Baxter v Hudson [2015] NTSC 17

PARTIES:	BAXTER, Tevin
	v
	HUDSON, Rebecca Clare
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 74/2014 (21432752)
DELIVERED:	20 March 2015
HEARING DATES:	27 February 2015
JUDGMENT OF:	HILEY J
APPEAL FROM:	MS ARMITAGE SM

CATCHWORDS:

APPEALS – Justices Appeal – *Sentencing Act 1995* (NT) s 88 – Restitution and compensation orders – Financial means of adult defendant – Relative conduct of co-offenders – Whether Court obliged to consider defendant's ability to comply with order – Whether order manifestly excessive – Appeal dismissed

APPEALS – Justices Appeal – *Sentencing Act 1995* (NT) s 93 – Compliance with restitution or compensation order – Imprisonment for breach of order – Whether term of imprisonment for breach of order should be set at time of sentence – Appeal dismissed

CRIMINAL LAW – Sentencing – Statutory construction – *Sentencing Act 1995* (NT) Part 5 – Purpose and effect of restitution or compensation orders – Orders not part of sentence

Children, Youth and Families Act 2005 (Vic) s 417(1)

Crimes Act 1958 (Vic) s 546

Fines and Penalties (Recovery) Act 2001 (NT) s 86(1), s 88

Law Reform Miscellaneous Provisions Act 1956 (NT) s 12(4), s 27

Sentencing Act 1995 (NT) s 5, sf 5(1)(a), s 88, s 92, s 92 (c), s 93, s 93(1) s 93 (3), s 93 (5)

Sentencing Act 1991 (Vic) s 85H(1) s 85H(2), s 86(2)

Youth Justice Act 2005 (NT) s 89, s 89(2)(b) s 71(2)

R v Ironfield [1971] 1 WLR 90; *RK v Mirik and Mirik* [2009] VSC 14; *Schnitzler v Burgoyne* [2003] NTSC 48, applied

Whitehurst v The Queen [2011] NTCCA 11, distinguished

Cooper v Sinnathamby [2007] WASCA 32; *Hookham v R* (1994) 181 CLR 450; *R v Braham* [1977] VR 104; *R v Petersen* (SC 21411803, 13 October 2014); *R v Williams* [2010] NTSC 74; *R v Woodhead*, (SC 21026854, 22 February 2012), referred to

REPRESENTATION:

Counsel:

Appellant:	G O'Brien-Hartcher
Respondent:	R Murphy

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

Baxter v Hudson [2014] NTSC 17
No. JA 74/2014 (21432752)

BETWEEN:

TEVIN BAXTER
Appellant

AND:

REBECCA CLARE HUDSON
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 20 March 2015)

Introduction

[1] On 6 October 2014 the learned magistrate sentenced the appellant to 13 months imprisonment, to be suspended after 9 months, and ordered that he pay a total of $10,420 in restitution.[1] These orders followed the appellant's conviction for property damage offences committed on 16 July 2014. Those offences included the appellant and other unknown offenders causing damage to motor vehicles including a

[1] Although her Honour and the parties in this proceeding referred to the order as a restitution order, the order must have been an order to pay compensation made under s 88(c) of the *Sentencing Act 1995* (NT) (**the Act**). I shall continue to refer to that order, and to orders made under s 88 as restitution orders.

Holden Statesman and a Nissan Patrol. The cost to repair the damage to the motor vehicles was $420 and $16,467.80 respectively.

[2] Her Honour ordered that the restitution be paid by 30 December 2015, and that the matter be "listed for show cause on 31 December 2015". Her Honour told the appellant that he will be excused on that occasion if the restitution has been paid by then.

[3] The appellant appealed against the restitution order on a number of grounds including that the restitution order was manifestly excessive.

Grounds of Appeal

[4] The grounds of appeal were as follows:

> Ground 1: the learned magistrate failed to have regard to the ability of the appellant to comply with an order for restitution;
>
> Ground 2: the learned magistrate failed to have regard to the relative conduct of the co-offenders in making the order for restitution;
>
> Ground 3: the learned magistrate erred in not setting a specific period of imprisonment in default at the time the appellant was sentenced;
>
> Ground 4: the learned magistrate's restitution order was manifestly excessive.

Restitution and compensation orders

[5] Part 5 of the *Sentencing Act 1995* (NT) (**the Act**) is entitled "Orders in addition to sentence". Within Part 5, provision is made for the making of restitution and compensation orders (Division 1), non-association and place restriction orders (Division 1A) and other orders including cancellation of a drivers licence, orders regarding passports and forfeiture of property orders (Division 2).

[6] A court may make a restitution or compensation order whether or not it records a conviction.[2] Such an order is made under s 88 and is in addition to any other order to which an offender is liable.[3] An order may be made on the court's own motion or on the application of the prosecutor.[4]

[7] An order may specify the amount to be paid, the person to whom it is to be paid, the time within which restitution is to be made and the way in which it is to be paid.[5]

[8] Of particular importance in this appeal is s 93 which provides as follows:

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2 s 87.
3 s 90(1).
4 s 91(1).
5 s 92.

Imprisonment for breach of order

(1) A court which makes an order under this Division may order that the offender be imprisoned if the offender fails to comply with the order.

(2) A term of imprisonment ordered to be served under subsection (1) must not be longer than 12 months.

(3) In making an order under subsection (1), a court may give such directions as it thinks fit for the enforcement of the order including a direction that the offender appear before the court:

(a) at a time and place stated in the direction; or

(b) when called on by notice;

to show cause why the offender should not be imprisoned because of the offender's failure to comply with the order.

(4) Where an offender fails to appear as required by a direction under subsection (3), the court may issue a warrant to arrest the offender and for the offender to be brought before the court to show cause in accordance with the direction.

(5) In addition to subsection (4), where it appears to a court that there are reasonable grounds for believing that an offender has failed to comply with an order made under this Division, the court may issue a warrant to arrest the offender and for the offender to be brought before the court to show cause why the offender should not be imprisoned because of the offender's failure to comply with the order.

[9] At the time of sentencing, in addition to making the orders comprising the sentence and a restitution or compensation order (which would usually contain the information set out in s 92), courts sometimes also

make an order under s 93(1) - for example, that unless the restitution order is complied with by a certain date, the offender is to be imprisoned for a particular period of time.[6]

[10] However there is nothing in Division 1, or anywhere else in the Act as far as I am aware, that requires that this be done. Rather I would have thought that s 93 should not normally be invoked unless and until it appears that the restitution order will not be complied with.

[11] Any number of circumstances could arise or change between the time of making the restitution order and the time for considering its enforcement. This would be particularly so in cases such as the present, where the offender is to serve time in prison before he or she is able to re-enter the workforce and earn sufficient money to cover the amount of compensation which he or she has been ordered to pay. Indeed, some prisoners do earn money while they are still in prison, for example under the "Sentence for a Job" program.

[12] I consider that s 93 contemplates exactly what the learned magistrate did in the present matter, namely, fixing a date for compliance (cf s 92(c)) and fixing a date soon after that date for commencement of the processes set out in s 93.[7] In particular, where the offender has not complied with the restitution order, he should be given the opportunity

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[6] Blokland J made such an order in *R v Woodhead* (SC 21026854, 22 February 2012).

[7] This is consistent with what Blokland J did in *R v Petersen* (SC 21411803, 13 October 2014).

to explain why he has not complied, the extent to which he has complied and whether, how and when he expects to comply. This is what is contemplated by the show cause provisions in ss 93(3) and 93(5). The offender could then be given further opportunity to comply with the restitution order,[8] and avoid being imprisoned at all (as occurred in *R v Williams*[9]). In most if not all cases it would be unfair to imprison the offender until and unless he was given this opportunity.

Ground 3

[13] The above discussion makes it convenient for me to deal with Ground 3 first. The appellant contended that when her Honour sentenced him she should have stipulated a term of imprisonment under s 93(1) so that he knew what would happen to him in the event that he failed to comply with the restitution order.

[14] Counsel advanced two main arguments in support of that contention. The first point was that if a court subsequently imprisons the offender for failing to comply with the restitution order, this will amount to double punishment. The appellant contended that when an offender is sentenced he is entitled to know the full extent of his punishment, including the term of his imprisonment in the event of him not complying with the restitution order. Unless the offender knew this

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[8] See for example s 94 of the Act regarding extending time for compliance with orders for non-monetary restitution of property, and s 95 of the *Fines and Penalties (Recovery) Act 2001* (NT) in relation to orders requiring the payment of money.

[9] [2010] NTSC 74 (Barr J). See [26] – [28].

from the time when he was sentenced, he would be "set up to fail". Counsel contended that the only purpose of imprisonment for failure to comply with a restitution order is punitive, and in support of that contention he referred to s 5(1)(a) of the Act.

[15] The second point was to the effect that an offender might feel that he would never be able to repay the amount ordered within the time allowed and "cynically [decide] that he would prefer to do his time in default rather than attempt to make repayments."[10]

[16] The first point misunderstands the purpose and effect of Part 5 Division 1 and of any imprisonment ordered pursuant to s 93(1). Restitution and compensation orders are additional to the sentencing process and not a substitute for punishment.[11] Section 5 of the Act relates to the sentencing process. The mechanisms provided for in s 93, which include imprisonment for up to 12 months, only apply where there has been non-compliance with a restitution order. Imprisonment under s 93(1) is not punishment for committing the offence. That has already occurred during the sentencing process.

[17] The second point seems to assume, wrongly, that the debt or obligation subject of the restitution order can be extinguished by the serving of a period of imprisonment under s 93(1). This assumption may have its

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[10] Summary of Submissions for the Appellant filed 27 February 2015 (***Appellant's submissions***) at [32].

[11] This is apparent from s 90(1). See too observations by Martin CJ in *Schnitzler v Burgoyne* [2003] NTSC 48 at [17] followed by Barr J in *R v Williams* [2010] NTSC 74 at [22].

source in the *Fines and Penalties (Recovery) Act 2001* (NT) (***Fines Act***). Section 86(1) of the *Fines Act* stipulates a formula to calculate a period of imprisonment to be served in the event that a fine is unpaid or a community work order breached; and s 88 of the *Fines Act* provides that after a fine defaulter serves that period of imprisonment, the fine is taken to be satisfied. However, an obligation to pay compensation or make restitution under s 88 of the *Sentencing Act* will remain notwithstanding the offender also being imprisoned under s 93(1).

[18] In the present matter I consider that the approach adopted by her Honour, namely to defer any further consideration under s 93 until 31 December 2015, was appropriate. This was particularly so in light of the uncertainty as to whether the appellant would be able to comply with the order after being released from prison. By 31 December 2015 I would expect the court to be better informed about, and take into account, the appellant's attempts and means to comply with the order, and the prospects of him complying if he were given more time. Only in light of this information would the court be in a position to decide what action to take if the appellant has failed to comply with the order, for example whether to imprison the appellant and if so for how long, or whether to defer such a course.

Ground 1

[19] Counsel were not able to draw my attention to any decision of a Northern Territory court to the effect that when making a restitution order the court must have regard to the ability of the offender to comply with the order.

[20] However the Northern Territory Court of Criminal Appeal did consider this question in relation to a youth, in *Whitehurst v The Queen.*[12] The Court ruled that the sentencing judge fell into error in imposing an order for restitution without having had regard to the ability of the offender to comply with the order. As the offender was a youth the court's decision was based on the clear and express requirement in s 89(2)(b) of the *Youth Justice Act 2005* (NT) that "the Court must have regard to … the ability of the youth to comply with the order."[13] There is no such requirement expressed in the *Sentencing Act.*

[21] In the course of her sentencing remarks in *R v Petersen,* Blokland J said, at p 7:

> When I enquired as to the current law regarding the amount of restitution which can be ordered by the Court, the parties agreed that the Court cannot order a sum of restitution if there is no realistic prospect of it being repaid. The offender's capacity to pay is a most relevant consideration. There is very little capacity to pay here. However, I am going to order a modest amount as signifying acceptance of responsibility. It does not

[12] [2011] NTCCA 11. See [18] – [22].

[13] In relation to restitution orders made against youths see ss 71(2) and 89 of the *Youth Justice Act 2005* (NT).

> stop the victims pursuing the matter in the civil courts, but the law has limits on ordering restitution in the criminal sitting.

[22] Counsel for the respondent referred me to the decision of Bell J in *RK v Mirik and Mirik (**RK**)*.[14] That matter concerned an application for an order of compensation to a victim of a crime under the *Sentencing Act 1991* (Vic) and the discretion of the Court to take into account the financial circumstances of the two co-offenders when determining that application pursuant to section 85H(1) and (2) of that Act.

[23] At the relevant time s 85H(1) and (2) of the *Sentencing Act 1991* (Vic) provided as follows:

> (1) If a court decides to make a compensation order, it may, in determining the amount and method of payment of the compensation, take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.
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> (2) A court is not prevented from making a compensation order only because it has been unable to find out the financial circumstances of the offender.

[24] At [96] to [102] Bell J said:

> [96] There can be no doubt that the court's power to take the financial circumstances of the offender into account under s 85H(1) is discretionary. As it uses the word "may", the legislation "shall be construed as meaning that the power… may be exercised, or not, at discretion."[15] By contrast, as regards

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14 [2009] VSC 14.

15 *Interpretation of Legislation Act 1984*, s 45(1).

children, s 85H(1) has been modified so "may" has been replaced with "must".[16] Differently to an adult offender, the power "must" be exercised to take a child's financial circumstances into account.

[97] Under the former s 546 of the *Crimes Act 1958*, the court could order compensation against an offender for causing loss or damage to a victim's property. There was no provision expressly allowing the offender's financial circumstances to be taken into account. Following *R v Ironfield*,[17] the Full Court in *R v Braham*[18] decided it "was not wrong in principle to order compensation in the case of a man without means".[19] The reasons given in *R v Ironfield* were blunt:[20]

> If a man takes someone else's property or goods he is liable in law to make restitution or pay compensation even if no compensation order is made by the court before which he is convicted. A victim who wishes to assert his rights need not be put to the additional trouble and expense of independent proceedings, and certainly cannot be required to forgo his rights in order to facilitate the rehabilitation of the man who has despoiled him. In contrast, liability to pay a fine or costs can only arise from an order of the court and, in the case of a fine, is entirely punitive.

[98] Possibly the decision in *R v Braham* left open the question whether the offender's means were a relevant consideration.[21] Any doubt on that score was removed legislatively by the predecessor to s 85H(1), which was s 86(2) of the *Sentencing Act 1991*.

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16 By s 417(1) of the *Children, Youth and Families Act 2005*, the provisions of Part 4 of the *Sentencing Act* are amended (relevantly) so that "may" is replaced with "must".

17 [1971] 1 WLR 90 at [91].

18 [1977] VR 104.

19 Ibid, 108 per Young CJ, Gowans and Harris JJ.

20 [1971] 1 WLR 90 at [91].

21 See *Cooper v Sinnathamby* [2007] WASCA 32 at [24]-[25]. I would have thought, on general principles, the means of the offender were relevant: see *Hookham v R* (1994) 181 CLR 450, 460 per Deane, Dawson and Gaudron JJ.

[99] The position stated in *R v Ironfield*[22] for the United Kingdom was also changed legislatively by s 1(4) of the *Criminal Justice Act 1972*, which provided this:

> In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the court shall have regard to his means so far as they appear or are known to the court.

[100] You will see s 1(4) of the legislation in the United Kingdom made explicitly clear the offender's means were relevant both as to whether to make an order and the amount. Section 85H(1) of our legislation is not so clear. It might be thought the opening words of s 85H(1) ("if a court decides to make a compensation order") mean the court can only take this into account on the question of the amount.

[101] I do not think that is right. It seems to me the opening words refer to whether the court is otherwise satisfied under s 85B(1) that an order should be made. Being so satisfied, under s 85H(1) the court can, at its discretion, and having regard to the offender's financial circumstances and the nature of the burden that payment of the compensation would impose, determine the appropriate amount of compensation to be nil. To give effect to that determination it would make no order for compensation. The court could also determine, at its discretion, having regard to those considerations, to make an order for compensation for the full amount, if it thought this was appropriate. Alternatively, having regard to those considerations, it could make an order of compensation for an amount that was less than the full amount. Under s 85B(4), the court has a discretion to order that compensation be paid by instalments. It is implicit in the provisions of s 85B(1) and (4) and s 85H(1) that the court also has a discretion to defer the date from which the payment of any compensation or instalments would commence.

[102] So, under s 85B(1) and (4) and s 85H(1), taking the financial circumstances of the offender into account is discretionary, both as to whether an order should be made, the

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[22] [1971] 1 WLR 90.

> amount of the order, whether any order should be paid in a lump sum or by instalments and as to the date from which payment of the amount or the instalments might commence. The question is, what weight should I give to the lack of means of the offenders in the present case?

[25] Bell J proceeded to consider compensation orders made under criminal compensation schemes in the United Kingdom, Canada and New Zealand. Many of those orders required the payment of significant amounts of money, some exceeding $1 million.

[26] At [135] to [139] his Honour said:

> [135] When the legislature enacted ss 85A-M of the *Sentencing Act 1991*, I think it struck a different balance between the interests of victims and adult offenders than the previous legislation, and a different balance to the one struck under the legislation in the United Kingdom. The position here, I think, is that an adult offender's means are a relevant but not a controlling consideration.
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> [136] The purpose of the new compensation provisions is to give victims easy access to civil justice in the criminal courts. The provisions give the courts enhanced capacity to achieve that purpose. They restrict the capacity of the courts to use their discretionary power to refuse to hear and determine applications. In general terms, the idea behind the new provisions is that the courts will order compensation wherever practicable.
>
> [137] The power to order compensation is discretionary. It is conferred in terms that allow the court to take into account the financial circumstances of the offender and the nature of the burden that payment of compensation will impose. This permits the court to consider the impact of an order on the rehabilitation of an offender, including an offender who has been sentenced to imprisonment. These are very significant considerations in the exercise of the discretion. After taking these considerations into account, the court could order no or reduced compensation,

> defer payment of compensation or order payment of compensation by instalments over a reasonable period.
>
> [138] Admitting the significance of these considerations, there are cases where the court could exercise its discretion to order compensation despite the offender's lack of means and the burden that payment of compensation would impose. In such cases, the interests of giving the victim just civil compensation will have priority over the interests of the offender in avoiding that result in criminal proceedings.
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> [139] That has been the approach of single judges of this court, and I agree with it.

[27] Bell J decided to exercise his discretion in favour of taking the offenders' means into account. He considered that the offenders would be "unable to pay any reasonable amount of compensation to the victim, a situation that is likely to remain in place for the rest of their lives. But the offenders have subjected the victim to crimes of violence of the utmost gravity."[23] His Honour proceeded to make compensation orders amounting to 75% of the amount of compensation that he considered the victim would be able to recover if he brought civil proceedings.

[28] Like the situation in Victoria at the time of Bell J's decision in *RK*, there is a requirement in the Northern Territory that the court take into account the offender's ability to comply with a restitution order where the offender is a youth.[24] In respect of other offenders there is no such

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23 *RK v Mirik and Mirik* [2009] VSC 14 at [141].

24 *Youth Justice Act 2005* (NT) s 89(2)(b).

provision, unlike the situation in Victoria where the legislation expressly confers on the Court the discretion to take into account an offender's ability to comply.

[29] In the present matter, the learned magistrate did in fact take into account the appellant's means.[25] Accordingly it is not necessary for me to determine whether or not there is an obligation upon a Northern Territory court to take into account an offender's means when making a restitution order. However, in many cases I think it would be necessary to do so in the course of considering rehabilitation and perhaps other matters relevant to the sentence.

[30] Given the circumstances of the appellant that were known to the learned magistrate at the time she made the order, including the possibility of him obtaining monies by way of earnings, royalties or otherwise after his release from prison, her Honour was quite entitled to exercise her discretion in the way that she did and order the appellant to pay $10,000 of the $16,467.80 that it was going to cost the victim to have the car repaired.

[31] Ground 1 is not made out.

[32] **Ground 2**

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[25] See page 9 of the transcript of the proceedings on 6 October 2014.

[33] Counsel for the appellant contended that "in imposing $10,000 restitution upon the appellant for the damage to the Nissan Patrol, the learned magistrate imposed a somewhat arbitrary amount on the appellant, vis-a-vis the co-offenders" and that "the resulting sentence was not just in all circumstances."[26]

[34] Contrary to the contention in Ground 2, the learned magistrate did have regard to the relative conduct of the co-offenders when she made the restitution order. In relation to the main part of that order (ie compensation for the damage to the Nissan Patrol) her Honour said:

> I have taken into account that there were others engaged in the violence on his vehicle, however on the facts it is clear that you were a significant if not the major contributor to the damage that was occasioned.[27]

[35] It seems that the others who were involved in causing the damage to these two vehicles had not been identified. There is no reason why a victim's entitlement pursuant to a restitution order should be reduced just because his or her damage was inflicted by multiple offenders, some of whom cannot be identified. Even if other offenders could be identified, I see no reason why a particular offender should benefit and the victim potentially miss out on appropriate compensation, by limiting the quantum of the restitution order on account of that fact. Further, I would expect that an offender could seek contribution from a

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[26] Appellant's submissions [16].

[27] See page 9 of the transcript of the proceedings on 6 October 2014.

co-offender under s 12(4) of the *Law Reform Miscellaneous Provisions Act 1956* (NT) if the offender considered that the amount which he was ordered to pay exceeded the amount that he should have to pay as between the various other people who were responsible for causing the damage.[28]

[36] In the present matter, the magistrate's finding as to the appellant's contribution to the damage justified her making the order requiring the appellant to pay $10,000 for the damage to the Nissan Patrol.

Ground 4

[37] This ground is subsumed within the grounds which I have already discussed and rejected. As counsel for the appellant said at the commencement of his written summary of submissions: "The appeal concerns a single issue, namely, whether it was just and appropriate for the learned magistrate to order the quantum of the restitution that she did, and whether her Honour gave the appellant sufficient time to pay the restitution. All grounds of appeal are directed to that issue."[29]

[38] The appellant contended that "an order for $10,420 to be paid in nine and a half months, by a person on Centrelink or RJCP with possible unknown royalties, is so excessive as to demonstrate error in the sentencing process" and that "a restitution order of that magnitude

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[28] See s 97 of the Act.

[29] Appellant's submissions [2].

defeated the purposes of sentencing set out in s 5 of the *Sentencing Act*."[30]

[39] As I have already pointed out, some of the appellant's submissions have misunderstood the relationship between the sentencing process which includes s 5 of the Act on the one hand and the regime set up in Part 5 for ordering compensation and restitution on the other. The contention quoted above also fails to recognise the fact that non-compliance with the restitution order will not automatically result in imprisonment.

[40] I do not consider that there was anything manifestly excessive about the restitution order.

[41] None of the grounds of appeal are made out. The appeal is dismissed.

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[30] Appellant's submissions [43] & [45].