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| CITATION: | *PB v CEO Territory Families & Ors* [2024] NTSC 12 |
| PARTIES: | PB<br><br>v<br><br>CEO TERRITORY FAMILIES<br><br>and<br><br>RN<br><br>and<br><br>AB |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | 2022-02221-SC |
| DELIVERED: | 8 March 2024 |
| HEARING DATES: | 7 February 2023 |
| WRITTEN SUBMISSIONS: | 23 January 2023; 31 January 2023; 17 March 2023; 13 April 2023 |
| JUDGMENT OF: | Blokland J |

**CATCHWORDS:**
APPEAL – Local Court – Family Matters Division – summons to CEO Territory Families to produce documents filed by mother of child – whether Local Court erred by restricting various items sought by the mother – whether the Local Court erred by restricting the question to be tried –

question of context in welfare cases when determining legitimate forensic purpose and whether on the cards that material will have forensic value – whether best interests of the child considered – question of relevance of redacted report when dealt with a period when child not the subject of report – appeal allowed in part.

Statutes:
*Local Court (Civil Procedure) Act 1989* (NT), s 19
*Care and Protection of Children Act*, ss 4, 7, 9, 12, 14, 42, 111, 123, 128, 130, 138
*Children's Commissioner Act* 2013 (NT), s 7

*NB & Ors v SB & Ors* [2020] NTCA 2; *The Commissioner of the Police Force for the Northern Territory v Cassidy* [2013] NTCA 01; *Secretary to the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145; *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd* [2009] NSWCA 307 referred to.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | A Wyvill SC with J Clark |
| First Respondent: | M Chalmers SC |
| Second Respondent: | J Franz/ P Tregear |
| Third Respondent: | Self-represented at hearing |

*Solicitors:*

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| Appellant: | NAAJA |
| First Respondent: | Hunt & Hunt |
| Second Respondent: | Darwin Family Law/ Arafura Legal |
| Third Respondent: | NTLAC for written submissions |

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| Judgment category classification: | B |
| Judgment ID Number: | Blo2401 |
| Number of pages: | 31 |

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

*PB v CEO Territory Families & Ors* [2024] NTSC 12
No. 2022-02221-SC

BETWEEN:

**PB**
Plaintiff

AND:

**CEO TERRITORY FAMILIES**
First Respondent

AND:

**RN**
Second Respondent

AND:

**AB**
Third Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 March 2024)

**Introduction**

[1] This is an appeal pursuant to s 140 of the *Care and Protection of Children Act 2007* ('the Act') from a decision of the Family Matters Division of the Local Court delivered on 9 August 2022.

[2] As the appeal is from the Local Court it is confined to a "question of law".[1] Section 140 of the Act sets certain parameters governing appeals from orders under the Act by providing that an appeal lies to this Court against any order or decision other than a temporary protection order;[2] by stipulating the time in which an appeal may be commenced (28 days)[3] and by requiring that the grounds of appeal and the facts on which the appeal is based to be specified.[4] The Notice of Appeal is to be served on each party to the proceedings.[5]

[3] Section 142 of the Act provides that an appeal against an 'assessment order', that is, an order under s 111 of the Act to assess a child must be conducted as a new hearing and is not limited by the evidence before the Local Court.[6] Unless the Supreme Court directs otherwise, an appeal 'against any other order or decision' must be decided on the evidence before the Local Court. That section applies to this matter which is an appeal against orders relevant to the production of material sought by summons before the Local Court.

[4] Aside where the Act has specifically provided for the nature of the appeal and specific procedural matters, the appeal remains an appeal from the Local Court and in confined to questions of law. I proceed on that basis.

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**1** *Local Court (Civil Procedure) Act* 1989 (NT), s 19.

**2** *Care and Protection of Children Act*, s 140(1).

**3** *Care and Protection of Children Act*, s 140(2).

**4** *Care and Protection of Children Act*, s 140(3)(a), (b).

**5** *Care and Protection of Children Act*, s 140(4).

**6** *Care and Protection of Children Act*, s 142.

[5] The decision appealed from comprises both oral and written reasons. The learned Acting Local Court Judge 'the Judge' determined to narrow the scope of a summons for the production of documents filed by the appellant (issued on 26 July 2022) ('the summons') and refused to make orders in terms of the appellant's application dated 25 July 2022 ('the application').

[6] Paragraph 1(d) of the summons originally sought assessments or reports made of the child the subject of the proceedings in the possession of the Department of Territory Families, Housing and Communities ('Territory Families') including such assessments or reports in relation to her transition from the Safe Care Facility ('the SCF') where she resided. The summons sought reports and assessments of programs the child engaged with while residing at the SCF, whether such reports were by any employee, officer, agent, delegate or external counsellors, social workers, health workers, therapists, doctors, psychologist or psychiatrists; and the terms of reference, and communications made by Territory Families with any external professionals who prepared such reports or assessments.[7] The Judge narrowed the scope of paragraph 1(d) to reports in relation to transitioning only.[8]

[7] The Judge also removed paragraphs 1(e)-(g) of the summons. Paragraph 1(e) sought "a complete, unredacted copy of the Report by the Officer of the

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**7** Summons for Production of Documents (PB) issued 26 July 2022, AB 45-48.

**8** *Chief Executive Officer, Territory Families v PB & Ors* [2023] NTLC 9 August 2022 at [18] ('*CEO v PB*').

Children's Commissioner ('OCC') on the monitoring of the *Safe Care Facility* dated 1 September 2021…" paragraph 1(f) sought "any document, including any note, record of communication, correspondence and report, that addresses the recommendations of the [OCC] contained within the OCC report". Paragraph 1(g) sought "any documentation relating to any evidence based model of care being provided to children residing at the SCF and the operational manual for the SCF".

[8] The Judge also refused to make orders in terms of paragraphs 1(a)-(d) of the application filed 25 July 2022. The Judge made orders with which the CEO agreed, in terms of 1(e)-(h) and 2.[9] The relief which was refused concerned a series of directions which were sought, namely that the CEO file and serve an affidavit outlining the following:

(a) Whether any recommendations in the OCC report have been implemented at the SCF, including how any such recommendations have been implemented;

(b) Whether the model of care provided to the child in the SCF is based on an evidence based model of care with an evaluation strategy, including details of any such evidence based model of care that is being provided to the child;

(c) Details of any formalised training the staff at the SCF caring for the child have undertaken in respect of the model of care being provided to her;

(d) Whether any admissions assessment induction process was followed for the child on her entry to the SCF, including details of how such process was conducted.

**9** Orders, 9 August 2022, AB 18.

[9] The Amended Notice of Appeal contends that the Judge erred by:

i. Concluding the only issue for determination "at trial" was the duration of a protection order in favour of the CEO and the evidence to be adduced is "confined to that issue";[10]

ii. Concluding that the contents of the OCC report and the CEO's responses were not relevant to the child, to the assessment of her well-being and to the issues before the court;[11]

iii. Concluding that the documents requested in 1(d) and 1(g) were not described with sufficient particularity, "cast the net wider than what is the legitimate forensic purpose for the production of the documents" and were "a perfect example… of a 'fishing expedition'";[12] and

iv. In refusing to make orders in terms of paragraphs 1(2)-(d) of the Application.

[10] At the oral hearing before this Court on 7 February 2023, the father (AB) was joined in these proceedings as the third respondent and appeared self-represented by phone with the assistance of an interpreter. He then received legal advice from the Northern Territory Legal Aid Commission and was provided the opportunity to file written submissions following the hearing, which he did on 17 March 2023. The first respondent then provided submissions in reply on 13 April 2023. Following confirmation that no parties wished to file further material, the decision was reserved on 15 May 2023. For the reasons that follow I will allow the appeal in part. For the

**10** *CEO v PB* at [11].

**11** *CEO v PB* at [14] and [16].

**12** *CEO v PB* at [15] and [17].

purposes of these reasons I note that the third respondent primarily adopts the position of the appellant,[13] with additions noted as necessary.

**Background**

[11] I accept and adopt the background facts as summarised by the Judge at paragraphs [4]-[10] of *CEO v PB* in so far as they outline the situation at the time of that decision. The appellant does not dispute those facts.[14] It is clear that there are significant, substantiated welfare concerns relating to the child that do not need to be reproduced in full here. It is of substantial relevance that the child was diagnosed with Foetal Alcohol Spectrum Disorder ('FASD'), ADHD, Intellectual Development Disorder and Severe Language Disorder on 12 October 2021.[15] Since the decision of the Judge, the child has been transitioned out of the SCF.

**Objectives of the Act**

[12] It is clear from s 4 that the objectives of the Act are to promote the wellbeing of children by protecting them from harm and exploitation, and to maximise the opportunities for children to realise their full potential. The Act also aims to assist families to achieve these objectives and ensure anyone with responsibilities for children has regard to fulfilling these objectives.

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**13** Third Respondent's outline of submissions at [2].

**14** Appellant's summary of submissions at [6].

**15** Appellant's summary of submissions at [8]

[13] A number of provisions under the Act have some relevance to the questions here. ‘Wellbeing’ and ‘Harm’ are further defined under ss 14 and 15 of the Act. Section 14 provides ‘the wellbeing of a child includes the child’s physical, psychological and emotional wellbeing.’ ‘Harm to a child’ is any significant detrimental effect caused by any act or omission or circumstance on the physical, psychological, wellbeing or emotional development of the child. The section provides ‘harm’ can be caused by physical abuse or neglect, sexual abuse or other exploitation of the child, or physical violence.

[14] Sections 7 to 12 of the Act set out the ‘underlying principles of the Act’ which are to be applied and upheld by the Court and by the CEO when exercising their respective powers under the Act. Those principles include the responsibility government has to safeguard the wellbeing of children and to support families to do the same. The Act provides that the family has primary responsibility for the care, upbringing and development of the child; that a child is to be treated with respect; that interventions must be the least intrusive available consistent with a child’s best interests; that a child may participate in proceedings and the principles relevant to kinship placement for Aboriginal children.

[15] The paramount principle under the Act is the best interests of the child.[16] The Court is bound by that principle.[17] That overarching principle and other principles expressed under the Act apply to all decisions under the Act.

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**16** Section 10(1).

**17** *NB & Ors v SB & Ors* [2020] NTCA 2.

Compliance with those principles may be expressed or manifest in different ways. Here the context was within the usual rules which govern access to evidential material by summons or by other mechanism as a preliminary to litigation. If relevant, the Court is to apply that overarching principle to interlocutory matters to the extent that it is feasible, making appropriate modifications given the proceedings are at the preliminary stage. Evidential material which sheds light on the application of the principles under the Act in a given case is likely to be required to enable the Court to fulfil its duties under the Act.

[16] Further guidance may be drawn from other parts of the Act. For example whenever a decision is made under the Act, s 130 provides the mandatory matters which 'must' be considered. Such a decision includes not only the making of a protection order, but also the decision to make specified directions under s 123 read with s 128 which includes, a 'daily care and control direction', a 'short term parental responsibility direction' and a 'long term parental responsibility direction'. The 'long term parental responsibility direction' gives parental responsibility to a specified person for a period that exceeds 2 years and ends before the child turns 18 years old. Further, a protection order may include a 'supervision order' which under s 123(iii) the Court may direct the CEO to do, or refrain from doing, a specified thing related to the care of the child.

[17] Section 130(1)(ca) provides the Court must consider 'the steps taken by the Territory: (i) to provide the services necessary to address any likely risks of

harm to the child; and (ii) to ensure the services were provided in accordance with s 42(4); and any other matters the Court considers relevant.'

[18] Section 9 provides decisions under the Act involving a child should be made 'promptly having regard to the child's circumstances' and 'in a way consistent with the cultural, ethnic and religious values and traditions relevant to the child' and 'with the informed participation of the child, the child's family and other people who are significant in the child's life'.

[19] Section 42(4) provides the CEO must take reasonable steps to ensure that services provided to families involve meaningful engagement, are culturally responsive and 'involve a holistic assessment of children and families to ascertain risk factors in order to enable tailored supports and services to be provided'. Section 42(4)(d)(ii) requires the CEO to 'actively involve' 'parents, family members and members of the relevant kinship group and s 42(4)(d)(iii) requires that decision making processes are developed with regard to the age, maturity, health, cognitive ability and cultural background of the children involved'.

[20] In terms of the powers of the Local Court, s 90 provides that in Court proceedings, the Court 'must regard the best interest of the child as paramount'. As mentioned above, directions may be made under s 123, including directions to the CEO to do or refrain from doing certain things. Such directions are expressly included in s 128 which allows the Court, once

a protection order is made, to specify directions. The parents are mandatory respondents to the application by virtue of s 125(1) of the Act. The wishes of a parent must be considered under s 130(1)(b)(ii). Such wishes are to be informed under s 42.

[21] A higher threshold of satisfaction must be reached by a Court as to the person who will have the care of the child if a long-term parental responsibility order is to be made. Section 130(2) provides the Court 'must not' give a person who is not a parent or family member of a child or a member of a kinship group parental responsibility under a long-term direction *unless* the Court is satisfied such a direction 'is the best means of safeguarding the child's well-being'; and 'there is no one who is better suited to be given the responsibility'. The Court must also be given a care plan or proposed care plan.

[22] Directions may be given during any adjournment of proceedings of the Court in which case under s 138 the Court may give direction to the parties about what they must do or refrain from doing.

**Establishment of a right to access the materials sought**

[23] The first respondent relies on the principles drawn from the decision in *The Commissioner of the Police Force for the Northern Territory v Cassidy*

('*Cassidy*').[18] The Judge summarised the relevant principles derived from that case at [13]:

> In The Commissioner of the *Police Force for the Northern Territory v Cassidy* [2013] NTCA 01 at [13] to [15] the Northern Territory Court of Appeal stated the relevant principles which they said were not in doubt. The onus is on the party issuing the subpoena (or summons to produce) to establish three things.
>
> (1) That the documents sought are described with sufficient particularity.
>
> (2) Must identify expressly and with precision the legitimate forensic purpose for which access to the described documents is sought. It is not sufficient that there may be a legitimate forensic purpose for production of some of the documents answering the description in the subpoena.
>
> (3) The subpoena/summons must show it is 'on the cards' that the documents would assist the party's case. It is not sufficient for a party seeking production of documents to establish merely that such documents are or may be relevant to the proceeding. If it is not 'on the cards' that the documents would assist the issuing party's case, the subpoena/summons may be set aside as a 'fishing expedition'.

[24] Neither the CEO or the appellant suggest *Cassidy* does not represent the appropriate test to be applied. The third respondent AB submitted *Cassidy* is restricted to criminal cases, but in civil proceedings it is unnecessary to show that it is 'on the cards' that the documents will materially assist the case. The third respondent points out that in *Secretary to the Department of Planning, Industry and Environment v Blacktown City Council* '*Blacktown*'[19] Brereton JA said the effect of *ICAP Australia Pty Ltd v BGC Partners*

**18** [2013] NTCA 01.

**19** [2021] NSWCA 145.

*(Australia) Pty Ltd* ('*ICAP*'),[20] a decision which was relied on by the Local Court Judge, is that the relevant test is whether or not it is likely that the documents sought will materially assist on an identified issue, or there is a reasonable basis beyond speculation that it is likely that the documentation will materially assist on an identified issue. Brereton JA pointed out that *ICAP* was silent as to whether it is necessary that it was likely that the documents will materially assist the issuing party's case.

[25] Provided *Cassidy* and the terms 'legitimate forensic purpose' and 'on the cards' are not themselves construed too strictly, the approaches in *Blacktown* and *Cassidy* may be reconciled, the former case noting 'legitimate forensic purpose' is the converse of 'abuse of process'. A subpoena will self-evidently be an abuse of process if it is not issued for a legitimate forensic purpose, in the sense of a purpose associated with obtaining apparently relevant evidence. In *Blacktown* the Court did not adopt the necessity for the issuing party to show it was 'on the cards' that the documents would materially assist them, but rather that the documents called for are 'apparently relevant, or capable of providing a legitimate basis for cross-examination, in which case there is a legitimate forensic purpose for the issue of the subpoena.'[21]

[26] I have proceeded essentially following *Cassidy* but taking a broader approach to 'legitimate forensic purpose' bearing in mind the context that

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**20** [2009] NSWCA 307.

**21** *Blacktown* at [89] (Brereton JA); Mc Callum JA at [100].

this is a jurisdiction where the welfare of the child is the dominant line of inquiry. That remains the case whether the order sought is for two years or is a long term order. The first respondent has drawn the Chief Justices remarks to my attention[22] in *Jenkins v Screening Authority*.[23] His Honour noted there that 'The principles applying in criminal and civil proceedings are the same, although their application may vary in context'. The context here is that it is the welfare jurisdiction which has some bearing, guided by the Act.

[27] As can be seen from the brief overview of the Act, the parties, particularly the CEO and the Court have significant statutory obligations in each case. Context is always important. Here the broader context is whether what is known of the previous care of the child is likely to inform the Court and the mother's case that the best interests of the child are not met by the direction sought by the CEO. At the same time, it is accepted the proceedings are not a roving enquiry over everything that has happened to the child in the past.

**The issue for determination at trial**

[28] At paragraph 11 in *CEO v PB,* the Judge stated:

> The issues then for consideration at trial are not whether the child is in need of protection and a protection order made because that has been conceded. The father does not wish to care for the child and has not been involved in these proceedings. The mother concedes she is not at present able to care for the child and proposes a two year order presumably on the basis that at the expiration of that period she will be

**22** First respondent's submissions in response to submissions of the Third respondent, filed 13 April 2023.

**23** [2016] NTSC 64 at [31]-[34].

> able and willing to care for her. RN through her legal representative has expressed her view that she does not want to live with her mother. The issue for determination at trial is therefore not whether a protection order should be made but the duration of the order. The evidence to be adduced is evidence confined to that issue.

[29] The appellant submitted that the Judge ought to have concluded that the issues before the Court included what order or orders best promoted and safeguarded the well-being of the child. While the best interests of the child is the governing principle, elsewhere in the Reasons it becomes clear the Judge has not lost sight of that principle.

[30] The first respondent submitted that the Judge was not in error. Drawing from *Cassidy*, the first respondent relied on the principle that the onus is on the appellant to properly describe the documents sought and persuade the Court that it was 'on the cards' that the documents would assist the appellant's case in challenging the CEO's case for a long-term responsibility direction. The first respondent submitted that the Judge's summary at [11] is an appropriate restriction of the matters in dispute following the summary of the background given by the Judge at [4] to [10], which acknowledged the child's placement at the SCF, her diagnoses of FASD, ADHD, Intellectual Development Disorder and Severe Language Disorder.

[31] The context here was case management and pre-trial issues. The objectives of those proceedings may be readily understood. Given the sensitivities of applications bearing on the welfare of a child and the need to resolve issues quickly, the principal objectives of the Act are still a central consideration.

The principles underlying the Act are to be seen in this instance in the context of achieving readiness for trial on the issues which are likely to arise in the context of the question of the length of the order.

[32] While it can be accepted the principal issue here was the length or form of the order, not whether one should be made in the first place, this does not diminish in a substantial way the importance of the overall objectives of the Act. Most of the evidential material would be directed to the particular issue of whether there should be a long term responsibility direction. That process in turn is likely to raise secondary or indirect issues such as what form of care the first respondent would propose in support of the long-term responsibility direction and in resolving those secondary issues, the principles underlying the Act and the various issues under the Act that must be considered when making such an order. Examples from the Act which are relevant are directions under s 123(iii); steps that are taken under s 130(ca) and service provision and involvement of family under s 42.

[33] Further background which may be accepted for the purposes of this appeal is, as mentioned, that the child suffers from FASD which was diagnosed in October 2021.[24] The features of the FASD which manifest in impairments and impact on functioning were reported as impairments in the domains of Brain Structure Cognition, academic achievement, attention, executive functioning and language.[25] The Patches Report noted the child's adaptive

**24** AB 11; Diagnosis of Dr Mantho Kgosimang of Patches.

**25** Patches report at AB 175.

functioning was poor which suggested she would require substantial supports to function independently. Her cognitive deficits impacted negatively on professional interactions and planning interventions with her. Aside the FASD, the child was said to have a complex background which may also have cognitive, behavioural, and emotional consequences. The exposure to alcohol in-utero appeared to be a significant contributing factor to her impairments and she readily met the criteria for a neurological disability.[26]

[34] Expert opinion was available which gave details of the secondary symptoms of FASD, the secondary symptoms included: disrupted schooling, trouble with the law, inappropriate sexual behaviour, vulnerability to substance abuse and comorbid mental health issues.[27] An opinion was likely to be advanced in the proceedings that while changes to brain development were likely permanent, early and coordinated interventions may improve the lives of children with FASD by reducing the risk of longer-term negative social impacts or secondary disabilities which may emerge from poor understanding and management of the primary difficulties.[28]

[35] The material before the Court included the *Commonwealth National Fetal Alcohol Spectrum Disorder (FASD) Strategic Action Plan* 2018-2028 (2018) ('*Action Plan*') which was developed to improve the management of

**26** AB 175.

**27** AB 460-466, Dr Sara McLean and Dr Stewart McDougall.

**28** AB 466.

children with FASD, including Indigenous children. Much of the *Action Plan* is directed to early identification and tailored interventions for children suffering from FASD. This too was directed towards limiting the extent of secondary conditions through multidisciplinary models of care. The *Action Plan* proceeds on the basis there is likely to be improved life outcomes for individuals affected by FASD if there is early identification and tailored intervention.

[36] The *Action Plan* refers to the FASD Hub (www.fasdhub.org.au) as a resource which provides a central repository for all information on FASD for clinicians, health practitioners, researchers and consumers. The FASD Hub emphasizes the form of specialised case management models and the ideal environment in which treatment should take place. Specialised services are continually referred to throughout the available material.

[37] Some of the affidavit material filed in the Local Court on behalf of the CEO which was filed after the diagnosis of FASD did not disclose whether there had been reliance on the FASD Hub website or whether and how the objectives of the *Action Plan* were to be achieved.[29] Ultimately the Court was told the appellant would submit that reference or adherence to the *Action Plan* including the content of the FASD Hub was the accepted manner of treatment and management of FASD and that this would have a bearing on the length of the protection order.

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**29** Affidavits of Rachael Whitelaw, 11 November 2021 and 9 May 2022.

[38] At the time of the Local Court hearing, the child was held at the SCF, a facility for children in care who manifest complex trauma and are at significant risk of harm. The office of the Children's Commissioner conducted a monitoring visit to the SCF on 4 February 2021. The office of the Children's Commissioner prepared a report dated 1 September 2021, titled 'Territory Families Housing and Communities Safe Care Families. Monitoring visit 4 February 2021 Snapshot from 1 September 2020 to 30 November 2020' ('the Report'), which was tabled in Parliament on 28 October 2021. The copy of the Report which is before this Court and was before the Local Court is heavily redacted.[30]

[39] The appellant submits that given the child had been placed in the SCF since 14 July 2021, the available criticisms from the un-redacted part of the Report were relevant to the proceedings and that it was likely the redacted parts were also relevant. The redacted Report was tabled in Parliament on 28 October 2021. The appellant points to s 7(1) of the *Children's Commissioner Act* 2013 (NT) which details the functions of the *Children's Commissioner*. The functions include monitoring the administration of the Act insofar as it relates to "vulnerable children" and undertaking enquiries related to the care and protection of "vulnerable children". A "vulnerable child" includes "a child who is the subject of the exercise of a power or performance of a function under Chapter 2 of the *Care and Protection Act*", "a child who is

**30** AB 91-148, including annexures. Redactions on pages (AB reference) 104, 107, 108, 110, 111, 112, 114, 118, 119, 120, 121, 125, 126, 127.

suffering from a mental illness or is mentally disturbed" and "a child who has a disability."[31] The criticisms of the SCF in the Report were detailed and substantial. In brief, examples included the absence of any therapeutic or evidence based model of care, the absence of appropriate training of staff in therapeutic care, the poor quality of the environment (not at all 'home-like'), and no proper clinical care model for transition into a less restrictive environment.

[40] The Report made a number of recommendations which were to be acted on by 30 December 2021.The training of staff to provide a clinical care model, to build capacity of trauma informed responses and associated subjects were to be implemented by 31 March 2022.

[41] Given the criticisms of the SCF, the appellant submitted it should have access to the redacted parts of the Report, particularly the redacted portions under the heading "Physical Restraint and Challenging Incidents" and under the heading "Education and Training for Young People". Ms Whitelaw's affidavits mentioned above include discussions of the child's placement at the SCF without any reference to the Office of Children's Commissioner's Report.

[42] Against that background, together with a history of child protection orders, placements and interventions too lengthy to set out here but are contained in

**31** *Children's Commissioner Act*, s 7(1)(a)(d)(e).

a detailed and helpful chronology before the Court,[32] the material was sought through the summons to produce documents.

[43] The first respondent argued the position of the parties in terms of the determination of the practical issues before the Court was the principal consideration. The point was made that the proceedings were not a roving inquiry. I agree. The Local Court was entitled to define the key issues which would be the focus of the proceedings. I agree with that proposition, however certain elements of the proceedings involve related issues that the Court clearly needed to consider or is likely to consider. For example, those matters which fall for consideration under ss 123(iii), 130(1)(a), 42, 123, 128. The key issues can be identified without losing sight of the paramount consideration, the child's best interest.

[44] In this matter it was agreed the child was at risk of serious harm, magnified by her use of volatile substances. Plainly the child was placed in the SCF in part as a result because of her volatile substance abuse, although as pointed out by the Judge, it was not the sole factor.[33]

## Grounds of appeal

### Ground one

[45] Ground one contends the Judge erred in concluding that the only issue for determination "at trial" was the duration of a protection order in favour of

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**32** Appellant's Chronology, 6 February 2023.

**33** *CEO v PB* at [7].

the CEO and the evidence to be adduced is "confined to that issue" (paragraph) 11 of the Decision. Ground one contends the Judge ought to have concluded that the issues before the Court from time to time included what order or orders best promoted and safeguarded the well-being of the second respondent (child) including whether and if so what directions ought to be made under s 128(1)(a)(ii) of the Act form time to time.

[46] The respondent submitted and I substantially agree that the issues must be confined in a practical way. All parties agreed the child was at severe risk of harm to the point her life was probably in danger given her use of volatile substances. She was initially placed in the SCF principally for that reason. Her previous placement was a means to keep her safe. The Judge was entitled to look to the current issues and as senior counsel for the respondent pointed out, the Judge had no application before her in respect of orders being sought under s 139 of the Act.

[47] In terms of the protection history it was also pointed out that there was a period when the child was not subject to any protection order, between April 2019-18 and February 2021, although there was involvement by Territory Families by way of support for the family.[34] From the end of 2021 to May 2022 a number of affidavits from the CEO were provided to the Court, including material on the SCF.[35] The respondent submitted there was no

**34** Application of 18 February 2021, AB 275-286.

**35** Updating affidavits including expert reports are provided at AB 328, 335 and an updated care plan at 340.

obligation on the CEO to provide policy or systemic material to the Court in the context of a case concerning a particular child. It may be accepted that the care plan[36] which was to be before the Court shows that a case officer was attending to NDIS supports and services which had been recommended.

[48] It should also be noted the CEO produced a significant amount of the material sought by the appellant. There does appear to have been a substantial amount of material provided to the appellant leading up to the hearing of the application in the Local Court.[37]

[49] Counsel for the CEO also pointed to paragraph [10] of the Judge's reasons which showed the appellant had not responded, through any of her affidavits about whether she knew of allegations of sexual abuse against the child. The Judge noted the appellant did admit she went to prison for hurting the child in 2021.

[50] I do not accept the contention that the Judge lost sight of the paramount principle of the best interests of the child. While the decision, in particular paragraph [11] does not specifically refer to that principle, the focus at the time was on ensuring the trial could proceed in three weeks from the date of the hearing before the Judge. While I agree there were other secondary or subsidiary issues which may well need to be resolved under the Act at the hearing, there was no error in what the Judge stated at [11]. It is the case

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**36** AB at 340.

**37** The summons is set out in AB 45-47. The CEO provided material sought under 1, a, b, c, h, I, j, k, l, m, n, o, p, q, r s.

that questions about directions might be made under s 128(1)(a)(ii), but that was not the focus of the hearing at that time. It may be a matter of interpretation, but in my view there was no error on the part of the Judge for not canvassing or listing the variety of issues and sub-issues which were not the main focus of what would likely take place at the hearing. In any event, at other points in the Reasons the Judge referred to supervision orders[38] and the best interests of the child.[39] This ground is couched in general terms and will not be upheld.

**Ground 2**

[51] Ground 2 contends there was error by concluding that the contents of the office of the Children's Commissioner Report and the CEO's response to it were not relevant to the Child, to the assessment of her well-being and to the issues before the Court (paragraphs 14 and 16 of the Decision). Further, it is contended that the Judge ought to have concluded that those documents and this information was relevant to the issues before the Court as referred in Ground 1.

[52] As pointed out on behalf of the CEO, the child was transitioning out of the SCF at the time of the hearing. The child was not living in the SCF at the time the observations were made by the Report writers, the 'Snapshot from 1 September 2020 to 30 November 2020'. Even taking a broad approach to the notion of legitimate forensic purpose, I cannot see how further details of

**38** Reasons at [20].

**39** Reasons at [21].

the Report would help the appellant's case. The child did not live there when the 'Snapshot' was taken. It is not proposed the child live at the SCF again.

[53] Leaving the Report aside, information about the stay by the child at the SCF does have some relevance, albeit indirectly to the question of whether there should be a long term direction or a shorter order. Although what is most important in the circumstances is what is planned for the child for the future, the willingness of the CEO to engage appropriate services for the many issues affecting the child, the resources available to meet the child's needs may in part be gauged by what has been provided in the past. If treatment and care has in the past been lacking, that is most appropriately dealt with by a supervision order which may be made under s 123(iii) of the Act. Further, the time in the SCF, even outside of the transition period will provide information that the Court must consider under s 130(1)(ca), 'the steps taken' to provide services to the child. The immediate period before transition is not so remote as to be irrelevant to a number of the mandatory considerations under the Act. Drawing from what is known of the material before the Court, it will likely assist the appellant to submit that a long term direction should not be made. The material sought is relevant to a number of statutory considerations and the summons should not have been narrowed to the extent that it was. The Report's relevance is however limited. It is somewhat historic *vis a vis* this particular child. The recommendations,

given they are directed to the future care of children with complex needs are likely to assist the appellant make the case against a long term order.

[54] This ground is made out in part. The effect of this ground being made out in part is that the documents sought in 1(d) in the schedule to the summons are to be provided by the CEO to the appellant, save that it this does not include the unredacted *Report by the Office of the Children's Commissioner* of 1 September 2021 and 16D is to be read accordingly.

**Ground 3**

[55] Ground 3 contends that in concluding that the documents requested in 1(d) (save those relating to transition) and 1(g) were not described with sufficient particularity, 'cast the net wider than what is a legitimate forensic purpose for the production of the documents' and were a 'perfect example of … a 'fishing expedition' (paragraphs 15 and 17 of the Decision), the Judge was in error. The Judge ought to have concluded that these documents and this information was relevant to the issues before the Court as referred to in paragraph 3.1 of the Amended Grounds of Appeal, were sufficiently described (or could have been amended to resolve any issue with their breadth) and were requested by the mother for a legitimate forensic purpose including for the purpose of determining whether the CEO was caring for the child in accordance with their duties under the Act and whether any directions ought to be made to better promote the well-being of the child.

[56] I will allow this ground in part. The considerations here essentially repeat what has been said above with respect to Ground two. There is a legitimate forensic purpose in the mother having access to materials listed in 1d of the Schedule to the summons, confined to the time the child was residing in the SCF. For similar reasons, namely the fact that it could likely bear upon the length of the order, directions on care and the steps taken by the Territory as required by the Act, any documentation listed in 1g, confined to the period the child was living in the SCF should be provided.

[57] In terms of 1(e) of the schedule seeking a complete unredacted copy of the Report, there are a number of considerations. First as mentioned above, the child was not living at the SCF when the 'Snapshot' forming the basis of the report was taken. The period she was living at the SCF does have some relevance given the provisions of the Act relating to 'steps taken' and potentially the directions required given this is a child requiring special services, but it seems too remote to be taking up other issues from the Report unless they can be seen to affect the child. Second, the redacted Report has been provided to the appellant and the Court. I understand from the hearing in this Court that the redacted version is how the Report was provided to the second respondent. The document is a third party's document. Otherwise it would be expected that the whole document be provided if it was in the hands of the CEO. But it is understood that is not the case. The authorities suggest that there is no absolute entitlement for a

party to redact irrelevant material in an otherwise relevant document.[40] Here the unredacted document, the Report, as I understand it, is a document of a third party being the Office of the Children Commissioner. It would be inappropriate to speculate as to why the Report is redacted without hearing from that third party. Although I was told that privilege was not claimed over the redacted parts, those parts are likely to be relevant to children not associated with this matter.

[58] Although I agree that information about to the child's stay at the SCF is relevant and in the hands of the appellant has a forensic purpose, I do not agree the forensic purpose can be established with respect to a 'Snapshot' in time before the child resided there. The decision of the Judge not to order an unredacted copy of the Report will not be disturbed.

[59] Ground 4 contends that in refusing to make orders in terms of paragraphs 1(a) to 1(d) of the mother's application for the same reasons as discussed under the grounds of appeal, the Judge was in error.

[60] As seen from the discussion on the grounds relevant to the summons, I have concluded the period that the child spent in SCF is relevant and is likely to be of forensic benefit to the appellant, particularly in relation to directions to the CEO and the steps taken, which in turn may bear on the length of the order. I do not however see that the Report constructed from observations when the child was not living at the SCF is relevant or of forensic value to

**40** *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863.

the case at all. However, the recommendations emanating from the Report may well be relevant and have forensic value to the mother including the implementation of recommendations.[41] Those recommendations were published on 1 September 2021, although as mentioned already related to the period 1 September 2020 and 30 November 2020. The child entered the SCF in July 2021 and was still a resident of the SCF when the recommendations were made. The extent of the implementation of the recommendations is likely to have a bearing on the length of the order, whether any directions should be made as to the care provided and what steps were taken by the Territory in the light of the recommendations. These are matters the Act itself readily provides for consideration. They are relevant to the care of a child with the disabilities outlined whether or not the child is in the SCF.

[61] This ground is made out. There will be an order requiring the CEO provide an affidavit in terms of paragraphs 1(a)-1(d) of the application.

**Summary of Decision on the Appeal Grounds**

1. The appeal is allowed in part.

2. Ground 1 (paragraph 3.1 of the Amended Notice of Appeal) is dismissed.

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**41** AB 128.

3. Ground 2 (paragraph 3.2 of the Amended Notice of Appeal) is allowed in part.

4. Ground 3 (paragraph 3.3 of the Amended Notice of Appeal) is allowed in part.

5. Ground 4 (paragraph 3.4 of the Amended Notice of Appeal) is allowed.

**Relief**

1. Set aside that part of the Decision of the Local Court of 9 August 2022 which restricted production of documents in paragraph 1(d) of the Schedule to the Summons to the transition of the child out of the SCF. Documents relevant to the child's stay in the SCF are to be produced, excluding an unredacted copy of the Report.

2. Confirm the decision of the Local Court that production of 1(e) of the Schedule to the Summons is not required, which is the unredacted copy of the Report.

3. Set aside the decision of the Local Court to remove documents falling within 1(f) and 1(g) of the Schedule to the Summons, save that the CEO need not produce documents relevant to the redacted parts of the Report.

4. Set aside the decision of the Local Court to not require an affidavit from the CEO in the terms of paragraphs 1(a)-(d) of the interlocutory

application of the appellant, instead require the CEO to file and serve an affidavit in the terms of 1(a)-(d) of the application, save that the affidavit need not address redacted parts of the Report.

5. The CEO's application in the Local Court (AB 55) is in part dismissed, consistent with these orders, save that it is confirmed that the documents described in 1(e) of the Schedule to the Summons are not required to be produced and that 1(d) will not be restricted to the transition of the child; the CEO must comply with 1(f) and 1(g) of the Schedule, but does not need to produce documents relating to redacted parts of the Report.

6. The matter is remitted to the Local Court to set timelines for the production of the documents in accordance with the Local Court's practices.

7. In consultation with counsel this Judgment will be forwarded to counsel via email.

8. The parties have leave to approach Chambers should any party wish to make an application for costs.

9. A courtesy letter to counsel will be forwarded with these reasons.

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