CITATION: *Rigby v Kachionis* [2008] NTMC 020

PARTIES:	KERRY LEANNE RIGBY
	v
	CHRISTOS KACHIONIS
TITLE OF COURT:	COURT OF SUMMARY JURISDICATION
JURISDICTION:	CRIMINAL
FILE NO(s):	20721203
DELIVERED ON:	28 March 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	22 February 2008
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – RESTRAINING ORDER – BREACH – STATUTORY INTERPRETATION - DE MINIMIS PRINCIPLE – 'APPROACH" – "CONTACT"

Ss4, 10 *Domestic Violence Act*
Farnell Electronic Components v Collector of Customs (1996) 142 ALR 322
Canadian Foundation for Children, Youth and the Law 2004 SCC 4
Williams v The Queen (1978) 140 CLR 591

REPRESENTATION:

Counsel:

Complainant:	Mr T Smith
Defendant:	Ms Kepert

Solicitors:

Complainant:	ODPP
Defendant:	NTLAC

Judgment category classification:	A
Judgment ID number:	[2008] NTMC 020
Number of paragraphs:	46

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20721203

[2008] NTMC 020

BETWEEN:

KERRY LEANNE RIGBY
Complainant

AND:

CHRISTOS KACHIONIS
Defendant

REASONS FOR DECISION

(Delivered 28 March 2008)

Ms Sue Oliver SM:

1. The defendant, Christos Kachionis, is charged with a single count of a breach of a restraining order contrary to s 10 of the *Domestic Violence Act*.

2. A copy of the order dated 2 May 2007 was tendered [P1] ("the order"). The order is in the following terms that, by consent and without admissions for a period of 12 months the defendant Christos Kachionis:-

    1. Must not approach or remain at any place where Rachelle Buhay Plongeon is residing, working or visiting;

    2. Must not approach or contact directly or indirectly or remain in the company of Rachelle Buhay Plongeon;

    3. Must not assault or threaten to assault Rachelle Buhay Plongeon directly or indirectly;

    4. Must not cause or threaten to cause damage to property in the possession of Rachelle Buhay Plongeon;

    5. Must not act in an [sic] provocative or offensive manner towards Rachelle Buhay Plongeon.

3. The prosecution rely on the order and on evidence of Rachelle Plongeon and Kosta Kalemis and an electronic record of interview conducted with the defendant on 5 August 2007 [P2] in proof of the charge.

4. At the conclusion of the prosecution case, it was submitted by the defence that there was no case to answer because the prosecution evidence failed to disclose a breach of the terms of the order.

5. Although no defence evidence has been given at this time, there seems no issue is taken as to factually what occurred on 3 August 2007. Ms Plongeon said that she was at the Casuarina Shopping Centre and that she went into the Post Office at the Centre. She said she was looking at a book on a shelf when she heard the defendant say "hello Chi Chi", which apparently is or was a familiar term used by the defendant for Ms Plongeon and she saw the defendant on the other side of the desk about a half a metre away. She said she was so surprised that she said "What the fuck are you doing here", put the book back on the shelf and ran to the counter. She described their position as being face to face and very close when he spoke to her. When she ran to the counter and turned, the defendant was already moving out of the Post Office.

6. Mr Kosta Kalemis gave evidence that on 3 August 2007 at around midday he was also at Casuarina Square. He met the defendant at Spiros Café where the defendant was having coffee. Mr Kalemis was on his way to JB Hi-Fi and the defendant said he would go with him to go to the Post Office because he had to get a postcard for his mother. Mr Kalemis went to JB Hi-Fi and the defendant to the Post Office opposite.

7. Shortly after he saw the defendant who said to him "I must have done something stupid, I just saw Chi Chi and said hello".

8. The electronic record of interview conducted by Police with Mr Kachionis also involved Mr Kalemis as an interpreter for Mr Kachionis. In that

interview, Mr Kachionis, through Mr Kalemis, said that he went to the Post Office for a postcard "because for Greeks on 15 August it is the holy virgin celebration, Maria, and his mother's name is Maria and his daughter's name is Maria". He went inside to the store where the postcards are and he was looking at the postcards when he came face to face with Rachelle. He said "Hello Chi Chi", her nickname…then she turned around and she went to the cashier and he said 'sorry'…He didn't even buy the postcard and he left…He knows that he cannot approach her. He cannot call her, he cannot talk to her…He seen her other times too, but he hasn't spoken because they weren't so close…it came very sudden…it was a spontaneous thing, a spontaneous reaction…he came face to face and didn't expect that.

9. The prosecution alleges that his conduct constitutes a breach of the Domestic Violence Order, that is, the restraint that the defendant "must not approach or contact directly or directly or remain in the company of Rachelle Buhay Plongeon."

10. Ms Kepert, on behalf of the defendant, correctly identified the three bases on which a breach of a restraint of that nature can occur. First, by an approach, secondly by contact and last, by remaining in Ms Plongeon's company. The latter circumstance is submitted not to be made out on the evidence because Ms Plongeon's evidence is that the defendant immediately left the Post Office after speaking to her. I agree with that submission – there is no evidence to support a finding that the defendant remained in Ms Plongeon's company.

11. It is further submitted that there is no evidence that would support a case to answer in relation to a breach of the direction not to approach Ms Plongeon because the evidence supports only a factual finding that the defendant and Ms Plongeon came accidentally together in a face to face situation, that both had entered the Post Office for their own reasons and that an accidental meeting is not an approach within the meaning of the order.

12. In addition, Ms Kepert submits that the evidence of their face to face encounter including saying "Hello Chi Chi" is insufficient to constitute "contact" within the meaning of the order.

What conduct is restrained?

13. The issue then is what is meant by the words "approach" and "contact" when used, as they commonly are, in a restraining order made pursuant to the *Domestic Violence Act* ("a restraining order").

14. Most commonly, a restraining order comes about either upon the granting of an application under s 4 or by confirmation of a s 6A Police Order.

15. Section 4 of the *Domestic Violence Act* permits the Court to make a restraining order where it is satisfied, on the balance of probabilities, of specified conduct and that unless restrained, the defendant is likely again to engage in the same conduct. Section 8C provides for confirmation of, *inter alia,* an ex parte interim order made under s 4(5), restraining orders made by Police (s 6A) and interim orders made by a Magistrate by electronic communication (s 6). Section 8C(5) directs that the Court must not confirm one of these orders unless it is satisfied the defendant has been served with a copy of the order in accordance with section 10(2) and it has considered any evidence before it and submissions from the parties.

Although s 8C does not make specific reference to the matters set out in s 4, in the case of the interim orders to which I have referred above, the requirements of s 4(1) must be satisfied (see s 6(4)(b) and s 6A(1)(c)). As a consequence, all restraining orders however they arise, can only be made or confirmed upon satisfaction that the conduct referred to in section 4(1) has occurred and requires restraint because the person who is sought to be restrained is likely, without that restraint, to engage in the same conduct.

16. The relevant conduct is that the defendant:

(i) has assaulted or caused personal injury to a person in a domestic relationship with the defendant or damaged property in the possession of that person (s 4(1)(a)(i));

(ii) has threatened to assault or cause personal injury to that person or threatened to damage property in the possession of that person (s 4 (1)(b)(i));

(iii) has behaved in a provocative or offensive manner towards that person and that behaviour is such as is likely to lead to a breach of the peace, including but not limited to behaviour that may cause another person to reasonably fear violence or harassment against himself or herself or another (s 4 (1)(c)(i)(ii)).

17. Apparent from these provisions is that the conduct of which the Court must be satisfied has occurred in order for a restraining order to be made can be constituted by either physical or verbal means. That being the case, a restraining order by necessity must impose conditions that restrain various types of physical and non physical conduct either by restraint of the conduct itself or by imposing a geographical or communication restraint to prevent the conduct recurring. Physical conduct restrained may be an assault or personal injury, damage to property, a threat to assault constituted by a physical gesture, or provocative or offensive behaviour, which likewise might be constituted by physical gesture. Non physical conduct that is restrained that may be committed by verbal means may be a threat to assault, injure or destroy property or offensive or provocative behaviour (such as offensive or provocative language or harassment through various forms of communication).

18. A restraining order is therefore aimed at imposing conditions that prevent physical and/or verbal engagement between the parties. In order to prevent physical engagement, conditions are commonly set, as in this case, that the defendant not approach or remain at any place where the aggrieved person is residing, working or visiting. A restraint of that nature, in effect, imposes a physical barrier to the conduct which is sought to be restrained. In order to

prevent verbal conduct of the type sought to be restrained, conditions may be set addressed to the means by which communication can be made taking into account that commonly these days communication can occur by electronic means. Threats or offensive or provocative behaviour may be delivered via letter, telephone, electronic mail or SMS text. It might also occur in on-line chat rooms and similar forms of instantaneous on-line communication. Threats or offensive or provocative behaviour might also be committed in an indirect way through a third party.

19. The objective of a restraining order will therefore be achieved by an order directed at the restraint of the conduct by the means I have described above.

20. The order in this case is a common form of a restraining order imposing what is commonly referred to as both "non violence" and "non contact" restraint. I observe that those terms are merely convenient shorthand references to common forms of order by the Court and are in no way determinative of the actual meaning of the order.

What constitutes an "approach"?

21. "Approach" according to the Shorter Oxford English Dictionary (3rd Edition) has the following relevant meaning:

> 1. To come nearer, or draw near, in space

The Collins English Dictionary and Thesaurus (1994) gives a similar meaning:

> 1. To come nearer in position, time, quality, character, etc to (someone or something)

These meanings are consistent with the objective of a restraining order that I have described, that is to place geographical limitations i.e. not to go near particular places or to a person wherever he or she might be.

22. Ms Kepert submits that although the offence of breach of a restraining order pursuant to s 10 of the *Domestic Violence Act* is a regulatory offence, that is, it does not require the proof of any mental element in relation to the breach (the defendant does not have to be shown to have intended to breach the order or foreseen that a breach will occur), the conduct itself in question (an approach or contact) does require some mental element which she suggests must be either knowledge or intent.

23. Turning first to the question of "approach" I agree with that view. Frequently of course the person restrained will know where the aggrieved person resides or works and where that knowledge exists, going near to those places will constitute an approach. However the defendant is also restrained from either approaching any place where Ms Plongeon is "visiting" or from approaching her physically. In the sense that the dictionaries to which I have referred define that word, it means a restraint from coming near her. There may be places which each party attends for their own purposes and at which they accidentally "come near" each other. Casuarina Shopping Centre as in this case, is an obvious example, but so are other places that people resort to for social purposes, for example cinemas, hotels and restaurants. There is a reality that Darwin is a small city where people are apt to encounter each other whilst going about their own business.

24. Restraining orders are also made for the protection of persons in even smaller communities. In a small Aboriginal community for example, it would be a virtual impossibility for the parties not to encounter each other whilst going about their separate business.

25. It cannot be the case that a breach of a restraint not to "approach" can be constituted by an accidental coming together in the same geographical area. What is required in my view is some deliberate action. Deliberate in the sense of the action being taken by the restrained person with either the

intent or knowledge that it will bring him or her close or near to the aggrieved person. Where the restraint includes a requirement not to "remain", a breach might also be made out by an accidental encounter where the restrained person fails to remove him or herself from the proximity of the aggrieved person but that is not the case here.

26. There is no direct evidence that would support a view that the defendant intended to approach Ms Plongeon. There is no inference that can be drawn from the evidence that he went to the Post Office with the intent of approaching her or in the knowledge that she was there.

What constitutes "contact"?

27. Ms Kepert referred me to the meaning of "contact" given in the Shorter Oxford English Dictionary, (3rd Edition). That dictionary described the relevant contextual meaning of "contact" as being:

    1. "the state or condition of touching";

    That however is the noun form of the word, not the verb form, which is how "contact" is used in the order – the defendant is restrained from the physical action of contacting Ms Plongeon. That dictionary also refers to the phrase "to come into contact with" which it describes as meaning as "to meet, come across".

    The Concise Oxford Dictionary (8th Edition) gives the transitive verb form as meaning:

    1: get into communication with (a person)

    2: begin correspondence or personal dealings with.

28. The Macquarie Dictionary (3rd Edition) gives the verb form of "contact" to mean:

    …

8: to put or bring into contact

9: to initiate communication with (a person).

29. Cambridge Dictionaries Online (dictionary.cambridge.org) gives the transitive verb form as:

> "to communicate with someone by telephoning them or sending them a letter, email, etc"

30. Condition 2 provides both a restraint not to approach and a restraint not to contact directly or indirectly the aggrieved person, Ms Plongeon. The word "contact" must therefore have a meaning separate and distinct from the word "approach", otherwise its use is superfluous. Additionally, and of relevance to determining the meaning of "contact", in my view the words "directly or indirectly" attach to the word "contact". It does not seem physically possible to "indirectly approach" someone or someplace. I note also that the words "directly or indirectly" are not used in the preceding restraint (condition 1) in relation to the places the defendant is restrained from approaching.

31. There is a particular difficulty in accepting that the word "contact" means meeting or coming across another person as is suggested by the Shorter Oxford English Dictionary. If this meaning were to be accepted, then a breach of the order would arise from the defendant merely "coming across" the aggrieved person. For the reasons I have already given, accidental encounters could not be intended to constitute a breach not only because of the practical difficulties that arise in small geographic locations. Additionally, the point of a restraining order is to have a person restrain from, that is, not engage in, particular conduct and an accidental or coincidental encounter involves no conduct on the part of a defendant which he or she is capable of controlling.

32. For those reasons, and in accordance with the common meaning in the other dictionaries to which I have referred, I am satisfied that "contact" as appears in this restraining order takes the meaning "to communicate with" the aggrieved person. Such communication can obviously take many forms, including oral and by the various forms of electronic communication that exist.

33. The issue is whether the words "Hello Chi Chi" are sufficient as a communication to constitute a contact so as to amount to a breach of the Domestic Violence Order, pursuant to s 10 of the *Domestic Violence Act.*

34. The prosecution submitted that if no more happened, than that they each came across the other in close proximity and no words were spoken, that would not be an offence. However the prosecution submits that in the general use of the term contact, the words spoken to Ms Plongeon constitute a contact. Mr Smith referred to the effect that the encounter had on Ms Plongeon and that the defendant said "sorry" as he left the Post Office. I do not think that Ms Plongeon's reaction is relevant though I do not doubt that she was as surprised and startled by the encounter as she described. What is at issue is the defendant's conduct not Ms Plongeon's reaction.

35. Ms Kepert has submitted that for conduct to constitute "contact" there must be either an intention to contact or knowledge that contact will occur. The relevance of the restraint against "contact" being made either "directly or indirectly" is brought into focus by this submission. An "indirect contact" might occur by a third party communicating with an aggrieved person on a defendant's behalf. However, that will be an "indirect contact" by a defendant only in circumstances where he or she knows or intends that the third party communicate with the aggrieved person. A communication by a third party absent the defendant's knowledge or without any intention to have that communication brought about could not amount to an "indirect

contact". However, what is at issue here is not an indirect contact but a direct communication from the defendant Mr Kachionis to Ms Plongeon.

36. As I have said, there is no evidence to support anything other than that Mr Kachionis' encounter with Ms Plongeon in the Post Office was accidental. Ms Kepert submits that the words he spoke do not take what occurred beyond that because the evidence is only of a spontaneous reaction to a discovery of being in close proximity to a familiar person.

37. The words used by Mr Kachionis are of course a common form of polite social greeting. A greeting of this nature may be used as introductory to and for the purpose of initiating communication or might simply be used as a passing acknowledgement to the presence of a person known to the speaker. In the first situation a greeting of that nature would, in my view, amount to a "contact" because it is intended to initiate further communication and that is conduct that is restrained. There may well be circumstances where that conduct would also amount to a breach because it is involves an approach and greeting intended to intimidate the aggrieved person. However the breach would be constituted by the approach or because it might be characterised as provocative behaviour.

38. In the second example I have given, a simple acknowledgement of the presence of the other person is not done for the purpose of initiating communication, but as an accepted social courtesy. A spontaneous greeting or acknowledgement in the circumstances that the evidence given by the prosecution supports does not in my view constitute conduct that would support a finding of a breach of the non contact aspect of the order.

39. I have reached this conclusion for the following reasons. As I have outlined above, I do not think that a social greeting in passing with nothing further can be characterised as communication, which is the meaning that I have found attaches to the word "contact" as used in the order, or alternatively, is

a communication of such a minor or transitory nature that it should not be taken to constitute a breach.

40. In *Farnell Electronic Components v Collector of Customs* (1996) 142 ALR 322 Hill J considered the application of the maxim *de minimis non curat lex* (the law does not concern itself with trifling (or trivial) matters) to the question of whether trade catalogues imported into Australia were subject to duty under the *Customs Tariff Act* 1987 (Cth). His Honour referred to a number of authorities (including *Halsbury's Laws of England,* 4th ed, vol 44(1)) and concluded that in an appropriate case, the maxim applies as a rule of statutory interpretation. The applicability or otherwise of the maxim will depend on the context in which it falls to be considered (at 327).

41. The maxim is more often recognised as one that operates as a defence at common law (see the discussion of the history of the defence and its application in *Canadian Foundation for Children, Youth and the Law* 2004 SCC 4 at [200]-[208]). In *Williams v The Queen* (1978) 140 CLR 591 at 602 Murphy J referred to the principle applying both to avoid punishment after a finding of guilty for an offence that is trivial and to avoid "hysterical or oppressive law enforcement; cases in which a finding of guilt would tend to bring the law or the judicial system into ridicule or contempt because of triviality". There may well be some question about the continued application of the *de minimis* principle as a defence as referred to by Murphy J, in view of the operation of the Criminal Code in the Northern Territory, however I do not need to consider that question, as it would only arise in the event that a *prima facie* case is found.

42. The consideration by the High Court in *Williams v The Queen* arose from an appeal from conviction of possession of a prohibited plant (cannabis sativa) by a magistrate. A minute quantity of plant material, mixed with dust, had been found in the pockets of two coats in the defendant's wardrobe. It was not practicable to extract a usable quantity of the plant and it could not be

separated from the dust without a microscope. Gibbs and Mason JJ in a joint judgement approached the issue by a consideration of what must have been intended by Parliament to be a possession of the drug for the purposes of the offence. Their Honours concluded (at 599-600) that the relevant provision contemplated the possession of such a quantity as made it reasonable to say as a matter of common sense and reality that it was a substance of which the accused person was presently in possession.

> "A consideration of these situations confirms us in thinking that when the Act creates the offence of having possession of a dangerous drug or a prohibited plant, without adverting to quantity, it contemplates possession, not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means, but a possession of such a **quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession. Even though the statute is aimed at a social evil, if it is ambiguous or silent upon a particular point it is permissible to construe the statutory provision so as to avoid an unfair or unjust result**. We prefer to express the concept of possession in the terms which we have used rather than in terms of "measurable" or "usable" quantities" (emphasis added).

43. It seems to me that their Honours' approach bears similarity to what is said to be the application of the de minimis principle to the interpretation of statutes, that is, whether it was intended that technical infringements or those which were satisfied only to a small extent should be penalised.

44. Section 10 of the Domestic Violence Act ("the Act") is in the following terms:

> *Breach of order*
>
> *(1) Subject to subsections (1D) and (3), a person is guilty of a regulatory offence if:*
>
> *(a) there is a restraining order in force against the person; and*
>
> *(b) the person has been served with a copy of the order; and*
>
> *(c) the person contravenes the order.*

Maximum penalty: For a first offence – $2 000 or imprisonment for 6 months.

(1A) Despite the Sentencing Act, where a person is found guilty of a second or subsequent offence against subsection (1), the Court must sentence the person to imprisonment for not less than 7 days but not more than 6 months.

The sentence of imprisonment required to be set on a finding of guilty for a second or subsequent offence cannot be suspended either partially or wholly (s 10(1)B).

45. Although not expressed in the Act, a clear purpose for the making of restraining orders pursuant to the provisions of the Act is to provide protection to persons from violence arising out of domestic relationships and to reduce the incidence of violence of that nature. As I have previously observed, a restraining order can only be made upon the Court being satisfied of the matters set out in section 4. None of these could be described as trivial matters and it is against a repetition of conduct of that nature that a restraining order is designed to protect. The penalty attached to a breach, particularly with respect to subsequent breaches, indicates the level of seriousness which is to attach. Taking those matters into consideration, I have reached a view that what might be described as "technical" breaches, that is, those that are highly unlikely to bring about a consequence that the order guards against, could not have been intended to constitute a breach for the purposes of section 10 with its attendant consequences. A coincidental encounter by the parties in a public place, even if accompanied by a spontaneous greeting as presented by the evidence in this matter, is not capable of amounting to a breach of the order for the purposes of section 10, even if "technically" it constitutes "communication". The trivial nature of that conduct cannot be conduct which "as a matter of common sense and reality" was intended to constitute a no contact breach of a restraining order.

46. I find that there is no case for the defendant to answer. The charge is dismissed and the defendant discharged.

Dated this 28th day of March 2008.

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Sue Oliver
STIPENDIARY MAGISTRATE