CITATION: Justin Antony Firth v Niall Martin Atkinson [2017] NTLC 019

PARTIES:	Justin Antony Firth v Niall Martin Atkinson
TITLE OF COURT:	Local Court
JURISDICTION:	Darwin
FILE NO:	21715561
DELIVERED ON:	6 July2017
DELIVERED AT:	Darwin
HEARING DATE:	1 June 2017; 6 July 2017
JUDGMENT OF:	Judge Neill

CATCHWORDS:
Statutory interpretation – validity of personal violence restraining order
Personal Violence Restraining Orders Act
Local Court (Civil Jurisdiction) Rules
Grimwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration (1978) AC 655
Perfect v Northern Territory [1992] NTSC 30
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

REPRESENTATION:

Counsel:

Prosecution:	Ms Everitt
Defendant:	Mr Berkley

Solicitors:

Prosecution:	DPP
Defendant:	Darwin Family Law

Judgment category classification:	B
Judgment ID number:	019
Number of paragraphs:	19

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

No. 21715561

BETWEEN:

Justin Antony Firth
Complainant

AND:

Niall Martin Atkinson
Defendant

REASONS FOR JUDGMENT

(Delivered 6 July 2017)

Judge Neill:

1. The Defendant was charged on Complaint taken on 29 March 2017 with contravening a personal violence restraining order on 2 March 2017, contrary to section 92(1) of the *Personal Violence Restraining Orders Act* ("the Act"). The charge related to a restraining order in respect of protected person Jane Bardon. It was contested and listed for hearing before the Local Court at Darwin on 1 June 2017. I was the hearing judge on that date.

2. On 1 June 2017 the Defendant by his counsel Mr Berkley raised a preliminary legal point. He disputed that the Defendant had been served with the initiating Application for a personal violence restraining order filed on 16 February 2017 in respect of protected person Jane Bardon and returnable before the Court on 24 February 2017 on file 21709424. There was no dispute that the Defendant had been served on 23 February 2017

with a related Application in respect of protected person Michael Bates also returnable on 24 February 2017, on file 21709423. After consideration of those files I was satisfied that the Defendant had indeed not been served with the initiating Application in respect of Jane Bardon.

3. The said files established that on 24 February 2017 the Defendant had not attended at Court but he had caused a note to be placed on file 21709423 advising he was not attending Court because of work commitments. He had advised he wished to seek legal advice and he asked for a two week adjournment. Judge Woodcock nevertheless had made final orders on that date without first referring the Defendant and either Michael Bates or Jane Bardon to mediation. He had made orders on each file for a period of 12 months restraining the Defendant in respect of each of Michael Bates, concerning whom he had been served, and also in respect of Jane Bardon, concerning whom he had not been served. Formal sealed Court Orders in respect of each of Michael Bates and Jane Bardon had then been personally served on the Defendant on 1 March 2017.

4. The Defendant did not then seek to have those final Orders on either file set aside pursuant to section 20(1) of the *Local Court (Civil Procedure) Act* or at all. He has subsequently made such an application but only after 1 June 2017.

5. The Defendant now argued that the restraining orders in respect of Jane Bardon were void *ab initio,* rather than merely voidable, because of the absence of service of the initiating Application on file 21709424. If this were so then the criminal charge before the Court could not be made out, because there would have been no personal violence order in respect of Jane Bardon to have been contravened on 2 March 2017.

6. I vacated the hearing date on 1 June 2017 and made a timetable for the parties to file written submissions on the legal issue and adjourned the matter before me to 6 July 2017 at 10:00am for any further submissions. Both parties have since provided their written submissions which have assisted me. I have also had the opportunity to consider the transcript of the proceedings before Judge Woodcock in both files on 24 February 2017.

7. The Act contains two relevant provisions couched in mandatory terms. The first is section 13 which provides:

> "13 As soon as practicable after the application is filed, a registrar **must** give **written notice to the** person whose protection is sought and **defendant** of the time and place for the hearing of the application (emphasis added)."

8. The second is section 14 which relevantly provides:

> "14 (1) Before hearing an application for a personal violence restraining order the Court **must refer the person whose protection is sought and defendant** for mediation under the *Community Justice Centre Act* (emphasis added).
>
> (2) However, the Court **must not** make a referral and **must proceed to hear the application** (emphasis added) if it is satisfied that a referral is not appropriate in the circumstances…".

9. The Defendant relies upon the mandatory language identified above in support of his argument that a failure to comply with either and/or both of these provisions is fatal to the validity of any subsequent orders of the Court – that is, he argues that any Court orders made without compliance

with these provisions or either of them are void *ab initio* and therefore a nullity.

10. Mandatory language in a statutory provision is not necessarily fundamental in the sense contended for by the Defendant. In *Grimwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* (1978) AC 655 at 690 Lord Diplock said: "A court is less reluctant to treat "shall" as being directory rather than mandatory in a provision in which all that is involved is a mere matter of machinery for carrying out the undoubted purpose of the Act". This was cited with approval by Mildren J in *Perfect v NT of A* [1992] NTSC 30 in paragraph 31.

11. Subsequently the High Court considered when a breach of a statutory provision might invalidate an act. In *Project Blue Sky Inc v Australian Broadcasting Authority* ("*Project Blue Sky*") (1998) 194 CLR 355 the plurality stated:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition…Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the

> jurisdiction…Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory… As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity".

12. The purpose of the Act is conveniently stated in section 9 as follows:

> "The object of this Act is to ensure the safety and protection of persons who experience personal violence outside a domestic relationship as defined in the *Domestic and Family Violence Act*".

13. The role of service of the initiating Application in the scheme of the Act is clear when section 19 of the Act is considered. That section empowers the Court to make interim orders:

> "At any time during proceedings for the hearing of an application for a personal violence restraining order…".

I am satisfied and I rule that "at any time" includes the time after the filing of the initiating Application but before it has been served on the Defendant. This is necessarily inconsistent with the argument that service of the initiating Application is "…an essential preliminary to the exercise of a statutory power or authority…" as discussed in *Project Blue Sky* (above).

14. I am satisfied and I rule that section 13 of the Act in providing for written notice to the parties, including the Defendant, of the time and place for the hearing of the application, is directory rather than mandatory in effect,

and that a failure to comply with section 13 does not render void any subsequent orders of the Court.

15. The Defendant also argues that the *Local Court (Civil Jurisdiction) Rules* ("the Rules") apply to these Applications by force of section 12 of the Act. I am satisfied that is correct. He further says there has been a breach of sub rule 6.01 of the Rules because that provides:

> "All documents filed by a party in proceedings are to be served on the other parties". The Defendant argues that because of this, "…if the Court proceeds to an order without proof of service it commits a jurisdictional error" – paragraph 9 of his submissions.

16. I am satisfied this is not correct. Rule 2.01(1) of the Rules provides:

> "2.01(1) A failure to comply with these Rules is an irregularity and does not nullify proceedings or a step taken, document used or order made in the proceedings.".

I am satisfied that this disposes of any argument that any breach of the Rules must result in a nullity.

17. Last I turn to consider the Defendant's submission based on section 14 of the Act. The Defendant has submitted in paragraph 10 of his submissions that the exceptions in sub section 14(2) did not apply in this matter. I disagree. I do not know whether the Defendant when he wrote his submissions had access to the transcript of proceedings before Judge Woodcock on 24 February 2017. That transcript makes it plain that His Honour initially proposed to adjourn the applications for two weeks as requested in the note from the Defendant (transcript page 2.5) but was prevailed upon by Ms Bardon (referred to in the transcript as "a person unknown") at transcript pages 2.6, 3.3 and 3.5, and by Mr Bates at

transcript page 3.6, to make final Orders there and then. The basis for His Honour's change of heart was plainly the risk of imminent and continuing violence and harassment of Ms Bardon and Mr Bates by the Defendant if no immediate Orders were made – transcript page 3.4. His Honour had regard to the submissions of Ms Bardon and Mr Bates and also to the supporting affidavit of Michael Bates made 16 February 2017 and filed in the proceeding – transcript page 4.3.

18. It is clear from this and I find by necessary inference that His Honour was satisfied that a referral to mediation was not appropriate on the basis of the submissions and evidence before him, and that he complied with sub section 14(2) of the Act

19. I rule that the Orders of Judge Woodcock made on 24 February 2017 in respect of Jane Bardon on file 21709424 were validly made and were in force on and from 24 February 2017 to date and continuing. They were in force specifically on 2 March 2017, the date of the alleged contravention by the Defendant.

Dated this 6th day of July 2017.

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Judge John Neill