CITATION:	*Laminex Group Pty Ltd v Catford* [2018] NTSC 56
PARTIES:	LAMINEX GROUP PTY LTD
	v
	CATFORD, Joanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	LCA 43 of 2018 (21748195)
DELIVERED:	16 August 2018
HEARING DATE:	13 August 2018
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

WORKERS COMPENSATION – Application to dismiss appeal for incompetence – whether Notice of Appeal was filed before the proceeding in which the decision or determination was made was finally determined by the Work Health Court – orders regarding period and rate of interest outstanding when Notice of Appeal filed – "decision or determination" has a wide meaning under s 116 *Return to Work Act* (NT) – "proceeding" means proceedings as a whole – s 109 *Return to Work Act* (NT) interest is a substantive issue – r 2.01 *Supreme Court Rules* (NT) cannot prevail over s 116 *Return to Work Act* (NT) – appeal dismissed for incompetence – *Return to Work Act* (NT), s 116(3).

Return to Work Act (NT), ss 69, 89, 103G, 107, 109, 109(2), 110, 116, 116(1), 116(3)

Supreme Court Rules (NT), rr 2.01, 82.02, 87.04, 87.06
Work Health Rules (NT), rr 1.08, 3.07(1), 8.02(1)

BAE Systems Australia Ltd v Rothwell [2013] NTCA 3; *Catford v Laminex Group Pty Ltd* [2018] NTLC 7; *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373; *Jape Furniture Pty Ltd v Bonifazio* (2001) 11 NTLR 34; *NT Drilling Pty Ltd v McFarland* [2004] NTSC 23; *Passmore v Plewright* (1997) 118 NTR 28; *Pengilly v Northern Territory of Australia (No 3)* (2004) 14 NTLR 1; *Wormald International (Aust) Pty Ltd v Aherne* (1994) 26 NTLR 152, referred to.

REPRESENTATION:

Counsel:

Appellant:	B O'Loughlin
Respondent:	M Grove

Solicitors:

Appellant:	HWL Ebsworth Lawyers
Respondent:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	BLO1805
Number of pages:	13

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

Laminex Group Pty Ltd v Catford [2018] NTSC 56
No. LCA 43 of 2018 (21748195)

BETWEEN:

LAMINEX GROUP PTY LTD
Appellant

AND:

JOANNE CATFORD
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 16 August 2018)

Background

[1] These reasons deal with an application filed on behalf of the respondent worker ("the worker") seeking to have an appeal filed on behalf of the appellant employer ("the employer") dismissed as incompetent.

[2] On 22 March 2018 the Work Health Court made a finding that a Notice given by the employer pursuant to s 69 of the *Return to Work Act* (the Act) was invalid. On the same date, the employer's counterclaim was struck out. The learned judge relevantly found the first pleading was too general and lacking in material facts, and the second pleading was no more than a bare

assertion, embarrassing and vague.[1] The formal orders of the Work Health Court on 22 March 2018 were:[2]

1. Summary judgement in favour of the Worker.
2. That the employer's counterclaim be struck out.

[3] The case resumed before the Work Health Court on 11 May 2018 to deal with consequential orders and other outstanding matters. At that time the employer argued the counterclaim continued as the pleading had been struck out but was not dismissed. The judge explained that it was her intention to strike out the counterclaim "completely, not to leave it somehow available for re-amendment or re-pleading."[3] On the same date, her Honour ordered the employer reinstate weekly payments including arrears. The matter was adjourned *sine die* for any further clarification or consequential orders to be made.

[4] At a further hearing on 14 June 2018, the judge clarified that it was her intention to strike out *and* dismiss the counterclaim. Further, she confirmed her view the s 69 Notice was a "clear case" for summary judgement due to its invalidity. The formal orders of the Work Health Court on 14 June 2018 were as follows:

1. The Employer's Counterclaim is struck out and dismissed.
2. The Employer's s 69 Notice dated 9 June 2017 is set aside.

---

1 *Catford v Laminex Group Pty Ltd* [2018] NTLC 7 at [42]-[47].

2 *Catford v Laminex Group Pty Ltd* [2018] NTLC 7 at [49].

3 Transcript, Work Health Court, 11 May 2018, p 3.

3. The Employer forthwith pay the Worker interest on any arrears of unpaid weekly payments of compensation, pursuant to s 89 of the Act.

4. The Employer pay the Worker's costs of and incidental to the proceedings including that Counterclaim, the mediation and the dispute (including those costs referred to in s 110 and s 103G of the Act) at 100% of the Supreme Court scale, to be taxed in default of the agreement on the indemnity basis, and paid forthwith.

5. The Worker's costs of and incidental to the Interlocutory Applications dated 13 October 2018, 10 January 2018 and 29 January 2018 are to be taxed at 100% of the Supreme Court scale in default of the agreement, on the indemnity basis, and the applications are certified fit for senior/junior counsel.

6. The Employer forthwith pay to the Worker interest pursuant to s 109(2) of the Act, but the decision as to the percentage of the interest and the period for which it is to be paid are adjourned.

7. Adjourned to 13 July 2018 before Judge Armitage.

[5] In relation to Order 6 concerning interest to be paid in the circumstances envisaged by s 109(2) of the Act, it may be noticed that although the order was made for the interest to be paid, the scope of the period and the rate of the interest was not determined. There were some areas of dispute or uncertainty between the parties about those matters. An illustration of this was that the employer asked for guidance on whether the calculation was to take account of interim benefits.[4] The judge informed counsel she would deal with the outstanding matters in dispute concerning s 109(2) interest after receiving written submissions. The oral submissions made before the Work Health Court on 14 June 2018 indicate it was the intention of counsel

4 Transcript, Work Health Court, 14 June 2018, p 9.

to make final calculations in the usual course after the judge's ruling on the period of time to be covered by the payments and the rate of interest.[5]

[6] The employer filed a Notice of Appeal on 11 July 2018 in respect of the dismissal of the counterclaim. Precisely what is contemplated in the Notice of Appeal is the subject of some argument which will be mentioned below. During oral submissions on the question of competency of the appeal, counsel advised this Court that the Work Health judge finalised the outstanding s 109(2) interest issues on 9 August 2018.

Is the appeal incompetent?

[7] The principal ground alleging incompetency is that the appeal was filed in contravention of s 116(3) of the Act, namely that the proceeding was not finally determined by 11 July 2018, the date the Notice of Appeal was filed. Section 116 of the Act provides:

> (1) Subject to subsection (3), a party to a proceeding before the Court constituted by a Local Court Judge who is aggrieved by a decision or determination of the Court may appeal against the decision or determination on a question of law to the Supreme Court within the time and in the manner prescribed by the Rules of the Supreme Court.
>
> (2) In deciding the appeal, the Supreme Court may:
>
> (a) confirm or vary the decision or determination; or
>
> (b) set aside the decision or determination and substitute its own decision or determination; or

5 Transcript, Work Health Court, 14 June 2018.

(c) set aside the decision or determination and remit the matter to the Work Health Court.

(2A) For subsection (2), the Supreme Court may make the orders and give the directions it considers appropriate.

(3) A party may not appeal under subsection (1) until the proceeding in which the decision or determination was made has been finally determined by the Court.

[8] Respectable arguments have been made by both counsel before this Court on whether s 116(3) of the Act is to be construed or applied in a manner that would preclude the filing of an appeal before the final determination of issues relevant to s 109 interest.

[9] Appeals from the Work Health Court are confined to questions of law. However, the question of law may arise from a "decision or determination". "Decision or determination" is used throughout s 116 and would appear to contemplate the widest possible form of decision making, provided any appeal arising is confined to a question of law. Matters of peripheral significance are unlikely to be within the contemplation of s 116 unless a question of law is raised. It would seem "decision or determination" contemplates the resolution or conclusion of issues in broader terms than merely "order" or "judgement", terms which do not appear in s 116(1) and (3).

[10] During the hearing, after a digital search of the Act by counsel for the employer, it was found that "determination" most often appears in the Act when coupled with "interim". Any appeal against a determination of interim

benefits would however be caught by s 116(3). On any conceivable view, a determination of interim benefits is not a final decision in a proceeding. An "interim determination" under s 107 may, as counsel for the worker suggested, be a subset of "determinations". It may be that "determination" in this context is distinguished from "decision", as "determination" may be thought to more readily apply to calculations or to the fixing of an amount, which is not an uncommon process engaged in proceedings under the Act. Meanings attributed to "determination" in the Macquarie Dictionary include *inter alia* the fixing, calculating or settling of amounts. Calculations as such are unlikely to raise questions of law. Whatever the case, the terms "decision" and "determination" are of wide import within the context of the relevant proceeding contemplated by s 116.

[11] The employer argued the only relevant decision or determination that was the subject of the appeal was the defence and counterclaim. On this argument, the counterclaim was said to form its own proceeding. It was argued the counterclaim should be treated as "the proceeding" for the purposes of s 116(3). Further, it was submitted the question of s 109(2) interest was an ancillary or incidental matter, and its final determination should not hold up the progression of the appeal.

[12] The employer does not seek to appeal any other decision or determination, including summary judgement in favour of the worker on the s 69 certificate. The counterclaim is, in the employer's submissions, "the proceeding". It was in essence the only matter to be determined on

14 June 2018. It was submitted s 116(3) should not be read so strictly as to preclude the appeal for the sake of an ancillary matter such as s 109 interest. It was pointed out that construing s 116(3) so strictly would potentially have the effect of disadvantaging a party, most likely workers, who receive an adverse result at first instance. While this in theory is a possibility, balanced against that, there are strong incentives embedded within the Act, particularly around costs and awards of interest, which militate against the effect of a wayward party intent on delaying the final determination of a matter.

[13] In my view the reference to "a proceeding" in s 116(1) and "the proceeding" in s 116(3) contemplates the proceeding as a whole, not separate parts of the proceeding or separate parts of the pleadings such as a counterclaim. The *Work Health Rules* permit the filing of a counterclaim, but this does not mean there is a multiplicity of proceedings. The *Work Health Rules* treat a counterclaim as a claim within a proceeding. For example, rule 1.08 of the *Work Health Rules* defines a counterclaim as "a claim in *a proceeding*" [*emphasis added*]. Rule 3.07(1) of the *Work Health Rules* that deals with the discontinuance of an action provides:

> At any time before the hearing of *a proceeding*, a party may discontinue an application or counterclaim. [*emphasis added*]

Rule 8.02(1) of the *Work Health Rules* dealing with additional claims or matters provides:

> A party may include in a pleading a claim or counterclaim against any other part to *the proceeding*. [*emphasis added*]

[14] Although a wide variety of decisions and determinations which raise a question of law may be the subject of an appeal, the relevant decision or determination cannot be appealed until "the proceeding" has been finally determined by the Court. In this particular matter, in my view, "the proceeding" did not conclude with the determination of the counterclaim, as the period of time over which to apply s 109 interest and the rate of interest was not finalised. In my view the question of s 109 is not an ancillary matter. Generally interest claimed under s 109 is the subject of pleadings and possibly evidence. How s 109 is to be applied in particular cases has often been a contentious subject on appeal.[6] Although not determinative, this tends to strengthen the conclusion that s 109 issues are substantive matters.

[15] There may be an argument that the mere calculation of the quantum of interest *after* issues such as the rate and period of time are determined are to be distinguished from the view taken here, however, in this matter, as at 11 July 2018, the necessary framework for the calculations remained unresolved.

---

6 See e.g. *Passmore v Plewright* (1997) 118 NTR 28; *Pengilly v Northern Territory of Australia* (No 3) [2004] NTSC 1; 14 NTLR 1; *Wormald International (Aust) Pty Ltd v Aherne* (1994) 26 NTLR 152*; NT Drilling Pty Ltd v McFarland* [2004] NTSC 23; *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373; *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 3.

[16] Counsel for the employer submitted that all that can be drawn from *Jape Furniture Pty Ltd v Bonifazio*[7] is that s 116(3) reveals a legislative intention to prohibit appeals against interlocutory orders in the Work Health Court until such time as the substantive claim for compensation has been determined. While there is force in that submission, *Bonifazio* involved a question of the application of s 116(3) to an appeal that was determined to be from an interlocutory matter. The issue here differs from the matter in contention in *Bonifazio*. The issue here is whether the proceeding has been finally determined, as opposed to the question raised in *Bonifazio*.

[17] Section 116(3) in my view also guards against the fragmentation of proceedings so that an appeal is not being processed or heard in this Court while there remain outstanding issues in the Work Health Court. If a cross-appeal were to be filed against a remaining determination in the Work Health Court while an appeal was pending in this Court in the same matter, further interlocutory steps would be required to consolidate all issues in the appeal/cross-appeal. That is one reason why fragmentation is undesirable in cases of this kind. That said, given the s 109 decision was made on 9 August 2018, it is obvious that this particular matter is no longer fragmented. However, I know of no principle that would allow an incompetent appeal to be determined competent, indeed somehow revived, by virtue of later compliance. Neither counsel have suggested such an approach.

---

7 [2001] NTSC 48; 11 NTLR 34.

[18] A further matter favouring the construction adopted here is that ideally the parties can make decisions about whether to appeal or cross-appeal based on the totality of the orders and determinations made. For those reasons it is concluded here the appeal is incompetent, based on the Notice of Appeal filed on 11 July 2018.

[19] Given that since the filing of the Notice of Appeal the matter of s 109 interest has been resolved, I would have favoured taking curative action to permit the appeal to progress, however there is nothing in the Act that I am aware of that would permit the Court to treat the Notice of Appeal as being filed or validated at a later date.

[20] That being the case, the employer cannot rely on r 2.01 of the *Supreme Court Rules* to prevent a nullity in the face of non-compliance within the Act. Counsel for the worker argued r 2.01 is relevant only to Chapter 1 of the *Supreme Court Rules*, dealing with originating processes. However, that is not correct, as r 82.02 of the *Supreme Court Rules* provides r 2.01 applies to appeals with necessary changes. Although it would be expedient and quite possibly in the interests of justice to permit the appeal to be amended so that it is taken to be filed on or after 9 August 2018, as subordinate legislation the *Supreme Court Rules* cannot prevail over the Act. Somewhat reluctantly it is concluded here that there is no rule that would overcome the non-compliance with s 116(3) that operated at the time of filing the Notice of Appeal that still bears the date 11 July 2018.

[21] The worker also argues the appeal is incompetent as the Notice of Appeal does not refer to any relevant decision or determination of the Work Health Court made on 14 June 2018. This submission principally refers to the part of the Notice of Appeal that states:

> The Appellant appeals from the decision … ordering summary judgement for the Respondent worker in respect of the Appellant's counterclaim.

In my view, although the relevant decision may not be correctly described as "summary judgement", and the words may incorporate both the refusal to amend and to dismiss the counterclaim, it is sufficiently clear to denote the decision, or confirmation of the decision on 14 June 2018 to dismiss the counterclaim without hearing evidence is the subject of appeal. If the appeal were otherwise competent, I would permit the Notice of Appeal to be amended to more precisely describe the decision being appealed. The worker argued such an amendment would be contrary to r 87.06 that permits amendment to the grounds of appeal but not to the decision being appealed against. This fails to recognise the Court may permit amendment not only to the grounds of appeal, but may make "any other order on such terms as it thinks fit to ensure the proper determination according to law of the rights of the parties."[8]

[22] Similarly, and contrary to the argument on behalf of the worker, if the appeal were otherwise competent, I would not uphold the argument that the

---

8 *Supreme Court Rules* (NT), r 87.06.

"orders sought" were deficient. If the appeal were otherwise competent, the deficiencies in precision and language could be dealt with by amendment.

[23] The worker also argued the appeal was served out of time. On 20 June 2018 the employer's solicitor (Mr Dancis) sent an email to the respondent's solicitor and counsel (Mr Grove) notifying that he had instructions to appeal the decision, but was unsure whether orders were actually made on 14 June 2018 or were expressed as intended orders to be formalised at a later time. To allow for time to clarify this matter, Mr Dancis asked Mr Grove if he was prepared not to take an issue with respect to the appeal being filed out of time. Mr Grove replied that he was "not prepared to not take issue with any late filing of an appeal".[9]

[24] The orders sealed by the Work Health Court are dated 14 June 2018. The orders were received by Mr Dancis via his court box on 25 June 2018. Given Mr Grove's position, Mr Dancis arranged for the Notice of Appeal to be filed on 11 July 2018.[10] The worker submitted the Notice of Appeal was to be served on or before 12 July 2018 to comply with r 87.04. There is no evidence before the Court about the date of service.

[25] Contrary to the apparent belief of counsel for the worker, I do not have access to Work Health Court Registrar records that would verify the date of service, nor is it appropriate that I investigate that matter. If the appeal were

9 Affidavit of Reinis Nilss Dancis, sworn 10 August 2018, annexures RND1, RND2.

10 Affidavit of Reinis Nills Dancis, sworn 10 August 2018.

otherwise competent, I would extend the time in which service could be effected on the basis of the known material.

[26] There will be an order dismissing the Notice of Appeal for want of competency, however by way of clarification it should be understood the merits of the proposed but incompetent appeal have not at all been considered during the course of this application.

Orders

1. The appeal filed on 11 July 2018 is incompetent for non-compliance with s 116(3) of the *Return to Work Act*.

2. The Notice of Appeal is dismissed.

[27] I will hear counsel on costs.