate appeal body;

9. The grant of broad remedial powers to an appeal body generally is a contra indication that the appeal is an appeal in the strict sense (*Coal & Allied Operations Pty Ltd v AIRC* supra);

10. The implication of the power to receive fresh evidence is less appropriate where the appeal is to a body which ultimately decides the issue (*Eastman v R* supra); conversely, in such cases, the appeal will more likely be an appeal in the strict sense;

11. Simply because an Act is beneficial in nature does not result in it being read and constructed in an expansive way for all purposes where the language used is otherwise clear (*Compensation Fund v Brown* (2003) 201 ALR 260).

15. I now turn to apply these principles to the determination of the nature of the appeal in this case. I note that there has been no Supreme Court authority on the nature of an appeal under section 15A of the Act. I am aware of various other authorities of this Court which find that the appeal is by way of rehearing with discretion to accept fresh evidence. Indeed, on two occasions when I dealt with similar appeals I acted on the agreement of the parties that the matter was a rehearing. However in those cases the nature of the appeal was not in issue and the parties agreed that the appeal was to be by way of rehearing and it was not necessary for me to consider that aspect. However, I am not bound by those decisions and, having now considered the matter and after hearing argument, I have come to a different view.

16. Applying the general principles listed above, in my view an appeal under section 15A of the Act is an appeal in the strict sense. The relevant matters indicating this in my view are:

1. The Act appears to have a policy of expediting the procedure for the determination of assistance to be given to a victim of crime;

2. Part 37 of the Rules, which regulates appeals under section 15A requires grounds of appeal (rule 37.04(2)(v)) which are not necessary in the case of a hearing de novo and of limited utility in the case of a rehearing;

3. There is no express power given to receive fresh evidence;

4. There are no broad remedial powers given to the Court on the hearing of an appeal under section 15A;

5. This Court, in hearing an appeal under section 15A of the Act, ultimately determines the matter (section 15A (6));

17. In my view the foregoing indicates that Parliament intended that an appeal under section 15A of the Act is to be an appeal in the strict sense. I reject the submission that the power to regulate process given by rule 37.09(1) of the Rules incorporates the power to receive fresh evidence and consequently indicates an appeal by rehearing. A provision such as rule 37.09(1) is a power to give "directions" which I think is intended to relate only to procedural matters. Whether fresh evidence is to be received goes to the very nature of the jurisdiction. It is a power given to the Court. It is not a procedural matter. In my view rule 37.09(1) was not intended to operate in a way which determines the very nature of the appeal. It is the type of direction making power which courts are almost always invariably given with a grant of jurisdiction. Such a widespread use is contra-indicative of an application which allows its operation so as to grant a power which is of such specific and limited application such as the power to allow fresh evidence on appeal. It is for this reason I think that there is such a plethora of authorities which say that such a power is usually given expressly.

18. Further, the power in rule 37.09(1) to make directions is contained in rules of court, which are a form of delegated legislation. Although I accept that in certain circumstances, delegated legislation can alter the substantive law,

whether statute law or general law, if rule 37.09(1) were interpreted as authorising the reception of fresh evidence on appeal, this would in effect operate to change the substantive law. This serves to highlight that the interpretation of rule 37.09(1) as giving the Court the power to receive fresh evidence could not have been intended. If Parliament had intended such an effect and also intended that this Court was to have the power to receive fresh evidence, I would have expected that Parliament would have clearly said so in the Act or in the Rules rather than rely on a provision such as rule 37.09(1) in the form of a general directions making power. In accordance with the decision in *Coal & Allied Operations Pty Ltd v AIRC*, the directions making power in rule 37.09(1) should not be read so as to operate to alter the substantive law contrary to the apparent intention of Parliament where that intention is sufficiently manifested. In my view that is the position here.

19. It is for these reasons that, although I acknowledge that the power to receive fresh evidence on appeal does not necessarily have to be expressly conferred and can be implied, the absence of an express power to receive fresh evidence in the current case is extremely telling in view of the authorities.

20. Lastly and in relation to the submission based on the categorisation of the Act as beneficial legislation. It is a widely accepted principle that beneficial legislation should be broadly interpreted. The theory behind the approach is that where legislation grants a benefit it should be construed generously to ensure that the aim of the legislation is carried out with maximum application. The current submission is that that same approach ought to apply to the interpretation of the Act in relation to the determination of the nature of the appeals under the Act. However as *Compensation Fund v Brown* (supra), demonstrates, the mere fact that legislation is beneficial in nature does not mean that the legislation must be given the most expansive interpretation possible where the language used is otherwise clear. In other words, it is only an aid in resolving alternative possible interpretations. For

the reasons given above, in my view it is clear that Parliament intended an appeal under section 15A of the Act would be an appeal in the strict sense.

21. In any event, I also have doubts that the principle applies to matters of procedure and the powers of the Court under the Act, in particular where they relate to appeals. The position is clearly different in terms of favourable interpretation for applicants in terms of the assistance to be offered under the Act. That in my view does not necessarily translate to an expansive interpretation in respect of non substantive matters.

22. In summary, in my view the appeal before the Court is an appeal in the strict sense.

Dated this 21st day of August 2007.

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V M LUPPINO
STIPENDIARY MAGISTRATE