*Aboriginal Areas Protection Authority v S & R Building & Constructions Pty Ltd* [2011] NTSC 16

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| PARTIES: | ABORIGINAL AREAS PROTECTION AUTHORITY<br><br>v<br><br>S & R BUILDING & CONSTRUCTIONS PTY LTD |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | 49 of 2010 (20935996) |
| DELIVERED: | 4 March 2011 |
| HEARING DATES: | 19 November 2010 |
| JUDGMENT OF: | KELLY J |
| APPEAL FROM: | M CAREY SM |

**CATCHWORDS:**

*Justices Act*, s 27, 31, 32, 165, 167, 167(5), 167(6), 168, 168(1), 171(1), 171(2), 172
*Northern Territory Sacred Sites Act*, s 10(k), 34
*Sentencing Act*, s 5, 8

*Alympic v Burgoyne[2003] NTSC 43;Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8; *Fitzgerald v Balchin* [2009] NTSC 29; followed

*Wilfred v Rigby* [2004] NTSC 31; mentioned

*Words and Phrases Legally Defined* (4th Ed)

**REPRESENTATION:**

*Counsel:*

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| Appellant: | G McMaster |
| Respondent: | J Stirk |

*Solicitors:*

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| Appellant: | Solicitor for the Northern Territory |
| Respondent: | Povey Stirk |

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| Judgment category classification: | C |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Aboriginal Areas Protection Authority v S & R Building & Constructions Pty Ltd* [2011] NTSC 16

No. 49 of 2010 (20935996)

BETWEEN:

**ABORIGINAL AREAS PROTECTION AUTHORITY**
Appellant

AND:

**S & R BUILDING & CONSTRUCTIONS PTY LTD**
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 March 2011)

[1] In this matter, the appellant, a statutory authority whose functions include enforcement of the *Northern Territory Sacred Sites Act*,[1] appealed against a sentence imposed by the Court of Summary Jurisdiction on the respondent for contravention of that Act by carrying out work on a sacred site. The respondent has applied to strike out the appeal as incompetent on the grounds:

(a) that the appeal was not served within time; and

1 *Northern Territory Sacred Sites Act* s 10(k)

(b) that the appellant failed to comply with an essential pre-condition for instituting a valid appeal, namely the requirement to enter into a recognizance on appeal within one month from the time of the order appealed against.

[2] The respondent has applied for an order under s 165 of the *Justices Act* ("the Act") dispensing with compliance with the requirement to enter into a recognizance on appeal within the time specified in the Act.

[3] On 19 November 2010, I heard both applications and made the following orders.

(1) I dismissed the application by the respondent to strike out the appeal.

(2) I made an order pursuant to s 165 of the Act, dispensing with compliance with the requirement in s 171(1), that a recognizance on appeal be entered into within one month from the time of the order appealed against.

[4] At the time of making those orders I said that I would publish my reasons at a later date. These are those reasons.

**Original proceeding**

[5] The respondent pleaded guilty in the Court of Summary Jurisdiction to carrying out work on a sacred site, contrary to s 34 of the *Northern Territory Sacred Sites Act*. On 17 September 2010, the Court of Summary

Jurisdiction, without recording a conviction, imposed as a sentence a $500.00 fine with a victims' levy of $40.00.

**Filing and service of appeal**

[6] On 14 October 2010, the appellant filed a notice of appeal against the sentence imposed by the learned magistrate, claiming that the magistrate erred in law:

(a) by imposing a sentence that was manifestly inadequate;

(b) by failing to properly address s 8 of the *Sentencing Act*; and

(c) by failing to adhere to the sentencing guidelines contained in s 5 of the *Sentencing Act*.

[7] Also on 14 October 2010, the appellant signed a recognizance on appeal in which no sum of money had been inserted.

[8] On 28 September 2010, counsel for the appellant spoke to the solicitor for the respondent by telephone. During that conversation, counsel for the appellant said it was likely an appeal would be filed soon and asked if the solicitors were still acting for the respondent. The solicitor for the respondent said words to the effect that he would look forward to receiving an appeal document in due course.

[9] On 14 October 2010, the appellant "served" the notice of appeal and recognizance on appeal by sending a copy of both documents by fax to the office of the respondent's solicitor.

[10] The appellant then posted an original signed and sealed copy of the notice of appeal and recognizance to the office of the solicitors for the respondent, where the documents were received on 25 October 2010.

[11] Later, on 1 November 2010, having realised that the original recognizance was defective, the appellant entered into a recognizance of $500.00 to prosecute the appeal without delay, to submit to the judgment of the Supreme Court and to pay such costs as may be awarded by that court.

**The issues**

[12] The respondent has brought an application to strike out the appeal as incompetent on two grounds.

[13] First, the respondent says that the notice of appeal was not served within one month of the date of the decision under appeal as required by s 171(1) of the Act. The respondent submits that service was not validly effected by sending a faxed copy of the notice of appeal, and the original signed and sealed copy was not received within one month of the date of the decision under appeal.

[14] The respondent contends that s 27 of the Act provides for personal service and a faxed copy cannot constitute personal service. For the purposes of this ground, the respondent concedes that:

(a) it is open to a solicitor for a respondent to agree to accept service of a notice of appeal on behalf of a respondent;

(b) the telephone conversation referred to in paragraph 4 above constituted an agreement by the solicitor for the respondent to accept service of the notice of appeal on behalf of the respondent in this matter; and

(c) therefore, if the original signed and sealed copy of the notice of appeal had been received in the office of the solicitor for the respondent within one month of the sentence being handed down, the respondent would have been validly served.

[15] The sole issue in relation to this submission therefore, is whether the notice of appeal was validly served by sending a faxed copy.

[16] Secondly, the respondent submits that the appellant has failed to comply with an essential pre-condition for instituting a valid appeal, namely the requirement in s 171(1) of the Act to enter into such recognizance on appeal as is required under s 167 and s 168 of the Act within one month from the time of the order appealed against.

[17] It is conceded by the appellant that the entry into a recognizance on appeal is an essential pre-requisite for the existence of a valid appeal.[2] However, the appellant relies on s 165 of the Act which permits the court to dispense with compliance with any condition precedent to the right of appeal if, in the opinion of the court, the applicant has done whatever is reasonably practicable to comply with the requirements of the Act. The appellant says that the court should be so satisfied in the present circumstances, and should exercise its discretion to dispense with compliance with the requirement that the appellant enter into a recognizance on appeal within the time specified.

[18] The respondent in turn concedes that the court does have jurisdiction to entertain the appeal (ie the appeal would not be incompetent) if the court exercises the power of dispensation under s 165 of the Act, but says that the court cannot be satisfied that the appellant has done whatever is reasonably practicable to comply with the requirements of the Act and that, accordingly, the court should not exercise the dispensing power under s 165 of the Act.

**Service**

[19] Section 27 of the Act provides:

**27. Service of summonses and notices under this Act**

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2 See *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8; *Fitzgerald v Balchin* [2009] NTSC 29 per Riley J at paragraph [4]; *Wilfred v Rigby* [2004] NTSC 31 per Mildren J at paragraph [5]

> Subject to the provisions of this or any other enactment specially applicable to the particular case, any summons or notice required or authorized by this Act to be served upon any person, may be served upon the person by:
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> (a) delivering it to him personally; or
>
> (b) leaving it for him at his last or most usual place of abode or of business with some other person, apparently an inmate thereof or employed thereat, and apparently not less than 16 years of age.

[20] *Prima facie*, this would not include faxing a copy of the notice to the respondent's solicitor. However, the respondent concedes that in this case there was an agreement by the solicitor to accept service, and that if an "original" copy of the notice of appeal bearing an original signature and court seal had been delivered to the solicitor's office within a month of the order, the appeal would have been served within time. The only question, therefore, is whether it was a pre-condition to the existence of a valid appeal that an original sealed copy of the notice of appeal (as distinct from a faxed copy) be delivered to the solicitors office within one month of the decision appealed against.

[21] Section 171(1) of the Act provides (so far as is relevant) that "the appeal shall be instituted by notice in accordance with s 172". Section 172 of the Act provides that "the notice of appeal shall be in writing, and shall be served upon the respondent" (and sets requirements for the content of the notice). Section 171(2) of the Act provides that "every appeal shall be instituted within one month from the time of the … order … appealed

against". The nett effect of these provisions is that service of the appeal within one month is a condition precedent to the existence of a valid appeal.

[22] In this case, a copy of the notice of appeal was delivered to the office of the solicitors for the respondent by means of the fax machine. The respondent says that this is not sufficient. However I do not see why not. There is no requirement in the Act for the notice of appeal to be signed or sealed by the court. The only requirements in s 172 of the Act are that the notice be in writing and contain the matters set out in that section. It is not contended that the faxed copy of the notice of appeal was not in writing or that it did not contain the matters set out in s 172 of the Act. Therefore, in my view, there is no substance to the submission that the notice was not served within time: the facsimile copy was delivered within time.

**The Recognizance**

[23] Section 171 and s 172 of the Act provide that an appeal shall be instituted by serving a notice of appeal, by entering into a recognizance on appeal, and by payment of the appropriate fee. The appeal must be instituted within one month from the time of the order appealed against. There is provision in s 171(2) of the Act for the Court to grant an extension of time of up to three months in very limited and not presently relevant circumstances.

[24] The recognizance of $500.00 entered into by the appellant on 1 November 2010 was not entered into within one month as required by s 171(2) of the Act. Therefore the appeal is incompetent unless the recognizance on appeal

of 14 October 2010 complied with the requirements of s 167 and s 168 of the Act or this Court exercises the discretion conferred by s 165 of the Act to dispense with that requirement.

[25] The recognizance on appeal signed by the appellant on 14 October 2010 complies with the formal requirements of s 168(1) of the Act but does not specify an amount of money payable if the specified conditions are not met. The first question, then, is whether a "recognizance" in that form is in fact a recognizance within the meaning of s 171(1) of the Act.

[26] There is nothing in s 167 or s 168 of the Act which states that an amount of money must be specified in a recognizance and there is no definition of recognizance in the Act.

[27] Section 31 of the Act provides as follows:

> **31. Discretion of Justices as to amount and sureties**
>
> Every recognizance shall be for such amount and with such surety or sureties as the Justice taking the recognizance thinks fit to ensure the due fulfilment of the conditions thereof: Provided that, in the case of a recognizance taken under section 33 it shall be for such amount, and with such surety or sureties, as the Justice authorizing the taking thereof thinks fit.

[28] Section 32 of the Act provides:

> **32. Justice may fix amount of recognizance and sureties**
>
> Where a Justice is authorized to take a recognizance, or when any recognizance is required to be entered into before a Justice, the Justice may fix the amount or amounts in which the principal and

> sureties are to be bound, and the recognizances may then be entered into as provided in section 33.

[29] On one view of the matter, it would be open to the Justice taking the recognizance to insert "nil" (or what is the same thing, leave it blank) if he or she formed the view that ensuring the due fulfilment of the conditions of the recognizance did not require the specification of an amount – as may well be the case in a matter such as the present, namely an appeal against sentence by a prosecuting statutory authority.

[30] However, I think the better view is that it is necessary to insert some amount for there to be a proper recognizance. That is because a recognizance is, by definition, a promise to pay a sum of money on the non-performance of a condition.

[31] The Australian Concise Oxford Dictionary defines "recognizance" as follows:

> "**1** a bond by which a person undertakes before a court or magistrate to observe some condition, e.g. to appear when summoned. **2** a sum pledged as surety for this."

[32] The same dictionary defines "bond" (in the legal sense) as: "a deed by which a person is bound to make payment to another". See also *Words and Phrases Legally Defined* (4th Ed) at p 277.[3] A form of undertaking which does not bind the obligor to pay anything would not, in fact or in law, be a

[3] This accords with the usage of the term in stamp duties law.

bond, nor would it be “a sum pledged” as surety for performance of the conditions – and hence not a recognizance.

[33] This conclusion is reinforced by the provisions of sub-sections 167(5) and (6) of the Act which provide that in the limited circumstances set out in s 167(5) the Court making the order may order that, if the decision is appealed, no recognizance shall be entered into. That restriction on the circumstances in which it may be ordered that no recognizance is required (and the grant of power to make such an order to the Court making the original decision which may be subject to appeal) would be subverted if in any case the Justice taking the recognizance were simply able to fix the amount of the recognizance at nil.

[34] The next question, then, is whether the affidavit evidence establishes that the appellant has done whatever is reasonably practicable to comply with the requirements of the Act, so as to enliven the Court’s power under s 165 of the Act to dispense with compliance.

[35] Section 165 does not confer on the Court a wide discretion to dispense with compliance with a condition precedent to the right of appeal. The Court may only do so if, in the opinion of the Court, the appellant has done whatever is reasonably practicable to comply with the Act. The onus is on the applicant to demonstrate that he or she has done whatever is reasonably

practicable to comply with the Act, thereby justifying the exercise by the court of the power to dispense with compliance.[4]

[36] In this case, Mr Christopher Capper, the acting CEO of the appellant, signed the blank "recognizance" on 14 October 2010. Mr Capper deposes that he relied on the appellant's legal advisors and had no independent understanding of the procedural requirements (and this is not contested).

[37] It is well established that a person (not legally qualified) who provides his solicitor with instructions to lodge an appeal, along with all necessary information, within a reasonable time to enable the solicitor to prepare and lodge the appeal on time, will have done everything reasonably practicable to comply with the Act, and will generally be entitled to an exercise of the dispensing power in his favour.[5]

[38] That is not precisely the case here. Mr Capper deposes that he personally attended before the Justice and signed the document referred to as a "recognizance". He must be taken to have read it and to have seen that no amount was filled in. On one view of the matter it would hardly have been impractical for him to have filled in an amount. After all, on 1 November 2010, Mr Capper signed another form of recognizance with an amount filled in.

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4 *Fitzgerald v Balchin* [2009] NTSC 29 per Riley J at paragraph [5]

5 *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1978) 47 NTR 8; *Wilfred v Rigby* [2004] NTSC 31 at paragraph [6].

[39] In paragraph 4 of his affidavit, Mr Capper deposes:

> "While no sum of money was inserted in the recognizance to prosecute …. I believed the form to be properly lodged. Neither the Justice of the Peace nor my legal advisors informed me to the contrary."

[40] As Martin CJ said in *Alympic v Burgoyne*[6]:

> "His lack of knowledge or mistake on that issue and consequent failure to act cannot be a ground for showing that he did what was reasonably practicable for him to do. It explains why he did nothing, it does not show that he did something to enable him to rely on s 165."[7]

[41] If it had been the responsibility of the appellant to fix an amount to be offered by way of recognizance, I would have been of the opinion that the present appellant had not done everything reasonably practicable to comply with the Act. It would not have been impracticable for the person signing the document in question to have filled in an amount.

[42] However, s 31 and s 32 of the Act provide that it is the responsibility of the Justice taking the recognizance to fix the amount. In those circumstances, it seems to me that by preparing the form of recognizance (or having it prepared) in the correct form and presenting it to the Justice whose duty it was to fix the amount to be inserted, the appellant has done everything practicable to comply with the Act – indeed everything that it was necessary

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6 [2003] NTSC 43 at paragraph [9]

7 The applicant in *Alympic* decided not to appeal because he thought the only consequence to him of the sentence was a fine of $1,000.00. Later, when he discovered he could be made liable to pay compensation to the victim under the *Crimes (Victims Assistance) Act*, he sought a dispensation under s 165 from the requirement to file a notice of appeal within one month.

for the appellant, as distinct from the Justice, to do. Therefore, I am of the opinion that an order should be made dispensing with compliance with the requirement in s 171 of the Act.

**Conclusion**

[43] The notice of appeal was served within the one month time period specified in s 171(2) of the Act, but the appellant did not comply with the requirement in s 171(1) that a recognizance on appeal be entered into within one month after the order appealed from. However, for the reasons set out above, I am of the opinion that the appellant did everything practicable to comply with the provisions of the Act. I therefore:

(a) dismiss the respondent's application to strike out the appeal as incompetent; and

(b) make an order pursuant to s 165 of the Act dispensing with compliance with the requirement in s 171(1) of the Act that a recognizance on appeal be entered into within one month after the order appealed from.