

*S. Kidman & Co Ltd v Lowndes CM and the Director of Public Prosecutions*  
[2015] NTSC 90

PARTIES: S. KIDMAN & CO LTD

v

LOWNDES CM

And

DIRECTOR OF PUBLIC  
PROSECUTIONS

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NOS: JA 49 of 2015 (21504753) and 84 of  
2015 (21545396)

DELIVERED: 2 November 2015

HEARING DATE: 2 November 2015

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

PRACTICE AND PROCEDURE – Appeal – appeal from Court of Summary Jurisdiction – Chief Magistrate made preliminary rulings regarding limitation of action, sufficiency of complaint and amendment of complaint – whether appeal could be brought under s 163 of the *Justices Act* 1928 (NT) – whether the Chief Magistrate’s decision was reviewable for jurisdictional error – appeal dismissed – *Justices Act* 1928 (NT), s 163, s 164

*Macey v Cooper* (1990) 150 FLR 476, applied

*Step v Atkins & Anor* [2008] NTCA 5, followed

*Kirk v Industrial Relations Commission (New South Wales)* (2010) 239 CLR 531, referred to

*Carr v Finance Corporation of Australia Limited* (1981) 147 CLR 246; *Oates v Williams* (1998) FCR 348; *Potter v Tural* (2000) 2 VR 612; *R v Iorlano* (1983) 151 CLR 678; *Re Luck* (2003) 78 ALJR 177, cited

**REPRESENTATION:**

*Counsel:*

Appellant:	M Crawley
First Respondent:	No appearance
Second Respondent:	D Morters and M Chalmers

*Solicitors:*

Appellant:	Sparke Helmore
First Respondent:	Solicitor for the Northern Territory
Second Respondent:	Office of the Director of Public Prosecutions

Judgment category classification: B

Judgment ID Number: Sou1511

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

*S. Kidman & Co Ltd v Lowndes CM and the Director of Public Prosecutions*  
[2015] NTSC 90  
Nos. JA 49 of 2015 (21504753) and 84 of 2015 (21545396)

BETWEEN:

**S. KIDMAN & CO LTD**  
Applicant

AND:

**LOWNDES CM**  
First Respondent

AND:

**THE DIRECTOR OF PUBLIC  
PROSECUTIONS**  
Second Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 2 November 2015)

**Introduction**

- [1] The appellant/applicant has filed both a notice of appeal and an originating motion seeking the following orders. First, an order quashing or setting aside a decision of the Court of Summary Jurisdiction made on 14 August 2015 whereby his Honour Lowndes CM determined that the complaint filed in the proceeding was made within the limitation period fixed by s 232(1)(b) of the *Work Health and Safety (National Uniform Legislation) Act* and allowing the second respondent to amend the complaint to overcome certain

defects identified by the Court of Summary Jurisdiction. Second, an order that the complaint filed in the Court of Summary Jurisdiction be dismissed.

- [2] Both proceedings were commenced out of an abundance of caution because the appellant/applicant was uncertain whether the orders made by the Court of Summary Jurisdiction on 14 August 2015 were final or interlocutory.
- [3] Under the provisions of s 163 and s 164 of the *Justices Act*, an appeal to this court only lies against a final order.<sup>1</sup> In *Step v Atkins & Anor*,<sup>2</sup> which is a decision of the Court of Appeal of the Northern Territory, her Honour Thomas J, approved the following statement by Martin CJ, as he then was, in *Macey v Cooper*.<sup>3</sup>

It has long been held ... that the right of appeal only lies from an order determining the subject matter of the complaint, that is, from a final and not from an interlocutory order.

- [4] The test to be applied in determining whether an order is a final order is whether the judgment or order appealed from as made, finally disposed of the rights of the parties.<sup>4</sup> That test is to be answered by determining whether the legal effect of the judgment is final or not. Unless the legal effect is final, it is an interlocutory judgment or order.<sup>5</sup>
- [5] In my opinion, the orders made by the Court of Summary Jurisdiction are not final orders. The orders do not determine the subject matter of the

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<sup>1</sup> *Step v Atkins & Anor* [2008] NTCA 5.

<sup>2</sup> [2008] NTCA 5.

<sup>3</sup> (1990) 150 FLR 476.

<sup>4</sup> *Carr v Finance Corporation of Australia Limited* (1981) 147 CLR 246; *Re Luck* (2003) 78 ALJR 177.

<sup>5</sup> *Re Luck* (2003) 78 ALJR 177.

complaint. The legal effect of the orders made by the Court of Summary Jurisdiction is that the charge against the appellant/applicant may proceed and the appellant/applicant may defend the charge. The orders have not finally disposed of the rights of the parties. Consequently, the appellant/applicant has no right of appeal under the *Justices Act*.

[6] Section 164 of the *Justices Act* is a privative section which purports to preclude any final order being removed to the Supreme Court other than in accordance with s 163 of the Act. The purpose of the section is to ensure that all appeals are brought, subject to the time limits and pre-conditions for appeal specified in the *Justices Act*, in order to achieve finality of all proceedings commenced in the Court of Summary Jurisdiction as soon as is reasonably practicable.

[7] Section 164 of the *Justices Act* states:

No appeal shall be allowed from any conviction or a determination or adjudication of the kind mentioned in s 163(1) or (3) nor shall any such [*I emphasise 'such'*] conviction or a determination or adjudication be removed to the Supreme Court except as provided by this Act.

[8] According to its text, s 164 of the *Justices Act* does not preclude proceedings for judicial review being brought with respect to interlocutory orders made by the Court of Summary Jurisdiction. The use of the word 'such' in the text of the section makes it clear that the section is confined to the same convictions, orders, determinations or adjudications that are referred to in s 163 of the Act, which are final orders only. The section

precludes final orders being removed to the Supreme Court, except as provided by the *Justices Act*.

[9] As the orders appealed from in this proceeding are interlocutory orders, it is not necessary, at this stage, to consider whether or not s 164 of the *Justices Act* applies to jurisdictional errors made by the Court of Summary Jurisdiction when making a final order which may involve a consideration of whether *Kirk v Industrial Relations Commission (New South Wales)*<sup>6</sup> applies in the Northern Territory.

[10] Whether a court should grant relief in the nature of prerogative relief is discretionary. As the appellant/applicant is seeking judicial review of interlocutory orders, it is necessary for the court to have regard to the principle that it is highly undesirable to interrupt the ordinary course of criminal proceedings by applications for orders in the nature of prerogative relief commenced for the purpose of challenging interlocutory orders. Superior courts have repeatedly said that the criminal process should not be interrupted by such applications.<sup>7</sup> However, in determining whether to apply this principle or not, the court should have regard to the nature and stage of the proceeding, the effect of the disruption and the availability of any alternative remedy.

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<sup>6</sup> (2010) 239 CLR 531.

<sup>7</sup> *R v Iorlano* (1983) 151 CLR 678, 680; *Oates v Williams* (1998) FCR 348 at 361; *Potter v Tural* (2000) 2 VR 612 at [52].

[11] In this case, his Honour the Chief Magistrate, determined that there were three procedural issues which must be determined by him before the prosecution could proceed any further. The first issue is whether the complaint was laid within time. The second issue was whether the complaint was defective because of its lack of particularity. The third issue was whether the complaint could be amended if it was defective after the limitation period had expired. His Honour determined by consent that these issues should be tried as preliminary issues. His Honour then heard argument about these issues and delivered his reasons for decision on 14 August 2015. The matter was then set down for mention for ancillary or consequential orders on 31 August 2015. On that day, counsel for the appellant/applicant announced that it was seeking an application for judicial review and seeking to appeal in the alternative. The matter was then adjourned pending the outcome of the proceedings in the Supreme Court. No fresh trial date has been fixed. The appellant/applicant has not entered a plea to the charge on the complaint. The trial proper has not started in the Court of Summary Jurisdiction. The proceeding in the Court of Summary Jurisdiction has already been interrupted. Assuming the matter proceeds to trial, any new trial dates can be fixed in accordance with the convenience of the parties, the witnesses and their counsel. I have not been informed that there is any difficulty with the availability of any witnesses in the future. The points to be considered in the judicial review proceeding are discrete points which can quickly be considered by this court.

[12] While the appellant/applicant would not be precluded from appealing on these grounds if it were to be found guilty at the end of the summary trial, the appellant/applicant would have to face a three to five day trial with all the costs that such a trial would entail in circumstances where the grounds on which it relies are arguable and where there has been significant delay in making the complaint in the first place. There is also some merit in obtaining a ruling from this court about the essential elements of the offence pleaded in the complaint, as the issue has given rise to significant litigation in other jurisdictions and involves one of the primary duties created by the *Work Health and Safety (National Uniform Legislation) Act*.

[13] In the circumstances, I hold that this Court's discretion to dismiss the application for judicial review because of the principle against fragmentation of a criminal trial should not be exercised in this case.

[14] Consequently, I make the following orders.

1. The appeal being JA49 of 2015, file number 21504753 is dismissed as the orders appealed against are not final orders and there is no right of appeal to this court from such orders.
2. The application for judicial review may proceed.

[15] I will hear the parties further as to directions and listing for hearing of the application for judicial review.

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