CITATION:	*EA v Northern Territory of Australia* [2024] NTSC 90
PARTIES:	EA v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2024-01963-SC
DELIVERED:	31 October 2024
HEARING DATE:	19 August 2024
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Application for preliminary discovery – Prerequisites for an order – Requirement to establish a reasonable cause to believe that a right to relief may be available – Requirement to establish that the Applicant requires the documents to determine whether to commence proceedings – Residual discretion once the pre-requisites are satisfied.

Practice and Procedure – Application for judicial review – Time limit for commencement of proceedings for judicial review – Application for an extension of time to commence proceedings for judicial review – Need to show special circumstances as a pre-requisite to an extension of that time limit – Meaning of special circumstances – Sufficiency of special circumstances relied on by Applicant – Whether the granting of an extension is appropriate in conjunction with an application for preliminary discovery.

Care and Protection of Children Act 2007, s 4, 5, 7, 15, 16, 27, 84A, 293A, 293F, 308A, 309.
Information Act 2002 s 46.
Supreme Court Rules 1987, rr 3.02, 29.08, 32.05, 43.03(2), 56.01, 56.02.

Atherton v Jackson's Corio Meat Packing (1965) Pty Ltd [1967] VR 850.
Commissioner of Taxation v Ahern (1986) 87 FLR 112.
Atkinson v Bardon & Ors [2018] NTSC 9.
Australian Broadcasting Corporation v Seven Network Ltd [2005] FCA 1851.
Briginshaw v Briginshaw (1938) 60 CLR 336.
Carra v Hamilton (2001) 3 VR 114.
CGU Insurance Limited v Malaysia International Shipping Corp Berhad (2001) 187 ALR 279.
Daher v Bell [2011] VSCA 192.
Denysenko v Dessau [1996] 2 VR 221.
Glowatzky v Insultech Group Pty Ltd (1997) 39 IPR 215.
Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd [2014] NTSC 28.
Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor [2014] NTSC 58.
Hatfield v TCN Channel Nine Pty Ltd (2010) 77 NSWLR 506.
Kay v Legal Profession Tribunal [2000] VSC 460.
Lovejoy v Myer Stores Ltd (No 2) [1999] VSC 271.
Mann v Medical Practitioners Board of Victoria [2002] VSC 256.
Martynova v Brozalevskaia (No 2) [2023] NTSC 45.
Murdesk Investments Pty Ltd v Secretary to the Dept of Business and Innovation [2011] VSC 436.
MZAPC v Minister for Immigration and Border Protection (2021) 273 CLR 506.
Portelli v Stewart Unreported, Supreme Court of Victoria, Byrne J 6 August 1996.
Prencipe v. Nisselle [1998] VSC 137.
St George Bank Ltd v Rabo Australia Ltd & Anor (2004) 211 ALR 147.
Walcott v Davies (1984) 4 FCR 124.
Young v County Court [2005] VSC 311.

REPRESENTATION:

Counsel:

Applicant:	E Withnall
Respondent:	R Bonig

Solicitors:

Applicant:	Withnall Halliwell
Respondent:	Finlaysons Lawyers

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

EA v Northern Territory of Australia [2024] NTSC 90

No. 2024-01963-SC

BETWEEN:

EA

Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA

Respondent

CORAM: Luppino AsJ

REASONS

(Delivered 31 October 2024)

[1] The Applicant seeks preliminary discovery pursuant to rule 32.05 of the *Supreme Court Rules 1987* (SCR) and an extension of time to commence proceedings for judicial review pursuant to rule 56.02(3) of the SCR.

[2] The Applicant's evidence consisted of two affidavits of the Applicant's solicitor, Eric Gordon Withnall. The first was made on 29 May 2024 and was directly filed in these proceedings. The second was made on 20 May 2024 and was before the Court as an annexure to the first mentioned

affidavit. Why the earlier affidavit was an annexure to the other affidavit was not entirely clear. An affidavit in a proceeding should be directly filed and should not be an annexure to another affidavit in the same proceeding. The earlier affidavit was provided to an agency of the Respondent before the current application was commenced with a threat to seek pre-action discovery orders[1] and that may afford some explanation, but that is still unsatisfactory.

[3] The Respondent relied on the affidavit of Michelle Louise McManus made 17 July 2024.

[4] The background facts reveal that, via a private placement agency, the Applicant's wife (E) was engaged to provide foster care to children in the Respondent's care. In turn, and with at least the tacit approval of the Respondent, E appointed the Applicant as a co-carer.

[5] By letter dated 12 February 2024, Ms Rawlings, a Senior Child Protection Practitioner within the Child Abuse Taskforce of the Department of Territory Families, Housing and Communities (TF) wrote to E advising of a report concerning W, a child in her care and notifying of an investigation to be held pursuant to section 84A of the *Care and Protection of Children Act 2007* (the Act). Relevantly that letter advised that TF had "*..received a report regarding the safety and wellbeing of [W]*". Brief particulars were given specifically, "*The concerns that have been reported to [TF] concern*

[1] Affidavit of Eric Gordon Withnall made 29 May 2024 at para 3; see also para 11 below.

sexual exploitation. It has been alleged [W] was sexually assaulted by her carer E's partner..". That letter also offered an opportunity to E to contribute to the investigation in the following terms "*[TF] would like to meet with you to discuss the reported concerns …*".

[6] On 28 March 2024, Ms Rawlings wrote to both E and the Applicant to advise of the outcome of that investigation. Apparently an investigation was also conducted in respect of similar allegations concerning three other children who were, or had previously been, in E's care. There was no evidence that the Applicant or E were notified of investigations concerning children other than W. The result in respect of all four children was that the allegations had been made out and, in respect of the initial investigation, that the child W had "*…suffered significant detrimental Sexual Harm/Exploitation and Emotional Harm*".

[7] In respect of two of the other three children, the finding was that those children were "*…at risk of suffering significant detrimental Sexual Harm/Exploitation*". Lastly, in respect of the remaining child, there was a hybrid finding namely that the child "*…has suffered significant detrimental Emotional Harm*" and was "*at risk of suffering significant detrimental Sexual Arm/Exploitation*".

[8] Correspondence then followed between the Applicant's solicitor (Ms Roussos) and officers of TF, including Ms Harrington, the Senior Complaints Officer of TF. That correspondence commenced with a request

by Ms Roussos for a copy of the investigation report and the material on which the findings in the letter of 28 March 2024 were based. There is evidence that TF agreed to provide the requested material at some point but finally declined to do so. There is also evidence that TF suggested that the Applicant seek that material by way of a Freedom of Information request.

[9] Subsequently a review of the investigation and findings was conducted. The evidence as it currently stands is to the effect that TF initiated the review without a request to do so from either the Applicant or E. There is however a reference in an email from Ms Harrington dated 9 May 2024 to a request for the review by Ms Roussos but there is no direct evidence of such a request. Mr Withnall, counsel for the Applicant, denied that such a request was ever made.

[10] Following completion of that review, in an email from Ms Harrington to Ms Roussos dated 17 May 2024, the previous findings were confirmed and it was added:-

> "The substantiation decision was based upon [W] making clear and consistent particularised disclosures in relation to two separate occasions where she was sexually abused and exploited by [EA], who was acting in his role as purchased home based carer on both occasions. This meets the threshold for significant and detrimental harm as defined by section 15 of the Act.
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> The PBR [*Person Believed Responsible*] decision is upheld based on the following criteria being met: [EA] is established to have had sole opportunity to have harmed [W], credible evidence indicates Mr EA was the only person present when the harm occurred and there is strong corroborative, behavioural and psychological information about Mr EA that is consistent with the nature of the harm assessed."

[11] Mr Withnall was then engaged to represent the Applicant and E and on 20 May 2024 he emailed Ms Harrington, attaching his affidavit of 20 May 2024, inviting the Respondent to show cause why an application for preliminary discovery should not be filed. It was not necessary for that affidavit to be provided for that purpose. I suspect that the affidavit was intended to reinforce the Applicant's perceived entitlement to the requested documents or Mr Withnall's preparedness to make the application, notwithstanding that the affidavit was not the entirety of the evidence which the Applicant would rely on when the Originating Motion was filed only seven days later. The accompanying email set a deadline for production of the documents specifically indicating that the deadline was set having regard to the time limit in rule 56.02 of the SCR. Therefore, as was submitted by Mr Bonig, counsel for the Respondent, Mr Withnall was alert to the need to file proceedings by 27 May 2024 but apparently made the conscious decision to allow the time limit to lapse. That may then be relevant to the order for an extension of time, which is discussed below.

[12] In an email of 22 May 2024 Mr Bonig put to Mr Withnall that the Applicant already had sufficient information for the purposes of deciding whether to commence an application for judicial review. He also confirmed that the request for documents had been declined as those documents were protected under the *Information Act 2002*, in conjunction with public interest immunity.

[13] The Applicant then commenced the current application by filing the Originating Motion on 27 May 2024. Mr Withnall's last affidavit was filed on 29 May 2024 and the Summons was filed on 31 May 2024.

[14] The provisions of the SCR relevant to this application are firstly rule 32.05. That rule provides:-

> **32.05 Discovery from prospective defendant**
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> Where:
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> (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description he has ascertained;
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> (b) after making all reasonable inquiries, the applicant has not sufficient information to enable him to decide whether to commence a proceeding in the Court to obtain that relief; and
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> (c) there is reasonable cause to believe that the person has or is likely to have or has had or is likely to have had in his possession a document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist him to make the decision,
>
> the Court may order that the person shall make discovery to the applicant of a document of the kind described in paragraph (c).

[15] Secondly, rule 56 which provides:

> **56.01 Judgment or order instead of writ**
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> (1) Subject to any Act, the jurisdiction of the Court to grant relief or a remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with this Chapter.
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> (2) The proceeding shall be commenced by originating motion.
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> **56.02 Time for commencement of proceeding**

(1) A proceeding under this Order shall be commenced within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose.

(2) Where the relief or remedy claimed is in respect of a judgment, order, conviction, determination or proceeding, the date when the grounds for the grant of the relief or remedy first arose shall be taken to be the date of the judgment, order, conviction, determination or proceeding.

(3) The Court shall not extend the time fixed by subrule (1) except in special circumstances.

[16] Dealing first with the application for preliminary discovery, I summarised the requirements for a successful application pursuant to rule 32.05 of the SCR in *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd*[2] and I now restate that summary, modified to the extent required by the issues in the current proceedings, namely:-

1. Rule 32.05 is to be beneficially construed;

2. All of the pre-requisites in the subparagraphs of the rule must be established;

3. The test in rule 32.05(a) to determine whether a plaintiff has "*reasonable cause to believe*" is an objective one and is to be assessed based on some recognised legal ground but a plaintiff does not have to make out a *prima facie* case;

4. Belief requires more than mere assertion, suspicion or conjecture but the Court does not have to reach a firm view that there is an entitlement to the actual relief;

5. The question posed by rule 32.05(b) is not whether a plaintiff has sufficient information to decide if a cause of action is available but whether the plaintiff has sufficient information to make a decision whether to commence proceedings and therefore

[2] [2014] NTSC 28, adopting *St George Bank Ltd v Rabo Australia Ltd & Anor* (2004) 211 ALR 147 and *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506. See also *Martynova v Brozalevskaia (No 2)* [2023] NTSC 45.

documents relevant to defences and quantum are also discoverable;

6. Determining whether a plaintiff has sufficient information for the purposes of rule 32.05(b) requires an objective assessment to be made that a plaintiff is lacking information reasonably necessary to decide whether to commence proceedings.

[17] As is clearly evident from the wording of rule 32.05, the grant of an order under that rule is discretionary. Satisfaction of each of the criteria in the rule is a prerequisite which then enlivens the discretion.[3] The discretion must be exercised judicially and after taking all relevant factors into account.

[18] There was awkward overlap between the affidavits filed on behalf of the Applicant and the Applicant's written submissions. The affidavit material contained much commentary, which more appropriately should have been in written submissions. The affidavits also contained much irrelevant material for example, that the Applicant personally made a request to the relevant Minister. Also, in a number of instances, the Applicant's submissions, both written and in the course of argument, lacked necessary supporting evidence.

[19] There was also doubt as to whether the affidavit relied on by the Respondent sufficiently complied with the requirements of rule 43.03(2) of the SCR. That rule permits evidence based on information and belief in interlocutory applications if the grounds are set out. The application of that

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[3] *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28 at paras 8-11.

rule requires the deponent to identify the nature and source of the information giving rise to the belief in the truth of the statement[4] and that was lacking in the affidavits relied on by the Respondent. The requirement to identify the source of the information is to enable the other side to test the credibility and extent of the belief.[5]

[20] As no objection was taken by either party to the evidence of the other, I allowed all affidavit evidence.

[21] The first of the criteria in rule 32.05 is that there is reasonable cause to believe that the Applicant has, or may have, the right to obtain relief in this Court from the Respondent. The putative cause of action that the Applicant argued for was relief in the nature of certiorari based on jurisdictional error, and declarations. As declaratory relief is a remedy and not a form of relief, I disregard the claimed declarations as a putative cause of action.

[22] The Applicant's submissions went excessively into the requirements for success on that putative cause of action as opposed to satisfying the pre-requisites in rule 32.05(a). Indeed, the Applicant's written submissions commenced with the proposition that the question for determination was whether there was sufficient material available to the Applicant to determine whether the Applicant had a reasonable prospect of success in proceedings for substantive relief. That is clearly wrong as the requirement

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4 *Atherton v Jackson's Corio Meat Packing (1965) Pty Ltd* [1967] VR 850.

5 *Commissioner of Taxation v Ahern* (1986) 87 FLR 112

is whether there is sufficient information available to the Applicant to determine whether or not to commence proceedings for that relief[6] and the Applicant is not required to establish even a *prima facie* case. That error likely explains why the Applicant excessively focussed on the end result rather than the pre-requisites in rule 32.05 of the SCR.

[23] Mr Bonig said, both in preliminary correspondence and during the hearing of the application, that it was unclear as to precisely what the Applicant's putative cause of action was. I share that view as the Applicant's case in this respect could have been presented more clearly. Certiorari by way of judicial review based on jurisdictional error appears to be the putative cause of action relied on according to the Applicant's written submissions. Mr Withnall, in the course of reply submissions, confirmed that the putative cause of action relied on was that as set out in paragraphs 2 - 5 of the Applicant's written submissions filed 7 August 2024.

[24] The confusion concerning that arises from the matters set out in paragraph 14 of Mr Withnall's affidavit made 20 May 2024. Although that also refers to certiorari as the putative cause of action, there it is said to be based on the matters specified in subparagraphs (a) - (l) of that affidavit. Of those, only that in subparagraph 14(d) corresponds, and then not precisely, with paragraphs 2 - 5 of the Applicant's written submissions. Although Mr Withnall did not address the grounds in paragraph 14 of his affidavit in the

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6 Rule 32.05(b) of the SCR.

course of argument, other than to state that the putative cause of action relied on was that as set out in paragraphs 2 - 5 of the Applicant's written submissions, he did not indicate that the grounds in the affidavit were abandoned. The position is therefore unclear and that is highly unsatisfactory. I suspect that those grounds were intended to be abandoned in the circumstances, which I find unsurprising given that I think only one of those grounds can support the relevant criteria. This reinforces my view that the affidavit was used as a tactic.[7] However, as those grounds were not formally abandoned I will in turn consider those matters.

[25] What was submitted in paragraphs 2 - 5 of those written submissions was firstly, that the Applicant denied the allegation of sexual abuse and was aggrieved by the decision and its publication. That can only be background and not a cause of action for the purposes of rule 32.05(a) of the SCR.

[26] Secondly, that as the findings made against the Applicant were said to be based on "*strong corroborative, behavioural and psychological information about [EA]..*",[8] and as the Applicant had not undergone any psychological testing, reliance on such material was an irrelevant consideration amounting to jurisdictional error. Leaving aside for the moment that I do not consider that the reference necessarily refers to information based on a professional assessment, there was no evidence as to whether the Applicant

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7 See para 11.

8 See para 10.

had, or had not, undergone any psychological testing. All I had before me in that respect was Mr Withnall telling me, in the course of submissions, that the Applicant had not been tested but that is not sufficient on its own.

[27] Although I acknowledge that the Applicant does not have to establish even a *prima facie* case in respect of the putative cause of action, as the assessment required for rule 32.05(a) is to be made objectively and based on recognised legal grounds, the Applicant does bear the onus to establish that the prerequisites set out in rule 32.05 are satisfied. In my view the requirement to show reasonable cause places an onus on the Applicant to at least provide the evidence to support the recognised legal grounds, else all that is presented is mere assertion and conjecture, not belief. The absence of evidence that the Applicant has not undergone any psychological assessment is therefore fatal. As I have no evidentiary basis to find that the proposed cause of action is reasonably available, it cannot be shown that it was an irrelevant consideration as the Applicant argued. Consequently it cannot be established that there is any jurisdictional error in turn negating the availability of relief by way of judicial review. If the matter turned on this alone the result would have been the dismissal of the Applicant's application for preliminary discovery.

[28] Notwithstanding that Mr Withnall put to me that the putative cause of action relied on was the foregoing, I now turn to consider whether any of the grounds in paragraph 14 of Mr Withnall's affidavit made 20 May 2024

retrieves the situation for the Applicant. In summary form those grounds were:

(a) the failure to particularise the allegations concerning the child W;

(b) the failure to give notice of the investigations into the child S thereby depriving the Applicant of an opportunity to present material information to investigators;

(c) the failure to provide the Applicant with the material upon which the various decisions were made;

(d) the failure to provide the Applicant with notice of the behavioural and psychological information that was relied upon;

(e) the likelihood that the evidence of the child W was uncorroborated;

(f) the likelihood that the evidence of the child S was uncorroborated;

(g) the failure to enquire of the Applicant and E as to whether they had relevant information;

(h) that TF accepted that the available evidence could be assessed on the civil standard and failed to consider *Briginshaw* principles;

(i) the absence of any provision in the Act excluding the principles of natural justice;

(j) the immediate legal consequences of TF's findings namely, the revocation of the Applicant's approval as a carer and the mandatory requirement to make a report to the Children's Commissioner;[9]

(k) the readiness by which the exercise of statutory powers under the Act can be distinguished from the private acts of public servants making voluntary enquiries without exercising a statutory power, as might have been the case under child protection schemes in another jurisdiction;

(l) the Applicant's interest in not being subject to the indignity of being officially declared the "Person Believed Responsible" when those allegations have not been substantiated, and that any "Belief" is not reasonable, and that the Applicant was not aware with any particularity of what he has been alleged to have done.

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[9] Sections 15 and 16 of the Act.

[29] A number of these grounds were confusing and some were not well articulated. Some, I think, amounted to bare statements or commentary such that they could not support a finding that there was reasonable cause to believe in the existence of available relief for the purposes of rule 32.05(a) of the SCR.

[30] In respect of the ground in subparagraph 14(a), noting that the Applicant and E were informed of the allegation of sexual assault in the letters from TF dated 12 February 2024 and 28 March 2024, it is not apparent why the Applicant alleged a failure to particularise. Presumably this is meant to refer to a failure to provide further or better particulars but what further particulars should have been provided was not specified. Noting that the Applicant must establish, *inter alia*, insufficient information to decide whether or not to commence proceedings, as opposed to an assessment of the prospects of success, I consider that the particulars the Applicant was given would have been sufficient for the Applicant to determine whether to commence proceedings, leaving the question of defences aside for the moment. In my view the Applicant only required knowledge that it was alleged that he sexually assaulted W to decide whether or not to seek judicial review. As the Applicant denied that allegation, I cannot see how any further information, such as dates, times, places and conduct alleged, would have been necessary to arrive at that decision, as opposed to an assessment of the prospects of success. Although the Applicant has also

sought provision of the investigation report, that was only put on the basis discussed at paragraph 26 above and that is no longer an issue.

[31] I have already dealt with the ground in subparagraph 14(d), albeit in a different context.[10]

[32] The grounds in subparagraphs (e) and (f) raise irrelevant matters in my view. Although confined to W and S, I assume equal application also to the other two children the subject of investigations. Leaving aside considerations of any requirement for corroboration in the criminal context, and although there is the possibility that the Applicant may face criminal charges, I was not referred to any provision of the Act or any other requirement which demonstrates the need for corroboration. Hence these grounds cannot satisfy the criteria in rule 32.05(a) as, without more, it cannot be said that there is reasonable cause to believe that they can found a claim for relief based on judicial review.

[33] The ground in subparagraph 14(g) pre-supposes that the Applicant may have had some information to present to investigators. Absent some evidence about that, it is not possible to assess the reasonableness of this ground as supporting the existence of a cause of action for the purposes of rule 32.05(a) of the SCR. That is notwithstanding the reference in the subparagraph to the "obviousness" that the Applicant and E would have some relevant information. In any case the letter from TF dated 12

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10 See paras 26 and 27 above.

February 2024 offered E an opportunity to meet to discuss the report of the misconduct by the Applicant.

[34] Although put in an unnecessarily complicated way based on the supposedly "*apparent belief*" of the decision-maker, succinctly the ground in subparagraph 14(h) complains that the decision-maker applied the civil standard of proof and failed to apply the Briginshaw principles.[11] That seems to flow from the reference in the letter from TF of 28 March 2024 to findings having been made "*on a balance of probabilities*". The use of those bare words in this context does not necessarily indicate failure to apply the appropriate standard of proof.

[35] Subparagraph 14(i), refers to the absence of any provision in the Act which excludes principles of natural justice. That appears to be a convoluted way of alleging that natural justice was not complied with in the decision making process. If that is the case then that adds nothing to the other grounds.

[36] Subparagraph 14(j) is puzzling. I accept that legal consequences flowed from TF's decision but what is not clear is how that alone establishes any basis to challenge that by judicial review. Therefore, in my view absent some demonstrated legal or evidentiary basis, that cannot satisfy the criteria in rule 32.05(a).

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[11] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[37] As for the ground in subparagraph 14(k), for proper context I set out that ground in full namely, "*the readiness by which the exercise of statutory power under Part 2.2 Division 4A of the CAPOCA (NT), which include* in terrorem *coercive powers for obtaining information from relevant persons, can be distinguished from the private acts of public servants making voluntary enquiries without exercising a public power, as might have been the case under the child protection scheme in another jurisdiction*". I do not understand what that means. It appears to be a jumble of multiple thoughts. I cannot see how whatever might occur in another jurisdiction can be relevant in the Territory. How that supports a judicial review challenge based on jurisdictional error is woefully unclear and Mr Withnall did not clarify that in his oral submissions.

[38] The ground in subparagraph 14(l) seem to raise irrelevant matters even if it could be said that the allegations made against the Applicant were not substantiated.[12] They appear to be a repetition of the grounds in subparagraphs 14(a) and (h). I accept that the Applicant has an interest, and therefore standing, in respect of the decision complained of but I do not consider that what is expressed in that subparagraph adds anything further to that in subparagraphs 14(a) and (h).

[39] That leaves consideration of the grounds in subparagraphs 14(b) and (c). In respect of the former, and although the ground is confined to the child S,

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[12] Compare with the letter from TF dated 28 March 2024 being Annexure EW2 to the affidavit of Eric Gordon Withnall made 20 May 2024.

the evidence as discussed above demonstrates that TF gave E notice, and brief particulars, of the investigation concerning the child W. There is no evidence that notice or particulars were given in respect of the investigations in respect of the three other children. The first knowledge that the Applicant and E had of those investigations was the letter from TF dated 28 March 2024 which set out the result of all of the investigations. On that evidence neither the Applicant nor E were given an opportunity to answer the allegations and they were therefore denied procedural fairness. In my view, that demonstrates that the Applicant has reasonable cause to believe that he is entitled to relief by way of orders for certiorari on an application for judicial review. I consider that alone to be sufficient to satisfy the criteria in rule 32.05(a) of the SCR.

[40] Although ordinarily it could be said that the ground in subparagraph 14(c) also satisfies the criteria as the requested materials have not been provided, that is circular given that is the core issue in the current application. Much turns on privilege and the question of whether the Applicant has sufficient information for the purposes of rule 32.05(b) in respect of those documents. In respect of the former, I think that is more relevant to the question of the residual discretion.

[41] The Respondent's challenge to the application overall focussed more on the criteria of whether or not the Applicant had sufficient information in rule 32.05(b) of the SCR than on the criteria rule 32.05(a) of the SCR. What the Respondent submitted in respect of the criteria rule 32.05(a) was an issue

of standing, namely that if the Applicant's putative cause of action is a judicial review challenge to the decision of TF of 28 March 2024, then as that was a decision to revoke the approval of the Applicant's wife as an "*authorised carer*",[13] the Applicant had no standing to challenge that decision. The affidavit of Michelle Louise McManus made 17 July 2024 however acknowledges that the Applicant's wife was an "*authorised carer*" and that she "*… in turn appointed her husband, the Applicant as a Co-Carer…*", an appointment which was apparently recognised by TF. In my view that is sufficient to find that the Applicant has an interest in the decision, and hence standing, as clearly his appointment as a co-carer was automatically revoked with the revocation of the authorised carer status of the Applicant's wife.

[42] The second prerequisite for an order for preliminary discovery is in rule 32.05(b) of the SCR and requires the Applicant to show that he has insufficient information, after making all reasonable inquiries, to enable him to determine whether to commence proceedings in this Court. There are two limbs to this criteria the first of which is that the Applicant has made all reasonable inquiries.

[43] The only inquiries the Applicant has made is a request to TF for the required documents. There is no evidence of any other inquiries. Although there was reference in the correspondence that the Applicant could have

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[13] Affidavit of Michelle Louise McManus made 17 July 2024 at para 1.

made a Freedom of Information application, in the course of argument the Respondent conceded that TF is exempt under the *Information Act 2002* so I disregard that as an available means of inquiry.

[44] What is reasonable for the purposes of rule 32.05(b) depends on the context.[14] Although that does not necessarily require applicants to make inquiries that are predictably fruitless,[15] the requirement does contemplate a reasonable exhaustion of alternative sources of information beyond a request to a party.[16]

[45] In practical terms the nature of the documents sought appear to be documents exclusively in the possession of TF. For that reason I accept that the Applicant has made all reasonable inquiries as there is no other alternative reasonably available to the Applicant to obtain the required information.

[46] The second limb of the criteria in rule 32.05(b) requires the Applicant to demonstrate that he has insufficient information to enable him to determine whether to commence those proceedings and that renders documents relevant to defences to be discoverable.[17]

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14 *Australian Broadcasting Corporation v Seven Network Ltd* [2005] FCA 1851.

15 *Australian Broadcasting Corporation v Seven Network Ltd* [2005] FCA 1851 at para 13; *Martynova v Brozalevskaia (No 2)* [2023] NTSC 45 at para 58.

16 *GU Insurance Limited v Malaysia International Shipping Corp Berhad* (2001) 187 ALR 279, at p 288; *Martynova v Brozalevskaia (No 2)* [2023] NTSC 45 at para 57.

17 *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28 at para 14.

[47] Mr Bonig submitted that the Applicant already had enough information or material to commence proceedings as the grounds in subparagraphs 14(a) - (l) of Mr Withnall's affidavit made 20 May 2024 alone would have been sufficient to decide that. I agree broadly but in a converse way namely, that none of the information likely to be provided based on those grounds goes to the decision to commence proceedings as opposed to an assessment of the prospects of success. That is notwithstanding that I consider that the ground in subparagraph 14(b) satisfies the requirements of the criteria in rule 32.05(a).

[48] Returning now to consider whether information concerning defences would make a difference, Mr Withnall relied on materiality arguing that as being analogous to a defence[18] for this purpose. I think that analogy is apt. In the context of certiorari, that principle is that relief is routinely refused if an applicant cannot establish that a different result would have occurred had there not been jurisdictional error.[19]

[49] Mr Withnall submitted that any relief available to the Applicant based on jurisdictional error will be futile if material available to TF is such that TF could still legitimately conclude that the allegations made against the Applicant were made out. In that event declaratory relief would be refused as the Applicant would not be able to establish justification for judicial

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18 See subparagraph 5 in para 16 above.

19 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

intervention, relying on *Atkinson v Bardon & Ors*.[20] He submitted that the request for the documents in the current application was necessary to address that uncertainty.

[50] I think that also overlaps with the residual discretion which I discuss below. More relevantly to the residual discretion, I have accepted only a putative cause of action based on the lack of notice in respect of the investigation of the three other children for the purposes of the pre-requisite in rule 32.05(a). For the above reasons, if TF's decision had only been confined to the child W and not also to the three other children, the Applicant would not have demonstrated the required reasonable belief of entitlement to relief required by rule 32.05(a) given that I have ruled against the Applicant in respect of all other grounds. Materiality considerations means that TF could make the same decision to revoke the status of E and the Applicant as carers based purely on the allegations in respect of the child W. In that case, lack of procedural fairness in connection with the allegations of the other three children is rendered nugatory. In my view the Applicant fails to satisfy the criteria in rule 32.05(b) of the SCR.

[51] Although it is not therefore necessary to determine the remaining issues I will address those in case it becomes relevant.

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20 [2018] NTSC 9.

[52] The final criteria to be established is that there is reasonable cause to believe that the Respondent has, or had, or is likely to have, or has had, in its possession a document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the Applicant would assist him to make the decision as to whether to commence proceedings.

[53] This criteria was not the subject of any significant opposition by the Respondent and rightly so in my view. Moreover I think the criteria is self-evidently satisfied as, having regard to the nature of the documents sought, logically only TF, an agency of the Respondent, could have those documents.

[54] That would then have led to consideration of the residual discretion. *St George Bank Ltd v Rabo Australia Ltd & Anor*[21] is authority for the proposition that the residual discretion and beneficial nature of the rule is to be given the full scope that the language of the rule will reasonably allow. Although that does not permit the making of an order if any of the enlivening factors in rule 32.05 are not made out, the converse is true. The Court may refuse to make an order even where the enlivening criteria are satisfied.[22] However, normally there will be little scope for refusal of relief

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21 (2004) 211 ALR 147.

22 *Glowatzky v Insultech Group Pty Ltd* (1997) 39 IPR 215 at 220.

where the enlivening requirements have been met because the remedy provided by the rule is to be beneficial construed and applied.[23]

[55] When exercising the discretion the Court has regard to all relevant factors. What is relevant depends on the facts of each case but as a guide, some factors relevant to the current application derived from decided cases include:

- The level of inconvenience and cost that will be caused to the respondent;
- Whether the respondent will be reimbursed for its costs;
- Whether an order would be futile because the documents are privileged;
- The prospect of the documents sought providing the information required by the applicant;
- Whether the fact that there is no real prospect of success is apparent or discovery will not serve any useful purpose.

[56] In my view much would have turned on the last three of those factors. Relative to the third factor, the Respondent submitted that the overarching policy objective of the Act is to protect three categories of people. They are firstly, children taken into care. Secondly, the authors of the reports prepared for the purposes of the Act and lastly, the authorised people dealing with those reports. That, it was submitted, is apparent from various provisions of the Act.[24] The Respondent contends that provision of the

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[23] *Murdesk Investments Pty Ltd v Secretary to the Dept of Business and Innovation* [2011] VSC 436 at para 72.

[24] *Care and Protection of Children Act (NT)* 2007, ss 4, 5, 27, 293A, 293F and 309.

subject documents would run counter to the policy objectives of the Act and that a claim of public interest immunity can be made in respect of those documents. If correct and substantiated, that would be a valid basis for denying the relief the Applicant seeks on discretionary grounds.

[57] Mr Bonig also submitted that the application should be declined on discretionary grounds because the Applicant may have had an ulterior purpose in bringing the application namely, to obtain information relevant to the pending criminal investigation against him in respect of the alleged sexual assaults. I accept that if it was established that the application for preliminary discovery was motivated by the potential criminal charges, that would be a relevant and disqualifying consideration. Although that may be an incidental effect of an order for preliminary discovery, there was no evidence that the application was not bona fide and was only, or primarily, made for that claimed purpose. I do not consider it appropriate to inferentially find that to be the case.

[58] Therefore, it seems that what is most relevant is the extent to which the information sought is subject to protection based on policy considerations as Mr Bonig submitted. A related question indirectly relative to the fourth factor in paragraph 55, is whether the extent of any appropriate redactions that the Respondent could properly make to the documents would render the information of little use for the required purpose. Mr Bonig submitted that any material produced would be, appropriately, and heavily, redacted.

[59] Despite that I consider there is an arguable and strong basis for opposition to an order on discretionary grounds based on privilege, it is difficult to assess the extent of that privilege based only on a description of the nature of the documents and without an inspection of the documents. The same applies to the balance of documents after appropriate redactions. I would not decline an order on the basis of the residual discretion on that basis alone.

[60] Although subparagraphs 14 (a) - (l) of Mr Withnall's affidavit of 20 May 2024 set out extensive possible grounds for an application for judicial review, many of those grounds lack substance and/or fail to satisfy the requirements of rule 32.05(b) of the SCR. In respect of materiality, as discussed in paragraph 50, as TF could have made the same decision based only on the allegations concerning the child W, the order for preliminary discovery sought would not have served any useful purpose as the Applicant had no real prospects of success.

[61] Therefore, had I found that the criteria in rule 32.05(b) had been satisfied, I would have declined to exercise my discretion in the Applicant's favour.

[62] Next, for completeness I deal with the application for an extension of time to commence proceedings. In summary, rule 56.02(1) sets a 60 day time limit for applications for judicial review commencing from notification of the relevant decision. There is a specific provision to deal with extensions

of that time limit in rule 56.02(3) and that power to grant an extension is conditioned on the establishment of "*special circumstances*".

[63] Although rule 3.02(1) of the SCR gives the Court power to extend any time fixed by the rules, that is expressed in general terms and satisfying the requirement to show "*special circumstances*" in rule 56.02(3) is additionally required. Circumstances that would suffice to justify an extension under rule 3.02(1) will not necessarily suffice for rule 56.02(3).[25]

[64] No authorities were put to me by either party as to the meaning of the phrase "*special circumstances*" in rule 56.02(3). Oddly, the Applicant's initial written submissions did not deal at all with this apparently critical question and the Applicant only dealt with this issue in reply, and then only peripherally.

[65] There are limited authorities on what amounts to "*special circumstances*" for the purposes of the rule. Rule 56.02(3) is in identical terms to the corresponding rule in the Victorian Supreme Court Rules and the Victorian version also requires special circumstances to be demonstrated. In *Mann v Medical Practitioners Board of Victoria*[26] the Victorian Supreme Court said that it was not appropriate to judicially define the meaning of the phrase as it was deliberately flexible to avoid the unintended exclusion of circumstances which might result from use of more prescriptive words. In

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[25] *Kay v Legal Profession Tribunal* [2000] VSC 460.

[26] [2002] VSC 256.

Daher v Bell[27] the Victorian Court of Appeal said that the rule requires the Court to be objectively satisfied that special circumstances exist and that the existence of special circumstances is to be determined by reference to all the circumstances of the case. The Court of Appeal set out a number of considerations relevant to the exercise of the discretion conferred by the rule. Relevantly to the current proceedings, those considerations included:

- The length of the delay;
- The reason for the delay;
- Whether the plaintiff has an arguable case;
- The justice, and prejudice, to both parties;
- The public interest in the finality of litigation.

[66] Special circumstances have been found to exist in cases where:

- The plaintiff had, within the 60 days, issued other proceedings in the court in which the point at issue in the proposed proceedings was raised namely, an appeal in respect of a related claim of apprehended bias;[28]
- The issue to be raised was one of general significance;[29]
- The parties were not notified of the decision and of the orders made.[30]

[67] Instances where special circumstances were found not to exist are:

- Where the failure to commence proceedings was due to an absence of legal aid to assist the prospective plaintiff;[31]

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27 [2011] VSCA 192.

28 *Portelli v Stewart*, Unreported, Supreme Court of Victoria, Byrne J, 6 August 1996.

29 *Portelli v Stewart*, Unreported, Supreme Court of Victoria, Byrne J, 6 August 1996.

30 *Carra v Hamilton* (2001) 3 VR 114.

31 *Denysenko v Dessau* [1996] 2 VR 221.

- Where the failure to commence proceedings was due to the impecuniosity of the prospective plaintiff;[32]
- Where the failure to commence proceedings was due to an error of legal advisers;[33]
- Where a plaintiff fell ill during the 60 day period;[34]
- Where notwithstanding that a chronic illness of the prospective plaintiff might have amounted to special circumstances, the length of the delay was considered too prejudicial to the other party.[35]

[68] Before dealing with the issue, I first deal with a preliminary matter that was raised. The Applicant submitted that the time limit in rule 56.02(1) did not apply to the proposed declaratory relief. I repeat what I have already said that in my view declaratory relief is a remedy and not the relief for the purposes of rule 32.05(a).[36] The relief proposed for the purposes of rule 32.05(a) is certiorari by judicial review and rule 56.02(1) clearly applies to that relief. Accordingly, the Applicant must show special circumstances before an extension of time can be considered.

[69] What the Applicant proposed as special circumstances was firstly, the Respondent's decision to initiate a review, implicitly suggesting that was unnecessary and alleging an absence of statutory power to do so, as

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32 *Wolcott v Davies* (1984) 4 FCR 124; although Byrne J in *Portelli v Stewart* expressed doubt as to whether that was correct;

33 *Wolcott v Davies* (1984) 4 FCR 124; *Prencipe v. Nisselle* [1998] VSC 137; *Portelli v Stewart*, Unreported, Supreme Court of Victoria, Byrne J, 6 August 1996.

34 *Lovejoy v Myer Stores Ltd (No 2)* [1999] VSC 271.

35 *Young v County Court* [2005] VSC 311.

36 See para 21.

opposed to responding to the Applicant's request for production of documents, a delay which used up most of the 60 day period.

[70] Secondly, the Respondent's multiple extensions to the completion date for the review. The Applicant alleges that those extensions stultified the Applicant's efforts to obtain the requested documents.

[71] Thirdly, the Respondent's refusal to provide "… *Evidence or materials justifying their decision*…" subsequent to the email from TF of 17 May 2024.

[72] As to the first, divorced of causative considerations, that is a verbose way of complaining of TF's delay in ultimately refusing the request. Granted that much of the 60 day period was taken up pending that review, nonetheless the review was completed, and the Applicant and his wife were notified of the outcome, approximately 11 days before the expiry of the limitation period. I think that left the Applicant ample time to prepare and file the Originating Motion seeking the contemplated orders. That could also have been in conjunction with a summons for particular discovery. Although general discovery is not routinely permitted in matters commenced by Originating Motion,[37] orders for particular discovery in appropriate cases can be made.[38] That may have provided a better option for the Applicant to obtain the required documents as opposed to allowing

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37 Rule 29.01(1) of the SCR.

38 Rule 29.08(1A) of the SCR; see also *Joondanna Investments Pty Ltd v The Minister for Lands, Planning and the Environment & Anor* [2014] NTSC 58.

the proceedings to go out of time while seeking preliminary discovery. In that case, that could amount to an error of legal advisers negating certain special circumstances for the purposes of rule 56.02(3) of the SCR.[39]

[73] The second consideration proposed is, I think, largely repetitive of the first, albeit expressed differently.

[74] I do not understand the third circumstance. It also appears to be repetitive of the first circumstance. In any case, it is difficult to see how this can be a relevant consideration given that by the time of the email of 17 May 2024 it should have been apparent to the Applicant that the requested documents would not have been provided.

[75] For those reasons I doubt that the Applicant could have satisfied the requirements of showing special circumstances for the purposes of rule 56.02(3) of the SCR.

[76] Nonetheless, and in any case, I do not think it is appropriate that an order for any required extension should be made as part of this application for the following reasons. Firstly, if an order for preliminary discovery is granted, there is no certainty that substantive proceedings will be commenced thereafter. That was a clear possibility as materiality considerations would have made proceedings futile.

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39 See paras 11 and 67.

[77] Equally important is that I expect some time would elapse before there could be compliance with an order for particular discovery and production of documents may have been significantly delayed if a claim was made for public interest immunity privilege and that was then challenged.

[78] The overall effect is that the granting an extension now would result in a largely open-ended extension. Noting the relatively short 60 day period that ordinarily applies to applications for judicial review, that would necessarily result in an extension of well in excess of the actual limitation period fixed by rule 56.02. That limitation period has already been exceeded now by over three months. The Court would be required to case manage the matter beyond the conclusion of the current application to prevent abuse of such an order. Ongoing case management of a concluded matter is not contemplated by, and runs counter to, usual case management principles.

[79] In my view the better course of action was for the Applicant to make an application for the extension concurrently with any substantive proceedings which the Applicant commenced in the future and therefore, had I granted preliminary discovery, I would have declined to consider the application for an extension of time.

[80] For these reasons, I dismiss the Applicant's Summons.

[81] I will hear the parties as to ancillary orders.