Northern Australian Aboriginal Legal Aid Service Incorporated v Bradley and Northern Territory of Australia [2000] NTCA 13

PARTIES:	NORTHERN AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INCORPORATED v BRADLEY, HUGH BURTON AND NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP16 OF 2000 (20007966)
DELIVERED:	16 NOVEMBER 2000
HEARING DATES:	14 & 15 NOVEMBER 2000
JUDGMENT OF:	PRIESTLEY J, DOYLE AJ & BROOKING AJ

CATCHWORDS:

Practice and Procedure – appeal against summary disposition of Statement of Claim – the facts alleged in the Statement of Claim have to be treated as accepted — plaintiff has arguable cause of action upon the evidence being led – O23, r 1 and 3 *Supreme Court Rules* 1994 (NT)

Constitutional Law – Northern Territory – appointment of Magistrates under the *Magistrates' Act* 1980 (NT) – justiciablity of judicial appointments – judicial independence – remuneration and tenure of judicial appointments – question of improper appointment

Supreme Court Rules 1994 (NT), O23, r 1 and 3
Magistrates' Act 1980 (NT)

Wilson v Union Insurance Company (1992) 112 FLR 166, applied
Day v William Hill (Park Lane) Ltd [1949] 1 KB 632, applied
Brimson v Rocla Concrete Pipes Ltd [1982] 2 NSWLR 937, applied
Galoo Ltd v Bright Grahame Murray [1994] 1 WLR 1360, applied
Hubbuck & Sons Ltd v Wilkinson Heywood and Clark [1898] 1 QB 86, applied
Lonrho Plc v Fayed [1992] 1 AC 448, applied
Air Services Australia v Zarb, unreported, NSWCA, 26 August 1998, applied
Attorney-General (NSW) v Quin (1990) 170 CLR 1, discussed
Chilcotin Pty Ltd v Cenelage Pty Ltd [1999] NSWCA 11, applied
Spratt v Hermes (1965) 114 CLR 226, distinguished
Kable v Director of Public Prosecutions for NSW (1996) 138 ALR 577, discussed

REPRESENTATION:

Counsel:

Appellant:	Mr Bret Walker SC Mr Arthur Moses Mr Patrick Keyzer
First Respondent:	Mr John Reeves QC Mr Peter McNab Mr David Farquhar
Second Respondent:	Mr Douglas Meagher QC Mr Michael Crennan

Solicitors:

Appellant:	NAALAS
First Respondent:	Cridlands
Second Respondent:	Solicitor for Northern Territory

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

Northern Australian Aboriginal Legal Aid Service Incorporated v Bradley and Northern Territory of Australia [2000] NTCA 13
No. AP 16 of 2000

BETWEEN:

NORTHERN AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INCORPORATED
Appellant

AND:

HUGH BURTON BRADLEY
First Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

CORAM: PRIESTLEY J, DOYLE AJ & BROOKING AJ

REASONS FOR JUDGMENT

(Delivered 16 November 2000)

THE COURT:

[1] We have come to the conclusion that this appeal should be upheld. This is on the basis that the issues raised by the plaintiff's Statement of Claim should go to trial, rather than be disposed of summarily. Olney J had given summary judgment for the defendants because he was of the view that the plaintiff's Statement of Claim disclosed no cause of action. We think that when the full extent of the facts pleaded in the Statement of Claim is

understood, and when it is borne in mind that *for the purposes of this argument only* the defendants must accept that the pleaded facts are true, the plaintiff has an arguable cause of action.

[2] Put summarily we think that on a fair reading the plaintiff's Statement of Claim alleges that the first defendant was appointed pursuant to an arrangement with the second defendant about what his tenure and remuneration would be, which had the purpose and effect that the first defendant could be subjected, during his tenure, to influence by the second defendant, in the carrying out of his duties, to which he should not be subjected. We further think it arguable that the power of appointment of magistrates pursuant to the *Magistrates Act* does not authorise the making of an appointment with that purpose and effect.

[3] The defendants' arguments against these conclusions were that (1) the circumstances of the appointment of a judicial officer are not justiciable, (2) the facts alleged in the Statement of Claim do not bear the interpretation we say they arguably bear and (3) the plaintiff has no standing to bring the proceedings.

[4] We wish to make it clear that our decision to let the case go to trial does not mean that we have made any final or binding decision adverse to the defendants on the three matters listed above. We have decided that final conclusions on those matters, about which we decide no more than that they are arguable, should be left to a trial judge. Because of the limited nature of

our conclusions, because of the necessarily limited set of assumed facts on which we have reached those conclusions and because the final decisions to be made on the disputed points by the trial judge may well be made on a more or less different set of facts from those before this Court, we think it proper to state our reasons for our conclusions only briefly.

[5] Those conclusions have been reached after considering the materials and arguments that were before Olney J. The precise basis on which, on those materials, we think the case should go to trial, was not put to Olney J by the plaintiff, which no doubt accounts for his not having analyzed the Statement of Claim in the way we have done. However the substance of the case was dealt with by the second defendant in written submissions before Olney J and before this Court, and we have heard full oral argument on it. No complaint has been made by the defendants about the point being taken here by the plaintiff in the somewhat different form in which we deal with it.

[6] Another quite new argument was raised in this Court, which we will label the *Kable* argument. We will leave until later any further reference to it. At this stage we shall describe shortly the history of the case, what happened before Olney J, and our reasons for the conclusions we have come to.

[7] North Australian Aboriginal Legal Aid Service Incorporated (the plaintiff) began proceedings by originating motion against the defendant Mr Bradley on 20 April 2000. Various orders for relief were sought but as the result of interlocutory proceedings various paragraphs of the Originating Motion

were struck out, leaving as the relief sought simply a declaration that the appointment made by the Administrator on 27 February 1998 of Mr Bradley to the office of Chief Magistrate of the Northern Territory was invalid.

[8] Following those interlocutory proceedings an amended Originating Motion was filed together with a Statement of Claim in which the Northern Territory of Australia was joined as Second Defendant. The defendants filed Defences in which it was claimed that the Statement of Claim did not disclose any arguable or justiciable cause of action against them. On 2 June 2000 the second defendant filed a Summons seeking summary judgment or alternatively that the Statement of Claim be struck out. This application, which was supported by the first defendant, came on for hearing before Olney J, who delivered judgment on 13 June 2000 ordering that there should be summary judgment for both defendants. It was made clear in the course of his reasons that his decision was arrived at on the basis of the application having been made under rule 23.01 of the *Supreme Court Rules*, on the ground that the plaintiff's claim did not disclose any cause of action. On that basis, apparently, the view was taken that the defendants had shown a good defence on the merits and summary judgment was given pursuant to rule 23.03.

[9] Rule 23.01 is a rule which has counterparts in many jurisdictions and there are many authoritative pronouncements of what an applicant under it must show in order to obtain judgment. Olney J referred to a decision in this jurisdiction in which Kearney J said: "Order 23 is intended as a means for

dealing with actions which are absolutely hopeless, those so obviously frivolous or unsustainable or untenable that it is plain and beyond rational debate that they cannot succeed. The power under O 23 is to be exercised by courts with great caution; an applicant bears a heavy burden. If the plaintiff shows an arguable case, one which is not unworthy of serious discussion and of evidence being led, a case not hopeless beyond argument, an application under O 23 should be dismissed." (*Wilson v Union Insurance Company* 112 FLR 166 at 181.)

[10] Olney J accepted that statement by Kearney J as a correct statement of the way rule 23.01 had to be applied. It has not been criticised in argument before us. Olney J also accepted that the defendants succeeded in fulfilling the requirements stated by Kearney J and held that the plaintiff's case was not arguable. He did this on the footing that the facts alleged in the plaintiff's Statement of Claim must be accepted as correct for the purposes of the application. The only other facts for him to take into consideration in deciding whether the plaintiff had an arguable cause of action were those in an affidavit filed by the second defendant setting out formal facts relating to the appointment of the first defendant. No evidence was put before Olney J disputing the facts alleged by the plaintiff in the Statement of Claim. Thus, it is quite clear that the proceedings before Olney J were conducted on the basis that the defendants were arguing, accepting as true for the purposes of the argument the facts alleged in the Statement of Claim, that the plaintiff could never make out a cause of action.

[11] There was no dispute about this in this appeal. The second defendant in its written submissions recorded that the order sought from Olney J had been one "striking out the Statement of Claim on the ground that it does not disclose a cause of action known to the law and summary judgment on the ground that there is a defence on the merits no matter how the matter might be pleaded".

[12] The plaintiff appealed to this Court against the order made by Olney J. It is important to understand that what the plaintiff was arguing in this Court was, *not* that it must succeed at a trial of its claims against the defendants, but that on the facts alleged in the Statement of Claim it had an arguable case, one that might succeed at trial if the alleged facts were all proved. The defendants, *for the purposes of the argument only*, had to accept that the facts alleged against them were true, although if the matter were to come to a trial they would be contesting the facts which, for the purposes of this application, they were in effect admitting. On the basis of the facts thus accepted, it was for the defendants to show that the plaintiff's case was hopeless.

[13] Before Olney J, the plaintiff had argued that the appointment of Mr Bradley was invalid because not authorised by the *Magistrates Act* pursuant to which the appointment had purportedly been made. It was further argued that the appointment was invalid because it had been made for an improper purpose. Stated very briefly, the reasons for Olney J's decision were that in his view the appointment had been authorised by the terms of the *Magistrates Act*, as

he interpreted it, and that the question of the purpose of the appointment was not justiciable.

[14] Prior to the appeal coming on for hearing written submissions were filed on behalf of the parties. The same procedure had been followed before Olney J. Those filed by the first and second defendants in the appeal were in substance the same as had been filed below, suitably adjusted for purposes of the appeal. For the plaintiff however submissions filed, in accordance with directions, only a few days before the commencement of the hearing, as we earlier mentioned, took a different line from those that had been put before Olney J, raising what we have called the *Kable* argument.

[15] When the appeal came on for hearing questions were asked of counsel for the plaintiff to ascertain whether the plaintiff was relying solely on the *Kable* argument in this Court or whether it was relied upon together with the argument put before Olney J. Counsel indicated that the latter course was that which was being taken. At a later stage in the proceedings counsel for the first defendant submitted that the Court should not entertain the *Kable* argument because it had not been put below and because it was not covered by the Statement of Claim. Counsel agreed however that he was ready to argue the point if necessary, and agreed also that the first defendant suffered no prejudice by the point being raised at this stage of the proceedings. This was because the factual basis upon which the proceedings had been considered below, and must also be considered for appeal purposes, was

strictly confined to the facts alleged in the Statement of Claim and the formal facts proved in the affidavit filed by the second defendant. Since the *Kable* argument raised matters of purely legal argument, there could be no prejudice beyond that of surprise, which the first defendant was not relying on. Nevertheless the submission was still put that it was not appropriate for this Court to consider the argument. Counsel for the second defendant adopted the first defendant's submissions in this respect. We indicated that counsel should deal with the *Kable* argument. We said that we would, if necessary, give in our reasons for judgment our reasons for deciding whether the argument should be allowed to be put in the appeal. Counsel thereafter put their submissions on the point.

[16] We will deal with the arguments in the appeal by first considering the argument which Olney J accepted, and which was criticised by the plaintiff in this Court. This requires an examination of the Statement of Claim in order to see what were the facts which, for the purposes of the argument, were taken by the defendants to be true.

[17] Paragraph 8 of the Statement of Claim alleges that on or before 27 February 1998 members of the Executive Government of the Northern Territory, or persons acting on their behalf, entered into an agreement or arrangement with the first defendant pursuant to which he agreed to accept the office of Chief Magistrate for a period of two years upon certain terms and conditions. The particulars subjoined allege that the plaintiff is unable to say precisely how and when the agreement or arrangement was entered into

but that its existence is to be inferred from a number of matters, set out in eight lettered paragraphs. The first of these is the determination made by the Administrator in Council on 27 February 1998. The second is Report No. 1 of 1999 of the Remuneration Tribunal. According to a later paragraph of the Statement of Claim (paragraph 25), this report describes the first defendant's appointment as "a two-year appointment" and as a "short term special appointment". The third matter relied on is "statements made by the Attorney-General in an interview with Mr Murray McLaughlin on 14 March 2000". The terms of the statements are not set out in the pleading and, since they are alleged to be oral statements, assistance cannot be derived from the rule permitting regard to be had to the terms of a document which is referred to in a pleading: *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632 at 639; *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 941; *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 at 1382. The same may be said of the fourth matter referred to, "statements made by Mr Shane Stone, the former Attorney-General, in an interview with Mr Paul Toohey on or about 22 April 2000". The fifth matter relied on is the first defendant's letter to the Law Society of the Northern Territory dated 27 March 2000. The particulars under paragraph 25 of the Statement of Claim set out what purport, as it seems to us, to be excerpts from this letter. Presumably recourse could have been made below to the full terms of this letter, but the letter is not contained in the materials before us and so evidently was not placed before the judge. The sixth matter is "reasons

given by the first defendant for refusing to disqualify himself from hearing a case before the Juvenile Court on 28 March 2000". These reasons were given orally and what is presumably alleged to be an excerpt from them is given in the particulars under paragraph 25 of the Statement of Claim. The seventh matter relied on is "statements made by the Attorney-General during a radio interview with Fred McCue on 10 May 2000". What are said to be excerpts from this radio interview are given in the particulars under paragraph 25. Eighthly and finally, the particulars under paragraph 8 rely on the alleged refusal of the defendants to release documents or make them public.

[18] Thus, of the eight matters relied on, the plaintiff is at large with regard to two – the terms of the statements made by the Attorney-General and by the former Attorney-General to McLaughlin and Stone respectively – since what those statements were is not alleged, and is to some extent at large with regard to two of the others, only excerpts of which are given in the pleading under a different paragraph, and it is possible that the plaintiff intends to rely on additional excerpts for the purposes of paragraph 8.

[19] Although no criticism was made of the Statement of Claim in this regard below, it is clear that the particulars given under paragraph 8 are not particulars of circumstances from which an actual agreement (or arrangement) is to be inferred from words or other conduct but particulars of the *evidence* by which the plaintiff wishes to establish the making of the agreement. The dates given in the particulars show this at once. For the

agreement is said to have been made on or before 27 February 1998, yet with the exception of the determination (made on that date) all the acts and matters relied on in the particulars post-date the alleged agreement. The pleading does not tie the plaintiff to an agreement that is to be inferred from conduct. The introductory sentence of the particulars, asserting inability to say precisely how and when the agreement was entered into, is consistent with an agreement that is written; or oral; or to be implied or inferred; or "mixed". It is clear from the particulars that they are relied on as words and other conduct of or on behalf of one or other of the defendants containing an express or implied admission that an agreement has been made, not as words or other conduct which give rise to an agreement. (How a report of the Remuneration Tribunal could be relied on successfully as an admission is another question.)

[20] Of course the evidence by which a party proposes to prove a material fact has no place in a pleading: its insertion is expressly prohibited by rule 13.02. Nevertheless the pleading of evidence may result in the allegation of material facts and in the present case no argument was put either before Olney J or to us pursuant to rule 23.02, either complaining about or seeking the removal of any part of the Statement of Claim on pleading grounds. Although the second defendant's application referred to rule 23.02 as well as rule 23.01 and rule 23.03, neither the argument nor the decision below was concerned with the pleading arguments which might have been raised under rule 23.02.

[21] As already mentioned, in so far as the defendant's application relied on rule 23.01 the facts alleged in the Statement of Claim had to be treated as accepted: *Hubbuck & Sons Ltd v Wilkinson Heywood and Clark* [1898] 1 QB 86 at 91; *Lonrho Plc v Fayed* [1992] 1 AC 448 at 469; *Air Services Australia v Zarb* (NSW Court of Appeal, 26 August 1998). By virtue of rule 23.04 evidence was admissible on an application under rule 23.01 or rule 23.03. The second defendant, however, only filed the affidavit earlier referred to, dealing with formal facts relating to the appointment of the first defendant. In its written submissions the second defendant conceded that any affidavit should be confined to matters not in dispute or not disputable.

[22] In these circumstances, one might have expected below a specific submission on behalf of the plaintiff that the case had to be considered on the basis that the plaintiff would or might succeed in proving the agreement or arrangement alleged in paragraph 8 of the Statement of Claim. A curious thing about this case is that, while the plaintiff did not specifically deal with that matter in its submissions to the judge, the second defendant did so.

[23] Paragraph 12 of the Statement of Claim alleged that the purported appointment of the first defendant was made for an improper purpose or purposes. The improper purposes were to defeat "the principles of judicial independence enshrined in the Magistrates Act"; to give effect to the agreement or arrangement alleged in paragraph 8; to secure a short-term, special appointment to the office of Chief Magistrate; to create what was, in effect, a two-year appointment subject to review at the expiration of that

time; to secure the appointment of a person who would at the expiration of two years be dependent on the Executive Government for remuneration and allowances; to subvert the purpose of s 7 of the Magistrates Act, requiring magistrates' appointments to be to the age of 65; and to defeat "a fundamental objective of the Act", namely, that magistrates should enjoy secure tenure to the age of 65 free from the influence and appearance of influence of the Executive Government.

[24] It seems to us to be a fair reading of paragraphs 8, 9 and 12 taken together, that the allegations of improper purpose include an allegation that the "members of the Executive Government" mentioned in paragraph 8, in agreeing with the first defendant that he should be appointed for a two-year term and in causing him to be appointed, did so in order that he might be subject to the influence of the Executive Government in the exercise of his powers as Chief Magistrate.

[25] It also seems to us to be a fair reading of these paragraphs that the plaintiff is alleging an appointment made with the purpose of circumventing the statutory provision for tenure to age 65 – subject to resignation or removal pursuant to the Act: see sections 7, 8 and 10 of the Act.

[26] The second defendant, in its written submissions to this Court, reproducing in this respect what it had put below, dealt at some length with the allegation of an agreement or arrangement made in paragraph 8 of the Statement of Claim. Counsel orally elaborated the same submissions before

us. In paragraph 12 of the written submissions on appeal, reference is made to the allegation that the first defendant's appointment was to be only for two years. The submission is that the plaintiff argued that "the Executive had as a result reserved to itself an improper power to control or influence the Chief Magistrate in the discharge of his duties. This, it is argued, diminished judicial independence to such an extent as to render the appointment invalid.".

[27] In paragraph 13 of the written submissions, and in the oral argument, the second defendant made a number of answers to the plaintiff's case based on this argument, but none of them challenged the sufficiency of the allegation in paragraph 8 of the Statement of Claim of the agreement or arrangement that the appointment should be for two years. The second defendant made two answers to the allegation of improper purpose: first, that the purposes for which an appointment are made are matters that are not justiciable and secondly, that in any event the alleged improper purposes are not in law improper. As to the second contention, it is argued that, for reasons which are given, it cannot be said that by the making of a remuneration determination limited to two years the Executive reserved to itself an improper power to influence the Chief Magistrate.

[28] The second defendant went on to deal with particularity with the improper purposes alleged in paragraph 12 of the Statement of Claim. It was submitted that the making of the agreement or arrangement alleged in paragraph 8 would have no relevant legal consequences. It was submitted

that whatever arrangement may have been made with the first defendant, the appointment that was made was unquestionably an appointment whereby, subject to the Magistrates Act, he would hold office until he attained the age of 65. It was not submitted however that the application, whether based on rule 23.01 or rule 23.03, should not be considered on the basis that there was or may have been an agreement or arrangement that the first defendant would be Chief Magistrate for only two years.

[29] The plaintiff's written submissions before Olney J do not seem to have relied on an agreement or arrangement that the first defendant should hold office for only two years. Rather, they concerned themselves with the consequences of a remuneration determination which made his remuneration secure only "for the first two years of his appointment". Although the plaintiff asserted that the defendants' application, in so far as it was based on rule 23.01, had to accept that all the allegations of fact in the Statement of Claim were true, plaintiff's counsel did not seem to attempt to draw from this, before Olney J, the proposition that the parties making the application had to accept that the agreement or arrangement alleged in paragraph 8 of the Statement of Claim had been made, and had to accept that the first defendant's appointment was made for the purposes alleged in paragraph 12. Nor did counsel seem to suggest to Olney J that, in so far as the application was made under rule 23.03, there being no affidavit material bearing on the issues raised by those paragraphs of the pleading, the case was to be considered on the basis that the plaintiff might succeed on those issues. The

main point made for the plaintiff before Olney J, both in writing and orally, was that the failure of the determination of 27 February 1998 to make provision for remuneration after the initial two-year period was inimical to the Chief Magistrate's independence. This is a point to which a large part of the second defendant's argument below was directed.

[30] Not surprisingly, in view of the submissions made on behalf of the plaintiff, his Honour did not in his reasons deal with the question whether the application had to be considered on the basis that the agreement or arrangement alleged in paragraph 8 of the Statement of Claim was or may have been made. In dealing with the allegation that the appointment was made for an improper purpose, his Honour expressed his conclusion thus:

> "Here there can be no question that the intention of the Administrator was to appoint the first defendant as Chief Magistrate and the purpose of the Act is, of course, to facilitate the appointment of magistrates. And the weight of judicial authority suggests that the Court has no power to interfere with the Executive power to make judicial appointments".

His Honour went on to refer to the judgment of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 34, the authority relied on by the second defendant in its submission about justiciability.

[31] Not surprisingly again, in view of the way in which the plaintiff had shaped its case in written submissions and oral argument, his Honour did not deal in terms with the allegation in paragraph 12 of the Statement of Claim that, the agreement or arrangement alleged in paragraph 8 having been made, the

appointment of the first defendant was made for improper purposes, namely, to give effect to that agreement or arrangement; to defeat "the principles of judicial independence enshrined in the Magistrates Act"; to secure a short-term, special appointment; to create what was, in effect, a two-year appointment subject to review; to secure the appointment of one who would at the end of two years be dependent on the Executive Government for remuneration and allowances; to subvert the purpose of s 7 of the Act, requiring appointments to be to the age of 65; and to defeat "a fundamental objective of the Act", namely, that magistrates should enjoy secure tenure to the age of 65 free from the influence and appearance of influence of the Executive Government.

[32] In addition to raising the issue of justiciability, the second defendant argued before the judge that there were no "principles of judicial independence enshrined in the Magistrates Act" and that there was no such "fundamental objective" of the Act as paragraph 12 of the Statement of Claim alleged. The plaintiff contended for the contrary view. His Honour may not have resolved this contest, resting his decision as regards "improper purpose" on the inability of the Court to interfere with the exercise by the Executive of the power of appointment, although on one view of the judge's reasons the allegation of improper purpose was rejected.

[33] It seems to us that the plaintiff's case on improper purpose did not necessarily depend upon acceptance of its allegations about "principles enshrined" in the Act and the "fundamental objective" of the Act. For the

purposes of the argument, the facts begin with the allegation of an agreement or arrangement that the first defendant would accept the office for two years. Then the appointment is alleged. Of course the legal effect of the appointment, if valid, was, as the second defendant contends, that the first defendant would, subject to the Act, hold office until he reached the age of 65, so that from a practical point of view the only way in which the agreement or arrangement could be given effect at the end of two years was by the first defendant's resigning. That is the practical effect of paragraphs 8 and 9 of the Statement of Claim.

[34] It then goes on to allege that the appointment was made to give effect to the agreement or arrangement and that it was made for a number of purposes said to be improper. It seems to us to be fairly arguable that the answer made by the second defendant to this – leaving aside for the moment the question of justiciability – does not dispose of this case sought to be made by the pleading. We do not think the references to the enshrinement of principles in the Magistrates Act and its fundamental objective are essential to this case, or to the contention that an arguable case is asserted of improper purpose, in that the appointment was made for the purpose of creating "what was, in effect, a two year appointment subject to review at the expiration of that time" and to bring it about that the first defendant should not enjoy secure tenure to the age of 65 free from the influence of and appearance of influence by the Executive Government.

[35] In our view, on a fair reading the words "subject to review" in the first of these alleged purposes are not a mere reference to the need for the Executive to deal with the matter of remuneration once the two years had expired or was about to expire; instead those words refer to the determination of the question whether the first defendant was to continue in office once that period expired. We also think that on a fair reading the second alleged purpose is, on the proper construction of the pleading, as general as the words used suggest and is not to be read down as confined to a failure to determine remuneration save for the two year period. If these purposes were to be established, then it would in our view be fairly arguable – still leaving aside justiciability – that the appointment was invalid as not made, to adapt the words of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 34, for the purpose of securing the proper administration of justice according to law by the magistrates of the Northern Territory.

[36] The plaintiff does not suggest that an arrangement between the Government and a proposed appointee that he or she would not serve until the age of 65 would necessarily and in all circumstances be improper. It is not suggested that it would be wrong to make an appointment on the understanding that the magistrate would retire at 60 where he or she had told the Executive prior to appointment of a desire to retire at that age. In such a case there would be nothing more than intimation of an intention to exercise, on attaining a certain age, the statutory power of resignation. But the pleading shows that the agreement or arrangement alleged that the first defendant should hold

office for two years was not made to accommodate an unwillingness on his part to serve for a longer period. Paragraph 12 asserts that the purposes of the appointment made to give effect to the agreement or arrangement were, inter alia, "to create what was, in effect, a two year appointment subject to review at the expiration of that time" and "to secure the appointment … of a person who would, at the expiration of two years, be dependent upon the Executive Government for remuneration and allowances." These two particulars are quite inconsistent with a mere case of acquiescence in an intimation prior to appointment of a desire to retire early.

[37] It is fairly arguable that, where a statute provides that a magistrate appointed under it holds office, subject to the statute, until attaining the age of 65 years, it is not an exercise of the power of appointment for the purpose for which it was conferred to appoint someone in order to give effect to an agreement or arrangement that the appointee shall hold office for only two years on certain terms and conditions and that this should "create what was, in effect, a two year appointment subject to review at the expiration of that time."

[38] Another way of putting the same point is to say that it is fairly arguable that an appointment under such circumstances is made improperly to circumvent the statutory provisions as to tenure.

[39] As regards justiciability, we regard it as fairly arguable that the Court may investigate the question whether the appointment of the first defendant was

made for the purposes alleged, if those purposes are to be given the wide meaning which the pleaders' words on a fair reading may be said to convey. If those purposes were to be established, the case might be said to be a very different one from *Quin,* which concerned what Brennan J at 34 described as the calibre of appointments to the judiciary and the choice of criteria in the selection of judicial officers. The statements by Brennan J, relied on by the defendants in this Court in support of the non-justiciability point, were not directed to a case of the kind that is alleged here. Moreover, Mason CJ, at 18, did not express himself in absolute terms ("generally speaking, the judicial branch of government should be extremely reluctant to intervene"). Dawson J said nothing on that point. Toohey J at 64 spoke of the appointment of judicial officers for reasons other than merit. We do not think *Quin* may be said clearly to be a binding authority to the effect that matters relating to judicial appointments are never justiciable.

[40] The plaintiff's standing was challenged by the defendants. The judge found it unnecessary to consider this. We think it is enough to say that the lack of standing was not so clear as to make it appropriate to grant the defendant's application on that ground. Compare *Davis v Commonwealth* (1986) 68 ALR 18 at 23-24; 61 ALJR 32 at 35-37.

[41] At the commencement of the oral argument it was a question in our minds whether the plaintiff should be allowed to frame its opposition to the defendants' application in a way not explicitly put below. The point could not be affected by evidence, since the second defendant concedes that any

affidavit should be confined to matters not in dispute or not disputable, and the conduct of the application, except in point of argument, cannot be said to have been affected by the course taken by the plaintiff. These considerations still left open the question whether it was expedient and in the interests of justice to allow the point to be raised now. We have briefly discussed this towards the beginning of these reasons. We add now that the authorities are conveniently reviewed in *Chilcotin Pty Ltd v Cenelage Pty Ltd* [1999] NSWCA at [9]-[19]. The way in which the matter was conducted by the second defendant both before Olney J and in this Court leads us to conclude that we should act upon the conclusions we have formed, in light of the facts in the case upon which the Court must base its decision. As already mentioned, the second defendant in its written submissions both before Olney J and in this Court, and in this Court orally as well, dealt at some length with the allegation that a two year appointment had been agreed upon or arranged and with the specific allegations of improper purpose. Thus this case has not been one of a point not taken below in the usual sense of some manifestly discrete point. The Court was, so to speak, always seized of the issue of improper purpose. The omission of the plaintiff was to rely on what is the wide, natural meaning of the allegations of improper purpose.

[42] In all the circumstances we do not think it is just or expedient that the plaintiff's claim should be brought to an end by summary judgment for the defendants because of the plaintiff's concentration on the fixed term of the

remuneration determination, if the case was in fact not an appropriate one for summary judgment. The defendants have not contended that we should treat the point as one not taken below and that accordingly we should decline to entertain the point.

[43] What we have called the *Kable* argument was not put to Olney J. As already mentioned, the first defendant said this Court should not allow it to be raised at this stage. The second defendant adopted the first defendant's submission on the point. In the circumstances of this case we think we should allow the argument to be put. The facts on which the Court must decide whether the plaintiff has an arguable cause of action are the same here as at first instance. The defendants do not say they are prejudiced by the argument being raised at this stage. We have heard everything the defendants want to put against the plaintiff's new submission. We think therefore we should indicate our view on the argument.

[44] We do so although it is not strictly necessary to do so, as we have decided that the appeal should be allowed on other grounds. Whether the argument fairly arises on the pleadings need not be decided by us. It will be open to the plaintiff to apply for leave to amend the pleadings if it is so advised.

[45] The argument was put in considerable detail by the appellant both in its written submissions and orally. It contained a number of steps. For present purposes it is sufficient to adopt the summary version of it as described by counsel for the second defendant, namely "that recent decisions of the High

Court give support for the proposition that in making judicial appointments even in States and Territories, security of tenure must be assured".

[46] The argument raised important questions about the appointment of members of the judiciary in a Commonwealth Territory, and, incidentally, in a State. We need not deal with all of those questions.

[47] It suffices to explain briefly why we consider that the point taken is, in some form at least, an arguable one.

[48] The argument must rest, ultimately, on identified assertions of fact about the circumstances surrounding the first defendant's appointment. The argument must also be considered in the context of the relevant provisions of the Magistrates Act. In the light of the allegations in the Statement of Claim, and in the context of the statutory provisions relating to appointment, resignation and removal from office, it is arguable that the appointment of the first defendant was made for a purpose offensive to a fundamental requirement or aspect of judicial independence, and that such a fundamental aspect or requirement must be observed in making appointments to the courts of a Territory. So described, the argument is more or less identical to that which we have already said is arguable. The difference is its genesis – a constitutional principle rather than the construction of a statutory power.

[49] We do not agree that the acceptance in *Spratt v Hermes* (1965) 114 CLR 226, that a magistrate of a Territory may hold office at the pleasure of the Crown, is inconsistent with our conclusion. It is one thing to say that

statutory security of tenure is not required by the Constitution for a judicial officer of a Territory. It is another thing to accept the propriety of an arrangement, pursuant to which an appointment to judicial office is made, intended to secure influence, or apparent influence, over a person to be appointed to judicial office.

[50] For those brief reasons we do not regard the point as unarguable.

[51] We therefore uphold the appeal, and make the following orders:

1. Appeal allowed.

2. Orders 1, 4 and 5 made below set aside.

3. In lieu thereof, order that application made by paragraphs 1, 2 and 3 of summons be dismissed.

[52] We will make costs orders after hearing any submissions counsel may wish to put.