AB v Hayes & Anor [2019] NTSC 13

PARTIES:	AB
	v
	HAYES, Neil Stephen
	And
	AB
	v
	BAUWENS, Juanita Margaret
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NOS:	LCA No. 13 of 2017 (21614729) and LCA No. 14 of 2017 (21616782)
DELIVERED:	6 March 2019
HEARING DATES:	22 June and 6 August 2017
JUDGMENT OF:	Southwood J

CATCHWORDS:

DOMESTIC VIOLENCE – Appeal – *Local Court (Civil Procedure) Act 1989* (NT) – Error of law – Whether there is any evidence of the facts and whether a particular inference can be drawn from the facts are questions of law

DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Appeal – Whether there was a proper evidential basis for the Local Court to conclude there

were reasonable grounds for the protected person to fear commission of domestic violence – No evidence protected person was harassed by the appellant engaging in regular and unwanted contact – Local Court findings were unreasonable, irrational and arbitrary – Appeal allowed – Domestic violence order set aside

DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Appeal – Local Court power to compel the destruction of personal property (digital images) under s 21 – Whether Local Court acted *ultra vires* in making order to compel the destruction of sexually explicit digital images – Person who took digital image owner of digital image – Clear proprietary interest affected – Presumption of statutory interpretation not to interfere with proprietary interests unless done so by clear and unambiguous words applied – No clear and unambiguous words in s 21 to grant Local Court power to order a person to destroy property – Local Court did not have power to direct person to destroy property – Appeal allowed – Domestic violence order set aside

APPEAL – Whether there was a proper evidential basis for Local Court to conclude there were reasonable grounds for protected person to fear commission of domestic violence arising out of the possession of sexually explicit images – Local Court finding that there was a reasonable fear of intimidation as a result of appellant’s possession of sexual explicit images unreasonable and irrational – Appeal allowed

DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Whether Local Court order is *ultra vires* as the Local Court substituted a completely different order to the section 41 police domestic violence order – Variation of order – not an appropriate vehicle to consider the issue – Unnecessary to decide

Domestic and Family Violence Act 2007 (NT) s 5, s 6, s18, s 21, s 28, s 41, s 42, s 43, s 82(1), s 82(2), s 116
Local Court (Civil Procedure) Act 1989 (NT) s 19

American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd [1981] HCA 65; (1981) 147 CLR 677; *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336; *Browne v Dunn* (1893) 6 R. 67; *Corby v Allen and Unwin* (2013) FCA 370; 297 ALR 761; *Coulton & Ors v Holcombe & Ors* [1986] HCA 33; (1986) 162 CLR 1; *Peach v Bird* [2006] NTSC 14; (2006) 159 A Crim R 416, referred to

REPRESENTATION:

Counsel:

Appellant:	R Murphy
Respondents:	L Nguyen

Solicitors:

Appellant:	Murphy & Associates, Barrister and Solicitors
Respondents:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Sou1901
Number of pages:	44

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

AB v Hayes & Anor [2019] NTSC 13
LCA No. 13 of 2017 (21614729) and LCA No. 14 of 2017 (21616782)

BETWEEN:

AB
Appellant

AND:

NEIL STEPHEN HAYES
Respondent

AND

AB
Appellant

AND:

JUANITA MARGARET BAUWENS
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 6 March 2019)

Introduction

[1] The appellant is a police officer who was stationed in Alice Springs. In 2016 the Northern Territory police applied to the Local Court for two domestic violence orders under the *Domestic and Family Violence Act 2007* (NT). The appellant was named as the defendant in both applications. In the first application (Local Court proceeding No. 21614729) EE, who is the

appellant's wife's daughter from a previous relationship, was named as the protected person. In the second application (Local Court proceeding No. 21616782) CD, the appellant's wife, was named as the protected person. Both CD and EE are immigrants from Southeast Asia. They started living with the appellant in Alice Springs in 2011. In that year CD's and the appellant's son was born. They were married in 2012. The appellant and CD have now separated. They separated in 2016 and have lived separately and apart since.

[2] The two applications were heard together. Proceeding No. 21614729 was brought under s 28 of the *Domestic and Family Violence Act*. Proceeding No. 21616782 involved the confirmation of a police domestic violence order made by an authorised police officer under s 41 of the *Domestic and Family Violence Act*.

[3] On 11 April 2017 the Local Court at Alice Springs made the following order in proceeding No. 21614729:

> That for a period of 12 months the [appellant] is restrained from contacting or approaching the protected person directly or indirectly.

[4] On the same day the Local Court at Alice Springs made the following order in proceeding No. 21616782:

> For a period of two months and within that period the [appellant] is required to delete and destroy all images of a sexual nature of the protected person, including from any computer, recording device, storage device or cloud storage facility within his possession or control and not deal with or publish those images in any other way.

[5] The appellant filed two appeals in the Supreme Court, one for each of the Local Court proceedings. In Local Court Appeal No. 13 of 2017 the appellant appealed against the domestic violence order made in proceeding No. 21614729 on the following grounds.

1. There is no proper evidential basis for the [Local Court] to conclude that there were reasonable grounds for the protected person to fear the commission of domestic violence.

2. The learned Local Court Judge erred in failing to apply the principles laid down by the High Court in *Briginshaw v Briginshaw*[1] when concluding that there were reasonable grounds for the protected person to fear the commission of domestic violence from the appellant.

3. The learned Local Court Judge erred in failing to apply the rule in *Browne v Dunn*[2] when admitting evidence.

4. The learned Local Court Judge erred by failing to impose an objective test when determining whether there were reasonable grounds for the protected person to fear the commission of domestic violence from the appellant.

[6] In Local Court Appeal No. 14 of 2017 the appellant appealed against the domestic violence order made in proceeding No. 21616782 on the following grounds.

---

1 [1938] HCA 34, (1938) 60 CLR 336.

2 (1873) 6 R. 67.

1. The order […] is *ultra vires* [as] the [Local Court] lacks the power to compel the appellant to destroy his property.

2. There [was] no proper evidential basis for the [Local Court] to conclude that there were reasonable grounds for the protected person to fear the commission of domestic violence arising out of the appellant's possession of the images.

3. The learned Local Court judge erred in failing to apply the principles […] in *Briginshaw v Briginshaw* when concluding that there were reasonable grounds for the protected person to fear the commission of domestic violence arising out of the appellant's possession of images.

4. The learned Local Court Judge erred in failing to apply the rule in *Browne v Dunn* when admitting the testimony of Senior Constable Bauwens into evidence as it applied to the appellant's purported conduct towards the protected person from 6 April 2016 when the s 41 domestic violence order was issued.

5. The Local Court's order is *ultra vires* in that it does not confirm the section 41 domestic violence order or constitute a variation of it.

The nature of the appeals to the Supreme Court

[7] Appeals from the Local Court to the Supreme Court about domestic violence orders are governed by s 19 of the *Local Court (Civil Procedure) 1989 Act* (NT). Subsection 19(1) of the Act confines such appeals to questions of law.

[8] It was common ground between the parties that the following passage from *Peach v Bird*[3] was applicable in this appeal when determining if the Local Court Judge made an error or errors of law.

> The question of whether there is any evidence of the facts and the question whether a particular inference can be drawn from the facts are both questions of law: *Australian Broadcasting Tribunal v Bond*; *Tracy Village Sports and Social Club v Walker*. To make a finding of fact or draw an inference in the absence of evidence is equally an error of law: *Sinclair v Maryborough Mining Warden*; *Tracy Village Sports and Social Club v Walker*. There is, however, no error of law in making a wrong finding of fact or drawing an illogical inference, if the finding is reasonably open. "Reasonably" in this context means no more than rational tribunal of fact acting according to law as opposed to an irrational tribunal acting arbitrarily: *Tracy Village Sports and Social Club v Walker; Berlyn v Brouskos* (footnotes omitted).[4]

Domestic violence

[9] Section 5 of the *Domestic and Family Violence Act* provides that domestic violence is any of the following conduct committed by a person against someone with whom the person is in a domestic relationship: (a) conduct causing harm; (b) damaging property, including the injury or death of an animal; (c) intimidation; (d) stalking; (e) economic abuse; and (f) attempting or threatening to commit such conduct as is previously mentioned.

[10] Section 6 of the *Domestic and Family Violence Act* states that intimidation is: "(a) harassment of the person; or (b) any conduct that causes a reasonable apprehension of: (i) violence to the person; or (ii) damage to the property of the person, including the injury or death of an animal that is the person's

---

3 (2006) 159 A Crim R 416.

4 Ibid at [11]. The decision was upheld on appeal, see *Peach v Bird* (2006) 17 NTLR 230 at [10]-[13].

property; or (c) any conduct that has the effect of unreasonably controlling the person or causes the person mental harm". Harassment includes regular and unwanted contacting of the person, including by mail, phone, text messages, fax, the internet or another form of electronic communication; and giving or sending offensive material to the person. Subsection 6(2) of the *Domestic and Family Violence Act* provides that: "for deciding whether a person's conduct amounts to intimidation, consideration may be given to a pattern of conduct (especially domestic violence) in the person's behaviour".

[11] Section 18 of the *Domestic and Family Violence Act* states:

> 1. The issuing authority may make a DVO only if satisfied there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant.
> 2. In addition, if the protected person is a child, the authority may make a DVO if satisfied there are reasonable grounds to fear the child will be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship.

[12] The test of whether there are reasonable grounds to fear the commission of domestic violence is an objective test. 'Satisfied' in s 18(1) of the *Domestic and Family Violence Act* means satisfied on the balance of probabilities. The Act contemplates that in order to determine if it is satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence, the Local Court will make findings of fact about a defendant's past conduct on the balance of probabilities. In other words, it is usually necessary for the applicant to prove the defendant has committed

past acts of domestic violence on the basis that past domestic conduct of the defendant is a reasonable basis for apprehending, or fearing, future domestic conduct. Domestic violence orders are made by the Local Court on the basis of a reasonable apprehension, or fear, of the commission of further acts of domestic violence against the protected person.

The decision of the Supreme Court in Local Court Appeal No. 13 of 2017

[13] On 22 June 2017 I allowed the appeal from the order made by the Local Court on 11 April 2017 in proceeding No. 21614729 on grounds of appeal 1 and 4 and set aside the domestic violence order. I did so on the basis that the following findings of the Local Court Judge could not reasonably be inferred from the facts and there was no evidence that the appellant harassed EE by engaging in regular and unwanted contact with her. The findings set out below were unreasonable, irrational and arbitrary.

> 1. From all of the evidence I find that EE does fear the commission of domestic violence from the Defendant. That domestic violence being intimidation and harassment *by regular and unwanted conduct*. Of course, each instance of unwanted contact or conduct by itself may not amount to domestic violence, *but the pattern of conduct over a period of time that is clear from the evidence before me, falls within the definition in the Act*.[5]
> 2. Even though they are no longer residing together, the above findings are sufficient for me to be satisfied that there are reasonable grounds for [EE] to fear the commission of domestic violence against her.[6]

---

5 *NT Police v AB* [2017] NTLC 011, at [70].

6 Ibid at [79].

[14] I also ordered the respondent to pay the appellant's costs of the proceeding.

Following are my written reasons for allowing the appeal.

The reasons for decision of the Local Court Judge in Local Court proceeding No. 21614729

[15] The Local Court Judge gave the following reasons for making the domestic violence order in favour of EE.

> […] The evidence of EE was tendered as two visually recorded statements, with accompanying transcripts. Pursuant to the Act, children cannot be cross-examined in relation to their evidence.
>
> […]
>
> [The appellant] gave evidence and was cross-examined. Several affidavits were also exhibited and formed part of his evidence. He was in attendance throughout the proceedings. In court he appeared slightly dishevelled and emotional, wearing a crumpled T-shirt and pants. Whilst giving evidence in the witness box, for the most part, he had his eyes closed and answered questions with his eyes closed. He rarely made eye contact with either his own counsel or counsel for the applicant. He cried and appeared emotionally labile.
>
> The applicants rely on several key incidents. Some of these incidents are relevant to both applications, and some are more pertinent to one or the other. These incidents include the discovery of a camera pen by EE, various actions of the defendant in the family home, including his level and frequency of intoxication, and a particular incident with a hose. There was also evidence of sexual activity outside of the relationship, including the possession of a large number of explicit photographs, some of which included CD.
>
> The following events outlined in the s 28 application are supported by photographs, are not disputed by the defendant and I accept from the evidence are an accurate summary of what occurred.
>
> > "On 19 February 2016, EE went into the bathroom to take her morning shower. EE noticed a Northern Territory police uniform shirt belonging to [the appellant] hanging in the bathroom. EE found this strange as this is the only time she can recall a police uniform shirt being hung-up in the bathroom. When she looked at the shirt closely she saw a small camera lens which was focused outward towards the shower. The camera had been taped into the shirt using black electrical tape. EE took photographs of the

> camera in situ and then removed the camera which was disguised as a pen. She took the pen apart and continued to take photographs. Inside the pen were an 8 gigabyte memory card and a USB output. EE put the pen back together and placed it back in the shirt the way she found it. EE was unsure if the pen was recording at the time she located it. EE has not seen the camera pen since. EE called her mother, Ms CD, who was visiting family in Country A and told her what she had found. Ms CD told EE to go and stay with other family in Alice Springs until she returned from Country A.'

The photographs taken by EE of the camera pen have been tendered in evidence.

[The appellant] did not become aware of the substance of this allegation until later. When CD returned from her trip to Country A it seems as though whilst she raised the matter with him, [the appellant] was under the apprehension that he was being accused of installing CCTV cameras to watch his stepdaughter in the bathroom. He was under this misapprehension when he spoke to police who arrived at his home on 9 March 2016.

Police's arrival on that evening was at the request of [the appellant]. He had called the police because he wanted to report that his stepdaughter had assaulted his son. HH had dermatitis or some form of skin condition, which required the application of a blue coloured medication. This was uncomfortable for him and [the appellant] reported that whilst trying to apply the medication EE had slapped HH, evidenced by the blue medication on his face. [The appellant] rang police and two officers, one with a body worn camera, attended at his residence.

[…]

[The appellant] has attempted to discredit the evidence and actions of EE. Initially he has told police attending at the house that she was a liar and dishonest. At that time it is clear that he was not aware that she had taken photos of the camera pen. It is open to infer that he thought there would be no proof of her allegations and that it would only be his word against hers. It is also open to infer that he was ignorant or had forgotten about the camera pen or had not turned his mind to how it would appear to someone using the bathroom.

However, once the evidence and the photographs were disclosed, [the appellant], in his affidavit, explains the camera pen thus:

> "I confirm that I had ordered a camera pen over the Internet. It was my intention to use the pen to surreptitiously record "return to work" meetings between my employer's human relations officer

> and I. I felt this was necessary given previous instances of apparent miscommunication between us both.
>
> The camera pen had arrived in the post the day before (18 February 2016) my stepdaughter had found it in the bathroom (19 February 2016). When I opened the box containing the camera pen I was disappointed to see how large and garish it was. I thought that the pen, when placed into my shirt pocket, would draw attention to itself thereby defeating the purpose for which I had purchased it.
>
> To confirm whether this would be the case, I took the camera pen into the bathroom and placed it inside the chest pocket of my police issue uniform. Upon doing so, I found that the camera pen's brass top and clasp and its size drew attention to itself and was simply not fit for the purpose I had bought it for.
>
> I had considered returning the pen but had another return to work meeting scheduled in a few days' time and would be unable to order and receive a more suitable camera pen within that time. Consequently, I got some black tape and covered the brass cap and clasp of the phone (sic) to see if that would make the camera pen less obvious. I applied the tape to the shirt over the pen rather than the pen itself as it was late in the night (about 11:00 pm) and I just wanted a quick indication as to whether the blacking out of the brass components of the camera pen would make it less conspicuous. Had this have made it less conspicuous, it was my intention to paint or mask the brass portions of the camera pen itself. However, upon covering the pen with tape over the shirt, I discovered that the camera lens became even more visible. That being the case, I just left the pen in the shirt and went to bed.
>
> The following morning, 19 February 2016, I had a shower and shave in the bathroom and went to my bedroom, got dressed and left for work. I did so without turning my mind to the two work shirts that I had hanging in the bathroom at the time or the camera phone (sic) that I had left in the shirt pocket."

In his evidence in court [the appellant] attested to not knowing where the memory card for the pen was and that he had never opened the pen to see it, nor recorded anything on it. That particular memory card does not appear to have been found in the police search of his premises. I do not accept his evidence in relation to never having opened the pen or dealt with the memory card. It would be far-fetched to assume that upon its unpacking he did not either put the pen together, or pull the pen apart to see how it worked. However, there is insufficient evidence for me to infer that because the card is missing, there may have been something untoward recorded on it, and I make no such inference.

After consideration of the evidence surrounding the pen, and despite a number of factors of concern, including that the uniform had never been hung in the bathroom before, I am unable to find that the defendant intended to use the camera pen to photograph or record EE. *I accept his evidence that he had intended to use the pen to secretly record a meeting between himself and an employee of the police*.

Other matters that the applicant relies on include allegations that the defendant walked around the house naked in the presence of EE, including whilst intoxicated, exposed her to pornographic films on his laptop *and unwanted physical contact, including coming into her bedroom on two or more occasions and touching her* and buying alcohol for her. The defendant denies all of these matters. Whilst admitting to one occasion in 2011, where he had walked late at night from his bedroom to the toilet naked and EE had stepped out of her bedroom unexpectedly, all other instances alleged were denied by him. He says he was asked by his wife not to walk around naked again, and he purports not to have.

The defendant does admit to having pornography on his laptop but denies knowingly exposing EE to it. He also says that he locks his laptop when he is not using it. The evidence of EE regarding the pornography was that while she was aware he was watching it, it was on occasions when she came home early from school, or that she saw him watching it through a window. She does not allege that he invited her to watch it or deliberately showed it to her. However, she was aware of him watching it on more than one occasion.

[…]

In endeavouring to provide her best recollection I find that she was not attempting to embellish her evidence. For example EE corrected the interpreter during her interview as to the defendant sitting down next to her rather than lying with her on her bed.

[…]

EE then goes on to describe how he sat next to her on the bed one night, patting her stomach area and saying that he loved her. She confirmed that this happened two or three times when he first came to Australia and that the defendant was drunk at the time. She was scared when he drank, although described his drinking as only one or two bottles during the working week but on weekends or holidays he would drink half a box.

EE describes one occasion, which occurred some three months prior to her interview:

> […] …my younger sibling was sound asleep but I was still awake so basically he was drunk but again I'm not too sure whether he was drunk or not drunk but anyway he went into my room and he

> was um wearing only an undie and that make me very scared um but then you know after that he just went out of the room again that time, that particular time I didn't tell Mum but then when he repeated it, it happen again when he went to the room again um the next time I did tell Mum um perhaps Mum told him but you basically um whenever he is drunk that make me very scared.

[…]

As outlined above, for an order to be made I need to be satisfied that there are "reasonable grounds" for the protected person to "fear" the commission of domestic violence against them.

This is an objective test. There is clear evidence from EE that she subjectively does fear the defendant. She states this many times in the interview, using the word 'scary' both in relation to his actions towards her and how she feels about him (scared). She is scared that during the time she has resided with him (some five years) he has come into her room uninvited and intoxicated on a number of occasions, that he has sat on a bed and patted her during one instance, that he has walked around the house naked or in his underwear, again intoxicated, that she has seen him looking at pornography on his laptop computer, that she has seen sexually explicit photographs of women (albeit not shown to her by him, but by her mother) purported to be on his phone or account (sic), that he has placed a recording device in a bathroom that she commonly uses, that he argues with her mother and makes her mother unhappy, including by being with other women, and that he has offered to buy and did buy her alcohol when her mother was away, which she did not want and which he knew her mother would not approve of. Her Aunty has also told her that [the appellant] has made unwanted sexual advances towards the Aunty. All of these behaviours combined have contributed to her fear.

Despite the defendant's denials or explanations, I do accept her evidence in relation to the above. I am satisfied she is telling the truth as to these particular instances. I am satisfied that he came into her room whilst intoxicated on more than one occasion. The evidence of Ms CD, whom EE told at the time, also supports this. I can find no advantage to her to tell lies about these occurrences, indeed her behaviour and evidence is that while she is scared she does not want [the appellant] to get into trouble.

She is also very aware that the defendant is a police officer and in her view has not acted as a police officer should, for example in buying alcohol for someone under age and in placing the camera pen in the bathroom.

Her concern did not cease upon leaving the residence, and in her interview EE speaks of a video message sent to her aunty by the defendant of her younger brother crying and her concerns about what

this could be used for in relation to a future relationship with her brother.

[…]

[…], from all of the evidence I find that EE does fear the commission of domestic violence from the defendant. *That domestic violence being intimidation and harassment by regular and unwanted contact*. Of course, each instance of unwanted contact or conduct by itself may not amount to domestic violence, *but the pattern of conduct over a period of time that is clear from the evidence before me, falls within the definition in the Act*.

[…]

The defendant either denies the allegations made about his behaviour by EE, reduces them to a once off occurrence of some years ago, minimises his behaviour, or provides another explanation for his actions (such as with the camera pen).

I do not find that the defendant was a particularly credible witness, certainly around his consumption of alcohol and behaviour in the family home. I do accept that his intention with a camera phone (sic) was not to film his stepdaughter; *indeed I also accept that for the most part he did not intend to perpetrate domestic violence against her*. However I am also not satisfied that he necessarily has or had any awareness or understanding about the effect of his behaviour on her. This inability, for whatever reason, contributes to the reasonableness of a fear.

His evidence and affidavits included not just his own response and version of various events, but pointed out what he considered to be discrepancies or inconsistencies in the evidence of the applicant. Whilst he consistently denied most of the allegations against him his general emphasis was not on his own actions, but the actions of others.

It is of concern that during his evidence under cross-examination in Court he claimed that it was EE who behaved inappropriately by demonstrating sexualised behaviour by flicking her wet hair at him, or sitting so he said he could see under her pyjama bottoms. He claimed EE assaulted HH on regular occasions and that she was constantly 'playing with HH's penis'. I find that these are fabrications or vast exaggerations. If the allegations in relation to HH were true the defendant, as a responsible father would have taken more action than he did. It was put to him by Counsel for the Police that these allegations were being used by him to deflect away from his own behaviour, and whilst this was denied, in my view that is precisely the reason for them.

In my view her fear is a reasonable one in all the circumstances. The defendant is a person with whom she was in a parental domestic relationship, and yet who has an ignorance and/or denial of the

> *cumulative and intimidatory nature of his behaviour towards her*. She is aware that he is a member of the police force and it is reasonable for her to assume that he has the authority, the influence and the access to information that being a member of the police carries.
>
> The defendant, by his own admission is someone who would secretly record a conversation with a fellow employee of the Police Force. His intent to do so exemplifies a lack of judgement in matters of conflict.
>
> Even though they are no longer residing together, the above findings are sufficient for me to be satisfied that there are reasonable grounds for her to fear the commission of domestic violence against her.

<u>The evidence of EE</u>

[16] During the course of hearing the appeal, counsel were asked to highlight the transcript of EE's recorded interviews to clearly identify her evidence about the conduct of the appellant, which was alleged to constitute domestic violence, so the evidence could be thoroughly reviewed. It was apparent from that exercise that there were a number of significant inconsistencies between what EE told Detective Sergeant Carmen Butcher on 20 March 2016 and what EE told her on 30 March 2016. The quality of EE's evidence was also detrimentally affected by the leading nature and inaccuracy of many of Detective Sergeant Butcher's questions. A fair assessment of many of her questions is that she did not have an open mind. Consequently, it was necessary to carefully scrutinise EE's evidence.

[17] There were the following significant inconsistencies in EE's evidence.

1. As to the degree and regularity of the appellant's drunkenness:

(a) During her interview on 20 March 2016 EE stated that she was not *really* happy with her stepfather because he is "so messy" and every day he drank beer and "made me scary (sic)".

(b) During her interview on 30 March 2016 EE stated that the appellant did not drink beer very much. He gets drunk on the weekends and on holidays. He does not drink so much during the week. He just drank one or two bottles of beer on weekdays. He drank maybe half a box on the weekend. He is basically very clean when he goes to work. When he stays at home he often drinks beer and gets drunk sometimes. Also with cooking he is quite messy.

Conclusion: Ultimately, according to EE's evidence, it appears that the appellant's consumption of alcohol is no different to many people who live in the Northern Territory. The appellant's consumption of alcohol alone does not constitute domestic violence and cannot be a basis for EE fearing the appellant will engage in domestic violence.

2. As to EE observing the appellant watching pornography:

(a) During her interview on 20 March 2016, EE stated that she just saw him watching a sexy movie. After lunch one day she came home early from school because she was hungry. The appellant was not at work. She saw him watching a "bad naked girl women". It was not a movie. It was a picture. It was a lot of pictures. She looked straight through the window and she saw him watching

something sexy. When the appellant knew she could see him watching pornography he stopped watching. He did not keep watching. On another occasion, about four or five years ago, a friend of hers came to her house and her friend saw the appellant watching a sexy movie. She told EE about it.

(b) During her interview on 30 March 2016, EE stated that it happened quite a few times that she went to school and forgot her food and had to come home early because she felt hungry. She came home and saw the appellant watching an adult movie involving an underage minor. She was so scared she did not go into the house. The movie had a lot of naked girls in it. The girls were maybe under 17 years of age. She did not watch much. She just saw through the door. She knocked on the door and the appellant opened the door for her. She saw him watching such movies a lot. When the appellant knows EE can see what he is doing he trembles and shakes and looks concerned.

Conclusion: The inconsistency in this evidence is at a level which could cause a reasonable and impartial trier of fact to doubt the whole of EE's evidence. EE's evidence is internally inconsistent. She says that she did not go into the house, and later that she knocked on the door and the appellant let her in. EE's assertion that the appellant was watching child pornography was proven to be untrue. The police interrogated all of the appellant's electronic equipment and it contained

no child pornography. It is also highly unlikely that EE could have clearly seen what the appellant was watching from outside the house. Further, it is very clear on EE's evidence that the appellant did not expose her to pornography. He only looked at pornography when he believed that EE was not present, and he stopped watching pornography as soon as he was aware of her presence. He was embarrassed and concerned by her presence. EE's evidence about this topic is not evidence of domestic violence or intimidation or harassment. It is not a basis for EE fearing the appellant will engage in domestic violence against her. Her coming across the appellant watching pornography was by sheer accident. The fact that she came home from school unexpectedly at lunch time on one occasion does not constitute unwanted contact by the appellant with EE. Nor does her evidence establish that there was a pattern of the appellant watching pornography in her presence. The appellant's evidence was that he locked his computer when he was not using it.

3. As to EE seeing the appellant wandering around the house naked:

   (a) During her interview on 20 March 2016 EE stated that the appellant is naked at night. He does not wear anything when he is sleeping at night. *She did not really see him naked anymore*. He is naked sometimes; some nights, not often. When he gets naked he lays down and sleeps in front of the TV. When he was laying down in front of the television EE could see "the bum something". The

appellant did not wear anything. One time EE woke up at night. She went to the toilet and she saw him naked. In the morning the appellant told EE not to tell her mother. EE saw his bum on two occasions.

(b) During her interview on 30 March 2016 EE stated that at night, when the appellant goes to the toilet he is naked sometimes. He is not wearing any clothes. He makes EE and her Aunty scared. Her Aunty is scared because when she went to the toilet at midnight she opened the door to go outside and saw the appellant going to the toilet and not wearing any clothes. He was very drunk. EE saw the appellant lay down in front of the TV. It happened *once* when she was preparing to go to school. She walked out of her room. The appellant was in the living room where the television is. She saw him laying down. He was drunk when it happened. *She just saw his shoulder. She did not see the lower part of the appellant's body*. His arms were spread out. There were no other occasions when she saw him with no clothes on. She is not often awake at midnight.

Conclusion: EE seemed to have absorbed what others had told her about the appellant walking about the house late at night without any clothes on. Contrary to what EE stated on 20 March 2016, it appears that ultimately she only claimed to have seen the appellant naked on one occasion. On that occasion she only saw one of his shoulders and his

arms. She did not see the lower part of his body. EE's evidence about this incident is not evidence of domestic violence. Her evidence is not a reasonable basis for her fearing that the appellant may engage in domestic violence against her. He does not contact her when he is naked. He was asleep in the lounge room when she comes upon him. The appellant has not sought to come into contact with her when he is naked.

[18] Having carefully scrutinised the evidence of EE, and taking her evidence at its highest, it appears that there are in fact only the following incidents proffered by EE as a basis for her allegedly fearing the commission of domestic violence against her by the appellant.

1. On two or three occasions in 2011 when EE was 11 or 12 years of age, the appellant came into her bedroom wearing only underpants, sat on her bed next to her, patted her on the stomach, and told her he loved her. None of these incidents involved any sexual overtones or impropriety.

2. On one occasion during the five years that EE was living in the appellant's home, EE came home from school at lunchtime and from outside the house she very briefly saw that the appellant was watching adult pornography. The appellant stopped watching the pornography as soon as he became aware of her presence.

3. On one or two occasions late at night in or about 2016, the appellant mistakenly walked into the bedroom in which EE and her younger brother were sleeping. He stood on the other side of the room from her bed, near her brother's bed and then left the room. On one occasion the appellant was wearing underclothes and on the other occasion EE cannot say what the appellant was wearing.

[19] There were also four other incidents of potential relevance. The first incident involved the purchase of a camera pen which was placed in the chest pocket of a police shirt that was hung up in the bathroom. EE saw the camera pen when she went to have a shower and she thought the appellant was attempting to film her while she was having a shower. However, the facts of the matter were that the appellant purchased the camera pen with the intention of filming a meeting between the appellant and a human relations person employed by the Police Force. The appellant believed the human relations person had formed an unfairly adverse view of him. When he received the camera pen he was disappointed because it was too conspicuous. He tried to camouflage the pen by placing it in a chest pocket of a police shirt and covering it with black electrical tape. He hung that shirt up in the bathroom but did not put the shirt on because he thought the camera pen was still too conspicuous. At no stage did he film EE. While this was a matter which legitimately caused EE some concern, it is not an incident of domestic violence. Any concern that EE had should have been overcome by EE being informed of the camera pen's true use.

[20] The second incident involved the appellant purchasing alcohol for EE while her mother was overseas. At the time of the purchase EE was 16 years old. She had previously consumed alcohol. She had done so on one occasion with her aunt, and on another occasion with her friends. EE did not want the appellant to purchase alcohol for her and she did not consume the alcohol. This is not an incident of domestic violence. Adults may lawfully purchase alcohol which is consumed by teenagers in their home. While it is not something to be encouraged, it is not unusual for teenagers to be introduced to alcohol in their homes from the age of 16 years onwards.

[21] The third incident involved the appellant calling the police after he thought EE had slapped his young son. It seems to me that this is an act which goes close to constituting intimidation because the appellant is a police officer and calling the police is a disproportionate reaction to a stepsister slapping her stepbrother. However, it does not constitute unwanted contact and was not relied on by the respondent.

[22] The fourth incident involved the appellant sending a video to EE's aunt after EE had started living at her aunt's house. The video showed the appellant's son crying after he had been with EE. It seems to me that this may also constitute a single instance of harassment. However, once again, it was not relied on by the respondent.

[23] None of the incidents referred to at [18] above constitutes intimidation or harassment or domestic violence of any kind. Nor do all of the incidents

taken together reveal a pattern of conduct. At the most, the appellant's conduct involves six random acts spread over a period of five years. The conduct does not provide a reasonable basis for inferring that there was regular and unwanted contact by the appellant with EE. EE's evidence was that the appellant was not naked at night often. He did not wander around the house naked while her mother was overseas. She no longer saw him naked anymore. In five years he walked into her bedroom on only five occasions. When he did so, the appellant did not behave in an improper or inappropriate manner. EE no longer resides with the appellant. At no stage did the appellant's conduct harm EE in any way. At all times she was safe.

[24] The objects of the *Domestic and Family Violence Act* are to ensure the safety and protection of all persons who experience or are exposed to domestic violence; and to ensure people who commit domestic violence accept responsibility for their conduct. Desirable as it may be to do so, the purpose of the Act is not to simply impose on a defendant values about the consumption of alcohol, the watching of pornography, and the care of children which the Local Court considers to be in accordance with a person's position or standard in the community.

Appeal No. 14 of 2017

<u>The nature of domestic violence orders made by authorised police officers</u>

[25] Section 41 of the *Domestic and Family Violence Act* enables an authorised police officer to make a domestic violence order *if satisfied: (a) it is*

necessary to ensure a person's safety: (i) because of urgent circumstances; or (ii) because it is not otherwise practicable in the circumstances to obtain a Local Court domestic violence order; and (b) a Local Court domestic violence order might reasonably have been made had it been practicable to apply for one. Under s 42 of the Act, the authorised police officer who makes the order must record the reasons for making the order and the time and place of its return. Under s 43 of the Act, the authorised police officer must give a copy of the order to the parties and send the original to the Local Court. Under s 44 of the Act, the copy of the police domestic violence order is taken to be a summons to the defendant to appear before the Local Court at the time and place shown on it for its return, to show cause why the order should not be confirmed by the Local Court.

[26] Under s 82(1) of the *Domestic and Family Violence Act*, at the hearing upon the return of the police domestic violence order, the Local Court may by order: "(a) confirm the [domestic violence order] (with or without variations); or (b) revoke the [domestic violence order]". In accordance with s 82(2) of the Act the Local Court must not confirm the police domestic violence order unless: "(a) it is satisfied the defendant has been given a copy of the [domestic violence order]; and (b) it has considered any evidence before it and submissions from the parties to the [domestic violence order]".

[27] Any order made by the Local Court under s 82 of the *Domestic and Family Violence Act* confirming, or confirming and varying, a police domestic

violence order is subject to the provisions of s 21 of the Act. So far as is relevant, s 21 of the Act states:

> (1) A DVO may provide for any of the following:
>
> (a) An order imposing the restraints on the defendant stated in the DVO as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person.
>
> (b) An order imposing obligations on the defendant stated in the DVO as the issuing authority considers are necessary or desirable:
>
> (i) to ensure the defendant accepts responsibility for the violence committed against the protected person; and
>
> (ii) to encourage the defendant to change his or her behaviour;
>
> (c) other orders the issuing authority considers are just or desirable to make in the circumstances of the particular case;
>
> (d) an order (an ancillary order) that aims to ensure compliance by the defendant with another order under paragraph (a), (b) or (c).
>
> (1A) An ancillary order may:
>
> (a) prohibit the defendant from engaging in specified conduct; or
>
> (b) require the defendant to undertake specified action.
>
> […]

<u>The police domestic violence order made by Senior Constable Bauwens</u>

[28] On 6 April 2016 Senior Constable Bauwens made a domestic violence order against the appellant which restrained him from directly or indirectly:

(a) approaching, contacting or remaining in the company of CD when consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance;

(b) approaching, entering or remaining at any place where CD is living, working, staying, visiting or located if consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance;

(c) and must submit to [a] breath test […] when requested by police in relation to this order;

(d) causing harm or attempting or threatening to cause harm to CD;

(e) causing damage to property, or attempting or threatening to cause damage to property of CD;

(f) intimidation or harassing or verbally abusing CD; and

(g) exposing any child/children of the parties to domestic violence.

[29] The protected persons were CD and the appellant's and CD's son.

[30] Senior Constable Bauwens' reasons for making the domestic violence order were the appellant, being a person in a domestic relationship with CD:

(a) caused harm or attempted or threatened to cause harm to the protected person/s;

(b) caused damage to property, including the injury or death of an animal, or attempted or threatened to cause damage to property or injury or death of an animal;

(c) intimidated the protected person/s;

(d) exposed child/ren to domestic violence against the protected person, being in a domestic relationship with the child/ren.

[31] It is to be noted that there was absolutely no basis for the conditions restraining the appellant from consuming an intoxicating drug or other substance and from damaging property. There is no evidence that the appellant ever consumed drugs or damaged or threatened to damage property.

<u>Ground 1 – CD's evidence about the sexually explicit images of her</u>

[32] During her evidence in chief CD stated the following about the sexually explicit images of her.

Counsel:	Can I ask you whether you have made any sexy movies with your husband and, if so, how long ago?
CD:	We did have romantic filming. When I first met him, he took me to Darwin for the trip and he asked me to do that so that when I returned to Vietnam, he would take it out and look at it when he missed me and that was the time I get to know him so I agreed to do that. After we got married he asked me to do it again and I said, 'No. We are now husband and wife. I don't want to do that anymore.' And he didn't ask me anymore.

[33] During her cross examination CD stated the following about the sexually explicit images of her.

Counsel:	Now you said in your testimony yesterday, [CD] that you had made a sexy movie with your husband, but that was before you were married. Is that right?
CD:	Yes.
Counsel:	And that he asked you to make sexy movies with him since you have been married, but you refused. Is that right?
CD:	He requested me to do that.
Counsel:	Okay, and you said, 'No, we are married now. You don't need too?
CD:	Yes.
Counsel:	And you refused to give him any more sexy photos or do any sexy movies with him?
CD:	I refuse to have the sexy photograph taken, he still did it without my consent. Normally when we went to bed at night both of us were naked and sometime I was sitting or sleeping and he took the photograph of me without my consent. I tried to delete these photos but I don't have the password of his laptop so I cannot do it.
Counsel:	We have photos of you engaging in sexual acts with my client which have occurred after you've been married. If need be, I will tender those photos to show that the evidence that you have given on this point is not true. Before we go any further, did you want to reconsider your answer to my question?
CD:	No. Everything I tell truth. I don't need to lie.

[An adjournment was then taken so that the photographs or digital images could be seen by the witness in private and she could have an opportunity to reconsider her evidence.]

Counsel:	Okay, CD you now accept that there has been – that you have had sexy photos taken by [AB] since you've been married?
Interpreter:	I'm sorry, she said I misinterpreted so could you please repeat that.
Counsel:	Yes. Do you now say that you've had sexy photographs taken of having sex with [AB] since you've been married?
CD:	I took those photos. I took with my husband and that was when I had drunk wine, so I don't remember. But after I (inaudible) photos of my husband and me, after we are

married, I didn't commit any adultery or anything. Why should anyone take photos of me?

Counsel:	Okay, so you admit now that what you told the court yesterday, that there was no photos taken of you and [AB] having sex since you've been married, that was not the truth?
CD:	Yes we did take photos of our having sex but I have erased them already.
Counsel:	So those photos you thought were erased were the same photos we showed you earlier today?
CD:	I don't remember because I work every day. I work hard job, seven days a week and I come home [and] feed and take care kids. Very hard job for me and I don't remember. We argument a lot of time, we don't remember.
Counsel:	Okay?
CD:	I think (inaudible) they make love together and if they can take photo they can stay together no problem. Why he (inaudible) everyone to see. Not nice. I not go with other man, I not take photos or make love with other man, I not do wrong.
Counsel:	I'm not suggesting that you haven't, ma'am. That's all the questions I have for you with regard to these photographs.

Ground 1 - the appellant's evidence about the sexually explicit images of CD

[34] During his cross-examination the appellant stated the following about the sexually explicit digital images of CD.

Counsel:	You photographed a lot of your sexual activity?
Appellant:	Yes.
Counsel:	And I assume it was you that did the photography work?
Appellant:	You assume incorrectly. We both did.
Counsel:	Alright, since your marriage, we have heard the evidence that your wife didn't see the need for that. That is the photography and the photographing of your sexual

	dispositions because you are married. Would you agree that is what she said?
Appellant:	That is what she said.
Counsel:	And she said that she didn't want to, didn't like it or words to that effect?
Appellant:	That is what she said.
Counsel:	On occasions and in particular, you took photographs in 2013 and 2015, the latest being 2015 of explicit photographs of your wife and yourself?
Appellant:	I know indefinitely as most recent 2015 by the photos that were still recorded on my laptop. However, there is the potential there may have been further at the beginning of last year.
[…]	
Counsel:	Those are the items that you gave Mr Murphy. That is the photography that you gave to Mr Murphy?
Appellant:	From my laptop, which I've since got back. But there were multiple others that she and I had made.
[…]	
Counsel:	The images that Mr Murphy and I and you saw from that USB, operated on Mr Murphy's laptop were primarily of your wife, were they not, none of you?
Appellant:	Well I can't say that specifically I can't… I haven't studied them but I'm well aware that my [anatomy] features in a lot of those photos and videos.
Counsel:	[…] I'm not, but primarily the images are of your wife and her private parts?
Appellant:	Well there's me in there too, so I can't say. I haven't sat there and counted. I can't answer the question.
[…]	
Counsel:	The lion share, majority of them don't show images of who they are of, they are simply discrete photography of private parts of your wife. Is that right?
Appellant:	That is what a wise couple will do.
[…]	
Counsel:	Anyway, I press my point, the majority of the photography taken was taken by you and it was of your wife's private parts primarily?

Appellant:	[…] Like I said, I haven't studied the 600 odd photos to sort of say, 'this is what is in each one'.
Counsel:	Well we were talking about 70. Mr Murphy counted for her Honour approximately 70, the number 70. And of those, I'm suggesting to you and putting to you, they were primarily of your wife, not you?
Appellant:	I don't know what 70 you have selected, but there were about 600 on the USB taken from my laptop.
Counsel:	And you took those photographs by and large, in fact exclusively?
Appellant:	I can't answer the question because I haven't studied them to answer that question accurately.
Counsel:	You'd know, [AB], photography of this nature, who's taking photographs. I'm putting to you that you took them?
Appellant:	Both my wife and I take photographs and videos. We did it frequently.
Counsel:	After your marriage and the protestation by your wife of this being a bit embarrassing to her, you took the photographs?
Appellant:	Sometimes, she hid the camera and actually filmed us in bed without me knowing about it and then we'd look at it together.
Appellant:	I know specifically on that USB, because I saw the photograph that she took, I am sitting outside the tourist cabin in Darwin and she has a photograph of me where she's asked me to display my anatomy to her.
[…]	
Counsel:	What was your purpose in taking the photographs that you took of your wife?
Appellant:	She and I enjoyed it.
Counsel:	No, no, what was your purpose?
Appellant:	I enjoyed it, as did she.

[35] In paragraph 14 c. of his affidavit made on 29 July 2016 the appellant stated the following:

At paragraph 29 she states that I watch pornography on my laptop computer. I can say that my wife and I do watch pornography together on my laptop computer from time to time. My wife and I also view together, movies made of our own lovemaking which we have done for some years. However I do not do so in the presence of others especially my stepdaughter and have never knowingly exposed my stepdaughter to pornographic material. Furthermore, I locked my computer when it is unattended. […]

The findings of the Local Court Judge

[36] Her Honour the Local Court Judge made the following findings about the sexually explicit digital images of CD and the appellant.[7]

> During the evidence of Ms CD it became clear that there were a large number of sexually explicit photographs that had been or were in Mr AB's possession. Shortly after the allegations leading to these applications arose, all of Mr AB's computers and storage items had been seized by police and forensically examined. These had only recently been returned to him prior to this hearing. I note the agreed fact that "all digital devices seized throughout the search have been analysed and found to have contained no child abuse material".
>
> However it was admitted through his counsel that Mr AB currently had in his possession a USB with a large number (over 600) of sexually explicit photographs. Some, indeed he claimed, a large number of these photographs were of Ms CD.
>
> The existence of these photographs was brought to the Court's attention because of the evidence given by CD. […] She admitted that prior to their marriage they did have 'romantic filming' but that after they were married when he asked her (to participate in photographs) she said no. In cross-examination she confirmed that she refused to have 'sexy photos' taken, and if he had taken them, they were without consent, taken whilst she was sleeping or sitting.
>
> During this evidence it became apparent that a large number of these type of photos were in the possession of Mr AB and there was discussion as to how best to manage their tender. All parties, including both Counsel and the Court were anxious to avoid tender if possible given the potential for future detriment and further embarrassment.
>
> During an adjournment, in the presence of counsel these photographs were shown to Ms CD. Upon resumption of her evidence it

7 *NT Police v AB* [2017] NTLC 011, at [54] – [60], [81] – [82].

was put to her that "sexy photos' had been taken since marriage. She responded that "I took photos with him and that's when I drank wine so I don't remember." She then admitted that there had been some photos taken but that she had erased them already. She then said "I don't remember, I work seven days a week, very hard, come home, kids, work hard". And finally conceded. "We were husband-and-wife, why take and (now) share?" *She was neither candid nor truthful in her evidence about the existence and provenance of the photos*.

It is very clear that the existence of the photographs was a huge embarrassment to Ms CD, one that now the relationship has ended, she did not want to acknowledge. So much so that she did not tell the truth to the court about how they came into existence. She was clearly hurt and embarrassed by their production in these proceedings. I find that was the reason she was not truthful about the photographs, not, as was put to her, because she was exposed and embarrassed about perjuring herself, but because they were something private that she thought should have remained so, particularly after the end of the relationship.

I am satisfied that that at the time the photographs are taken, they were consensual as per the evidence of Mr AB. I am also satisfied that there are a large number of photographs, and whilst the Court has been advised that many of them did not show the participants' faces, they are sexually explicit and they involve the protected person.

[…]

Despite the tumultuous nature of the relationship between Ms CD and Mr AB I am not satisfied on the balance of probabilities on all of the evidence that there is a reasonable fear of physical violence now that they are separated. However I am satisfied there is a reasonable fear, particularly regarding the photographs which are in his possession, of intimidation or threatened intimidation as defined in the Act, that is, any conduct that has the effect of "unreasonably controlling the person".

Whilst the defendant maintains control over the sexually explicit photographs, and in light of the evidence around his controlling conduct, I am satisfied that there is a reasonable fear that he may use those photographs or threaten to use those photographs to continue to control the actions of Ms CD. Particularly so given they have a young child together with whom they are both caring and providing for.

<u>The appellant's submissions about ground 1</u>

[37] As to ground 1 in appeal LCA No. 14 of 2017 the appellant made the following submissions.

[38] The domestic violence order made by the Local Court required the appellant to destroy some of his private property namely, the digital images of a sexual nature the appellant had taken of CD with her permission and stored on his computer and other electronic devices. Under the *Domestic and Family Violence Act*, the Local Court had no power to order the appellant to destroy his property. Although s 21 of the Act is expressed in broad terms, s 21 should not be construed so as to grant the Local Court power to order a defendant to an application for a domestic violence order to destroy his personal property. The right to private property is a fundamental common law right. It is a principle or presumption of statutory interpretation that Parliament is presumed not to interfere with vested proprietary rights unless it has done so by clear and unambiguous words.[8] There are no clear and unambiguous words in s 21 of the Act which grant the Local Court, which is an inferior court of statutory creation, the power to order a person to destroy their personal property. Where Parliament has intended that proprietary interests may be interfered with under the Act it has expressly said so. For example, in s 22 and s 23 of the Act, Parliament expressly grants the Local Court power to require a defendant to vacate premises and restrain a defendant from entering premises; and to terminate tenancy agreements and create new tenancy agreements.

---

8 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* [1981] HCA 65, (1981) 147 CLR 677 at 682-3 per Mason J.

[39] The appellant submitted that it was clear that his proprietary interests are affected by the order of the Local Court. The only evidence before the Local Court was that he took the sexually explicit images of CD and she granted him permission to do so. The owner of copyright of a photograph or digital image is the "author" of the photograph. The author of the photographs is (generally) the person who takes the photographs.[9]

The respondent's submissions about ground 1

[40] As to ground 1, the respondent submitted the following. The digital images of CD were not solely owned by the appellant. CD was entitled to constructive possession of the digital images. It was implicit in CD's grant of permission to the appellant to take the sexually explicit photographs of her that he could possess the photographs so long as they remained in a relationship. As the relationship had come to an end she was entitled to possession of the photographs or, alternatively, CD could authorise the destruction of the digital images which would otherwise remain on the appellant's electronic computer and other electronic devices.

[41] Further, CD's rights to privacy and to remain safe from the fear of intimidation and harassment by the unauthorised distribution or use of the sexually explicit digital images outweighed the appellant's proprietary interest in the images. The *Domestic and Family Violence Act* is beneficial legislation. The images are of little value. It is the intention of Parliament

---

9 *Corby v Allen and Unwin* (2013) FCA 370; 297 ALR 761 at [6]-[8].

that where there is a conflict between the rights of the protected person and the rights of the defendant in such circumstances the rights of the protected person must prevail. The terms of s 21(1)(c) of the Act are wide enough for the Local Court to make the order that it did in the circumstances of this case. The presumption relied on by the appellant is displaced by necessary implication because if it were not it would be impossible to protect individuals from a growing area of domestic violence in the digital age. Digital images are becoming a more and more frequent means of engaging in domestic violence.

[42] The concerns raised by counsel for the respondent about the distribution of sexually explicit images of another person or 'intimate image abuse' are now dealt with in Part VI Division 7A of the *Criminal Code* (NT). Section 208AB of the *Criminal Code* (NT) makes it an offence to distribute an intimate image of another person without the other person's consent.

Consideration of ground 1

[43] At the outset of the consideration of this ground of appeal it is important to note that her Honour the Local Court Judge did not inform the parties that she was considering making an order that the appellant destroy the sexually explicit digital images of CD that are in his possession. The only order canvassed with the parties by her Honour was an order in similar terms to the police domestic violence order made by Senior Constable Bauwens under s 41 of the Act. The appellant was not accorded the opportunity to

make submissions in the Local Court about whether there was power under the *Domestic and Family Violence Act* to make the final order made by her Honour. Her Honour erred in doing so. Consequently, the usual bar to raising fresh arguments on appeal[10] does not apply in this case.

[44] Second, when considering the matters raised in ground 1 of the Appeal in LCA No. 14 of 2017, it must be clear that a proprietary interest is being affected before the presumption relied on by the appellant can arise and this will require careful consideration of what interest is being affected and how the person affected came to have that interest. In this regard the appellant correctly states that, all things being equal, it is the person who takes the digital image who owns the digital image.[11]

[45] The evidence about who took the 600 sexually explicit digital images of CD and the appellant is somewhat unclear. However, adopting a common sense approach, a fair inference on the whole of the appellant's evidence is that the appellant took the digital images of CD which were taken after they were married. CD lost interest in this pastime after they were married. The only reason the appellant equivocated about who took the sexually explicit photographs of CD is that he wished to make it clear that the taking of these digital photographs was of mutual interest. I am satisfied on the balance of probabilities that the appellant is the owner of the sexually explicit photographs of CD and that she consented to him taking them for his

---

10 *Coulton & Ors v Holcombe & Ors* [1986] HCA 33, (1986) 162 CLR 1.

11 *Corby v Allen and Unwin Pty Limited* [2013] FCA 370 at [6].

satisfaction and enjoyment. CD does not constructively possess those photographs. She states that prior to their marriage she allowed the appellant to take sexually explicit photographs of her so he could look at them in her absence. As I have said, it is apparent that CD lost interest in this past time after the marriage. As a result, the presumption against interference with vested proprietary interests arises in this case.

[46] It is clear from reading s 21 of the *Domestic and Family Violence Act* that the section does not grant the Local Court power to order a defendant to destroy his or her personal property. Section 21 of the Act is concerned with regulating a defendant's behaviour to ensure that the defendant does not engage in domestic violence. That is, s 21 is concerned with ensuring a defendant does not engage in the conduct described in s 5 of the Act. Section 21 of the Act does that by enabling the Local Court to impose conditions on a defendant's behaviour. While s 21(1)(c) of the Act is arguably a very wide section, the subsection must be read in the context of s 21(1)(a), (b) and (d) of the Act. The example given by the Legislature following the subsection confirms that s 21(1)(c) of the Act does not enable the Local Court to make an order involving the destruction of a defendant's property. The example given by the Legislature is of an order about the return of personal property to either the defendant or the protected person.

[47] Further, the *Domestic and Family Violence Act* makes specific provision for the circumstances in which property rights may be interfered with by the Local Court. For example, s 22 of the Act makes express provision enabling

a domestic violence order to include a condition which requires a defendant to vacate premises where the defendant has a legal or equitable interest in the premises; and s 23 of the Act makes express provision for the Local Court to make a domestic violence order terminating a tenancy agreement and creating a new tenancy agreement.

[48] In my opinion, the Local Court did not have the power to make the domestic violence order directing the appellant to delete and destroy the images of a sexual nature of CD in his possession. I would allow appeal LCA No. 14 of 2017 on this ground.

Ground 2 – finding that CD had a reasonable fear of intimidation as a result of the appellant's possession of the sexually explicit images of her are unreasonable and irrational

[49] I refer to her Honour the Local Court Judge's reasoning at [36] above. In my opinion the following conclusion of her Honour is a conclusion that is utterly without foundation. The conclusion is not capable of being reasonably drawn from the evidence or the facts in the case.

> Whilst the defendant maintains control over the sexually explicit photographs, and in light of the evidence around his controlling conduct, I am satisfied that there is a reasonable fear that he may use those photographs or threaten to use those photographs to continue to control the actions of Ms CD. Particularly so given they have a young child together with whom they are both caring and providing for.

[50] The evidence reveals that the appellant and CD have taken sexually explicit images of each other over a number of years. They are circumspect with the images that they take. The images were taken for their own enjoyment. A

good number of photographs or digital images were taken in such a manner as not to show their heads so that if their electronic equipment was stolen and accessed it would not be possible to identify the people shown in the digital images. The appellant keeps his computer locked when he is not using it. There is absolutely no evidence that the appellant has ever threatened in any way whatsoever to disclose to others the sexually explicit images of CD. While CD was prepared to lie under oath and state that the appellant took sexually explicit images of her after they were married without her consent, she was not prepared to state that the appellant had ever threatened to show the images of her to anyone else. The sexually explicit images of CD only came to be used in the Local Court because they were necessary to disprove a very serious false allegation that CD had made against the appellant, namely that the appellant had taken the sexually explicit photographs of her without her consent. The digital images were not tendered in evidence but were shown to CD in the most discrete manner possible.

[51] The evidence of Senior Constable Bauwens does not overcome the lacuna or non-sequitur in her Honour the Local Court Judge's reasoning. I accept Counsel for the appellant, Mr Murphy's, description of Senior Constable Bauwens' evidence as "wishy washy". Her evidence was vague and lacking in detail.

[52] In the statutory declaration that Senior Constable Bauwens made on 6 April 2016 she sets out the content of a conversation she had with CD on 6 March

2016. During that conversation CD complains to Senior Constable Bauwens about the following matters: (i) an incident when CD says the appellant grabbed her around the neck and tried to choke her; (ii) an incident when he pushed her around the house in front of their son and yelled at her; (iii) an incident when the appellant picked up the garden hose and covered her with water and also picked up a container of some sort, threw it at her head and it struck her arm causing a bruise;[12] (iv) incidents of the appellant drink driving; (v) an incident of the appellant threatening her by saying if she calls the police he will take their son and she will go back to Vietnam; (vi) an incident in Vietnam in 2015 when he demanded to have sex with her, she refused and he pushed her onto the bed and his head hit her head; and (vii) occasions of the appellant walking around naked at night when he is drunk. Senior Constable Bauwens also stated that CD was scared of the appellant. As to these matters, her Honour the Local Court Judge correctly held that:

> Despite the tumultuous nature of the relationship between Ms CD and Mr AB I am not satisfied on the balance of probabilities on all of the evidence that there is a reasonable fear of physical violence now that they are separated.

[53] In her oral evidence in the Local Court, Senior Constable Bauwens also stated that she believed the appellant's behaviour was intimidating and controlling of CD. However, the statements were mere assertions. Other than reiterating that CD reported to her (before 6 April 2016) that the appellant had threatened her that if she spoke to the police he would take their son and

---

12 The content of Senior Constable Bauwens' statutory declaration is different to what is stated in *NT Police v AB* [2017] NTLC 011, at [37] and [39].

she would go back to Vietnam, Senior Constable Bauwens was unable to substantiate her assertions. All she could add was that CD had complained to her that the appellant had telephoned CD on numerous occasions despite her asking him not to do so. Senior Constable Bauwens could not say why the telephone calls were made or what was said on these occasions and CD made no complaint in her evidence about this. Senior Constable Bauwens did not state that the appellant had threatened CD during these telephone conversations and she confirmed that at no stage did the appellant breach the conditions of the police domestic violence order that had been made against him. At all times the appellant complied with the order she made under s 41 of the Act. Even if the appellant made the telephone calls to which Senior Constable Bauwens referred they do not provide a basis for inferring that the appellant would harass or intimidate CD with the digital images in his possession.

[54] I would also allow the appeal on ground 2. The conclusion of her Honour the Local Court Judge is unreasonable and irrational.

Ground 3 – *Briginshaw v Briginshaw*

[55] In light of the determinations I have made about grounds 1 and 2 it is unnecessary to consider this ground of appeal.

Ground 4 – *Browne v Dunn*

[56] The often referred to principle in *Browne v Dunn*[13] is that if a party intends to impeach a witness, the party is bound, while the witness is in the witness box to give the witness an opportunity of making an explanation which is open to the witness. The rule is one of fairness.

[57] In this case, the appellant complains that he was not cross-examined about the following evidence which emerged during Senior Constable Bauwens' evidence in the Local Court: (1) the appellant obtaining CD's private telephone number; (2) the appellant telephoning CD despite her request to the appellant not to call her; and (3) the appellant had stood outside her home after she separated from him.

[58] In my opinion, this ground of appeal cannot succeed. Senior Constable Bauwens gave her evidence before the appellant gave evidence in the Local Court. The appellant had notice of the evidence complained of. Much of the detail of Senior Constable Bauwens' evidence about the matters complained of emerged during her cross-examination by Counsel for the appellant. The matters could have been traversed in the appellant's evidence in chief. The appellant had a fair opportunity to deal with the matters complained of in this ground of appeal.

13 (1893) 6 R 67.

Ground 5 – the scope of s 82(1) of the Domestic and Family Violence Act

[59] In support of this ground of appeal the appellant submits that the final order made by her Honour the Local Court Judge was beyond the power granted to the Local Court under s 82(1) of the *Domestic and Family Violence Act*. The final order neither confirms, nor confirms and varies, the domestic violence order made under s 41 of the Act. Instead the final order substitutes a completely new domestic violence order on a completely different basis to the order made under s 41 of the Act.

[60] In light of my determination of ground 1, this appeal is not an appropriate vehicle to consider this ground of appeal. However, it is important to note that: (i) a domestic violence order is fundamentally an order which is made to protect all persons who experience or are exposed to domestic violence and it is an order of such a nature that is being confirmed; and (ii) the Local Court has power under s 21 of the Act to impose a wide range of conditions on a defendant. Further, the circumstances both of the defendant and the protected person may change significantly between the making of an order under s 41 of the Act and the hearing in the Local Court. Finally, 'variation' in this context is the action of making some change or alteration in the domestic violence order as the Local Court considers to be just or desirable in the circumstances of the particular case. The most important thing is that procedural fairness requires the Judge hearing the matter to give a defendant notice of any change being contemplated by the Judge and an opportunity to be heard as to the proposed change.

Conclusion

[61] Both appeals are allowed and the domestic violence orders in both Local Court proceeding No. 21614729 and Local Court proceeding No. 21616782 are set aside. I have already made a costs order in LCA No. 13 of 2017. I will hear the parties further as to the costs of LCA No. 14 of 2017.