Civil Procedure NT | BULLETIN

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About this bulletin

This bulletin provides a report on procedural aspects of civil cases in the Northern Territory by setting out excerpts of key sections of new content added to *Civil Procedure NT* in the most recent service update. The new content is incorporated under relevant headings to show the provisions or topics to which it relates.

Supreme Court Rules

[5.9.500] 9.06 Additional, removal, substitution of party

[5.9.505] Operation – *Family Provision Act* proceedings.

As the defendant to proceedings under the *Family Provision Act* is usually only the executor of the estate, the nature of the claim impacts on the operation of r 9.06. The general rule in claims for provision out of the estate pursuant to the Act is that the beneficiaries should not be a party notwithstanding that they have an obvious interest in the proceedings: *Cutting v Public Trustee for the NT* [2017] NTSC 6 at [23] (citing *Re Lanfear* (1940) 57 WN (NSW) 181 at p 183).

In *Albany v Albany* [2010] NTSC 25; (2010) 27 NTLR 89, Mildren J said (at [3]) (quoted with approval in *Cutting*, above, at [24]):

> Where an application is made for provision to be made out of an estate under the Family Provision Act, the parties to proceedings for such an order are generally just the applicants for the orders and the legal personal representatives of the deceased. Beneficiaries may be joined, but this is an exceptional power exercised, usually, only if the legal personal representative is not fulfilling his duty to either compromise the claim or claims, or contest it and seek to uphold the provisions of the will.

In *Bartlett v Coomber* [2008] NSWCA 100, the court indicated that, in a compromise situation, it may be appropriate that a beneficiary is given the opportunity to persuade the court that the legal personal representative was not adequately representing the interests of the beneficiaries (at [74]; cited with approval in *Cutting*, above, at [25]).

The general rule that only the executor of the estate is to be the defendant in a claim under the *Family Provision Act* recognises that it would be unworkable in most cases, certainly in smaller estates, if there were multiple defendants, in part as costs could be prohibitive. Rather, the approach taken by courts is to rely on the duties on the executors and to dispense with the involvement of beneficiaries as parties except in very specific instances: *Cutting*, above, at [27] per Master Luppino (see also authorities cited therein).

Other examples cited in the authorities as possible appropriate instances where joinder of beneficiaries should be permitted is where the executors take an attitude which compels beneficiaries to seek representation to protect the gifts (*Re Lanfear* (1940) 57 WN (NSW) 181

at 183]), or where the executors are not fulfilling their duty to represent the beneficiaries' interests, or if there is some other reason to justify that course (*Bartlett v Coomber* [2008] NSWSA 100 at [71]; *Albany v Albany* (2010) NTLR 89): *Cutting*, above, at [28].

CASES – *Phillip Frederick Cutting v Public Trustee for the NT* [2017] NTSC 6 (application for joinder by beneficiaries of estate in *Family Provision Act* proceedings refused where applicants dissatisfied with how former executors handled plaintiff's claim but evidence indicated former executors had fulfilled their duties in respect of the claim and current executor, being the Public Trustee, would do so as well).

[5.9.515] Limitation period.

It was a settled rule of practice in the court immediately prior to the commencement of the new rules that leave would be refused once time had expired, and in the absence of anything in the rules to the contrary, that practice should continue … However, whilst joinder in such circumstances is routinely refused, this is a rule of practice only and it is not an immutable rule: *Yamamori (Hong Kong) Ltd v Clark* [1994] NTSC 111 at [66]; *Gwalwa Daraniki Association Inc v Michael Chin* [2017] NTSC 51 at [44].

Rule 9.11(3)(a) makes it clear that joinder of a party only takes effect from the date of filing of the amended originating process. The filing of an amended originating process is required by r 9.11(1). Accordingly, there is no retrospectivity and the relevant party will not be denied any limitation defence it otherwise has available: see *Gwalwa*, above, at [50].

The *Limitation Act* (NT) does not prescribe a time limit in respect of equitable relief (s 21). Accordingly, in the context of an application for joinder, where there is a possibility that the relevant party may claim equitable relief (eg unjust enrichment), it may not be subject to the same limitation period as would apply to a claim in common law (eg breach of contract): *Gwalwa*, above, at [49].

[5.22.100] 22.02 Application for judgment

[5.22.106] Summary judgment for plaintiff – legal principles.

In *Outback Civil Pty Ltd v Francis* [2011] NTCA 3, the NT Court of Appeal held (at [10]) that r 23.03, relating to summary judgment for defendant, will only be enlivened where the plaintiff's case is "so clearly untenable that it could not possibly succeed" (citing *Spencer v The Commonwealth* (2010) 241 CLR 118 at 139-140; [2010] HCA 28 at [53]-[55] per Hayne, Crennan, Kiefel and Bell JJ). That principle "will apply equally, with appropriate modification, to an application by a plaintiff for summary judgment pursuant to Rule 22.01": *Monck v The Commonwealth of Australia* [2017] NTSC 49 at [12] per Master Luppino.

[5.23.20] 23.01 Stay or judgment in proceeding

[5.23.25] Summary judgment (r 23.01) vs striking out (r 23.02).

This distinction was demonstrated in *Monck v The Commonwealth of Australia* [2017] NTSC 49. In that case, the plaintiff's statement of claim was deficient. Master Luppino found that an order to strike out the plaintiff's statement of claim would have been appropriate if an amendment of the claim could have rectified its deficiencies. However, the Master found that the plaintiff could not maintain its cause of action under any circumstance and, as such, this could not be cured by an amendment of its statement of claim. Accordingly, Master Luppino ordered summary dismissal of the claim.

[5.23.26] "Abuse of the process".

The inherent jurisdiction of the court to prevent abuse of its own process is not limited by the power in SCR 23.01(2)(c) to stay or dismiss proceedings for abuse of process: *JMT Builders Pty Ltd v T J Ryan* [2016] NTSC 6 at [11].

…

In *JMT Builders*, Master Luppino quoted with approval the following passage summarising the principles relating to abuse of process from the text *Abuse Of Process And Judicial Stays Of Criminal Proceedings* (Choo, 2nd ed, Oxford University Press) (Master Luppino acknowledged that, whilst the title of the text refers to criminal proceedings, the principles are derived from, and apply to, civil proceedings) (at [14]):

1. A litigant has the right to have his claim litigated provided it is not inter alia an abuse of process;
2. The court has an inherent power to prevent abuse of its own process by summary order;
3. The jurisdiction to strike out proceedings for abuse of process should be used sparingly and with circumspection;
4. The categories of abuse of process are not closed and recognised categories of abuse of process are:-

   (a) proceedings which involve a deception on the court, or [are] fictitious or constitute a mere sham;

   (b) where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

   (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

   (d) multiple or successive proceedings which cause, or are likely to cause, improper vexation or oppression;
5. What is an abuse of process depends on all the circumstances of the case and whether in a particular case there is abuse will be a question of fact and degree.

…

The categories of abuse of process are not closed: *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509; *Sea Culture International v Scoles* [1991] FCA 523; (1991) 32 FCR 275; *Batistatos v Roads and Traffic Authority of NSW* [2006] HCA 27; (2006) 226 CLR 256 at [9]; *JMT Builders Pty Ltd v T J Ryan* [2016] NTSC 6 at [11] …

There are recognised categories of abuse and the most common are: firstly, that the proceedings are brought for an improper purpose or ulterior motive; secondly, that the proceedings use the court's procedures in a way that is unduly oppressive; and, thirdly, that the proceedings use the court's procedures in a way which tends to bring the administration of justice into disrepute: *JMT Builders*, above, at [11]. An unmeritorious claim brought merely in order to put pressure on a respondent for commercial or other reasons is an abuse of process. Such a claim might also be attacked as frivolous or vexatious or as disclosing no reasonable cause of action. Those designations are not mutually exclusive: *Sea Culture International*, above.

Proceedings will be an abuse where there is no genuine dispute as there will be no legitimate purpose in commencing the proceedings: *JMT Builders*, above, at [15]-[16]. In *JMT Builders*, it was held that it was an abuse of process to commence proceedings for damages for breach of a building contract where the parties had already concluded a deed of settlement which provided for final resolution of proceedings without reservation of the right to re-agitate the initial dispute in the event of default on the terms of settlement. The deed provided that there would be consent judgment for the settlement amount and that this would be enforceable by the plaintiff in the event of default on the terms of settlement. However, Master Luppino found that there was no genuine dispute as the only actionable remedy in the circumstances arose if there was default on the terms of settlement, in which case the plaintiff needed to bring an action for breach of the deed of settlement, rather than for breach of the building contract. Master Luppino found (at [19]) that the plaintiff was seeking for the court to keep the proceedings in abeyance in case there was a need to enforce the consent judgment. This was an unnecessary use of court resources to cover a contingency which may never occur and, furthermore, was being done in circumstances where another practical option would be available in the event of default on the terms of settlement (in particular, an action for breach of the deed).

An attempt to litigate in the court a dispute or issue which has been resolved in earlier litigation in any court or tribunal may also, according to the circumstances, constitute an abuse of process, even if not attracting the doctrines of *res judicata* or issue estoppel: *Sea*

Culture International, above; see also *Walton v Gardiner* [1993] HCA 77; (1992-3) 177 CLR 378 at 393. It is equally an abuse to bring concurrent proceedings in different courts or tribunals relating to the same subject matter: *Henry v Henry* (1996) 185 CLR 571; [1996] HCA 51 at 591 (cited in *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 at [35]). The commencement of proceedings which have been resolved by settlement and without any remaining residual issues will also constitute an abuse of process: *JMT Builders*, above, at [13]. Similarly, it would be an abuse of process, as well as potentially contrary to the principles of *res judicata* or issue estoppel, for a court to grant an application for summary judgment in respect of a part of an amount claimed in proceedings which had already been the subject of an earlier payment claim and determination pursuant to arbitration: *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69 (upheld on appeal), cited in *CH2M Hill Australia*, above, at [33]. It is possible, but not necessarily the case, that where a party makes separate applications agitating different issues and relating to different subject matters in the knowledge and expectation that the responses by the other party will raise the same issues in each case, this could amount to an abuse of process: *CH2M Hill Australia*, above, at [36] per Kelly J.

…

It would be an abuse of process to file an application for adjudication and then withdraw it in order to stop another party proceeding with an application for adjudication: *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7 at [9]; *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 at [32] per Kelly J.

…

CASES – *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 (not an abuse of process of adjudication for defendant to proceed with second adjudication application, despite plaintiff's responses in each adjudication identifying considerable overlapping issues, where adjudication applications made different claims, did not relate to same subject matter, did not seek to agitate same issues and plaintiff disputed each claim on different grounds).

[5.23.28] Summary stay or dismissal of claim – legal principles.

CASES – *Monck v The Commonwealth of Australia* [2017] NTSC 49 (plaintiff's tortious and constitutional claims summarily dismissed where not maintainable at law).

[5.23.200] 23.03 Summary judgment for defendant

[5.23.203] Summary judgment for defendant – legal principles.

The NT Court of Appeal held in *Outback Civil Pty Ltd v Francis* [2011] NTCA 3 at [10] that r 23.03 will only be enlivened where the plaintiff's case is "so clearly untenable that it could not possibly succeed" (citing *Spencer v The Commonwealth* (2010) 241 CLR 118 at 139-140; [2010] HCA 28 at [53]-[55] per Hayne, Crennan, Kiefel and Bell JJ) (applied in *Monck v The Commonwealth of Australia* [2017] NTSC 49 at [12]).

[5.24.20] 24.01 Want of prosecution

[5.24.23] Dismissal of action for want of prosecution – exercise of discretion.

The court would ordinarily be slow to dismiss an appeal brought by an unrepresented litigant on the ground of want of prosecution, and would only do so in exceptional circumstances: *Jenkins v Registrar of the Supreme Court (No 1)* [2017] NTCA 4 at [23].

CASES – *Jenkins v Registrar of the Supreme Court (No 1)* [2017] NTCA 4, *Jenkins v Registrar of the Supreme Court (No 2)* [2017] NTCA 5 and *Jenkins v Todd* [2017] NTCA 6 (appeals by unrepresented litigant dismissed for want of prosecution where he had no real prospect of taking steps necessary to prosecute appeal as he was incapable of preparing rational or comprehensible submissions and unable and unwilling to obtain legal representation).

[5.26.800] 26.08 Costs consequences of failure to accept

[5.26.805] *Calderbank* offer.

In *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55, Hiley J summarised the principles and test regarding a failure to accept a *Calderbank* offer in the following way (at [58]):

> [58] An offer made inclusive of costs can be properly considered to be a *Calderbank* offer. A *Calderbank* offer does not automatically result in the court making an order for indemnity costs. The question that the court has to determine in deciding whether to award indemnity costs is:
>
> > ...whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure. [*SMEC Testing Services Ply Ltd v Campbelltown City Council* [2000] NSWCA 323]
>
> [59] In the context of a *Calderbank* offer, this generally devolves into a consideration of the following two questions:
>
> (a) whether the offer was a genuine offer of compromise; and
>
> (b) whether it was unreasonable for the offeree not to accept the offer in the circumstances.
>
> [60] As to the first of these questions, a genuine compromise involves a party giving something away. As to the second of these questions, a court will take into account various factors such as the stage of the proceeding at which the offer was received, the time allowed to the offeree to consider the offer, the extent of the compromise offered, the offeree's prospects of success assessed as at the date of the offer, the clarity with which the terms of the offer were expressed and whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

…

In *Ceccon Transport*, three days after attempted mediation, the plaintiffs made an offer to settle by accepting $2.1 million plus GST inclusive of costs. The time for acceptance was seven days, less than the 14 day period required for offers under r 26.03(3). The defendants refused the offer and the plaintiffs subsequently obtained judgment for an amount of around $1.9 million plus interest plus costs with interest. It was accepted that, overall, the judgment amount was more favourable to the plaintiffs than the settlement offer. The defendants contended that the offer was not a genuine offer on the basis that: it was imprecise in terms of dollars because it included the possible addition of GST; it was inclusive of costs, as a result of which its real value was difficult to assess; and the offer did not clearly foreshadow an application for indemnity costs. The defendants also contended that it was reasonable to refuse the offer, including on the grounds that: the defendants were still actively engaged in assessing the merits and value of the counterclaims; and the offer was made shortly after the attempted mediation. In rejecting both of these contentions, the court found (at [62]) that the offer was a genuine offer and it was unreasonable to reject it. The offer was made at a highly appropriate time in the proceedings, perhaps the most appropriate time prior to the period leading up to the hearing itself, when both parties would have been extremely cognisant of the respective strengths and weaknesses of their cases. It was the time for settlement to be seriously explored by both parties. Further, the time period for acceptance was reasonable in the circumstances. Those circumstances included the fact that the Practice Direction 6 letter had been sent more than eight months earlier, pleadings had been exchanged and discovery provided and position papers would have been prepared for and used during the full-day mediation that occurred. The court held that, on this basis alone, the defendants should pay costs on an indemnity basis.

[5.26.809] Rejection by plaintiff of more favourable offer (sub-r (3)).

CASES – *Cook v Modern Mustering Pty Ltd* [2016] NTSC 17 (no order for costs to be on indemnity basis from date on which unsuccessful plaintiff, who had suffered catastrophic workplace injury, refused *Calderbank* offer of $350,000 on basis such refusal was not unreasonable as claim was for $10.5 million and, at time offer was made, plaintiff did not have expert reports used by court to conclude defendant not liable for injuries and because offer was only open for 13 days).

[5.36.20] 36.01 General

[5.36.29] Amendment late in trial.

In *Ketteman*, Lord Griffiths outlined considerations to be taken into account in exercising the discretion (at 220) (quoted in *ABB Australia (No 2)*, above, at [26]):

> … a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other …
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

…

In *AON*, the plurality said (at [102]) (quoted in *ABB Australia (No 2)*, above, at [27]):

> Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.

…

[5.36.38] "Mistake" – in name of party (sub-rr (4), (5), (7)).

An alternate power to substitute a party in appropriate cases is r 9.06 ("Additional, removal, substitution of party"): *Knott v JN Mousellis Civil Contractors Pty Ltd* [2016] NTSC 59 at [4]. However, where a relevant limitation period has expired, the addition or substitution of a party by amendment pursuant to r 36.01(4) overcomes the limitation issue by reason of rule r 36.01(5), which provides that where a correction of a name of a party has the effect of substituting another person as a party, the proceeding will be taken to have commenced with respect to that person on the day the proceeding commenced. In contrast, a limitation defence is available in the case of a substitution pursuant to r 9.06 by reason of r 9.11(3)(a), which provides that, in relation to a new defendant, the proceedings commence on the amendment of the filed originating process. The usual practice where the limitation period has expired is to refuse leave as the limitation defence will be inevitably taken and would inevitably succeed. In the ordinary course, an application by a plaintiff for leave to substitute under r 9.06 would be refused as it would be futile in light of the limitation defence that is available (see *Creedon v Measey Investments Pty Ltd* [1990] NTSC 15; (1990) 100 FLR 42; *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* (unreported, NTCA, 26 September 1997)). Accordingly, where a limitation period has expired, a plaintiff will often seek to apply under r 36.01(4) rather than r 9.06: *Knott*, above, at [4].

…

In *Bridge Shipping*, McHugh J concluded that the test was as set out in *The "Al Tawwab"* [1991] 1 Lloyd's Rep 201 where Lloyd LJ said (quoted in *Knott*, above, at [20] per Master Luppino):

> In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v Harris Engineering* the identity of the person intended to be sued was the plaintiff's employers. In *Evans v Charrington* it was the current landlord. In *Thistle Hotels v MacAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise.

In contrast, in *Bridge Shipping*, Dawson J, in the minority, applied a more restrictive interpretation. His Honour thought that equivalent r 36.01(4) in the Victorian Supreme Court Rules had a more limited application and applied only to errors in the nature of a misnomer. He was of the view that a mistake in the name of the party was not the same as a mistake in the identity of the party, citing the following example (at 242):

> In other words, one may intend to sue the landlord but be mistaken in the belief that X is the landlord. That is not to mistake the name of X, but to mistake the identity of the landlord.

The test suggested by Dawson J was:

> ... the question can only be resolved by asking whether, in all the circumstances, it can reasonably be said that the party whose name is sought to be amended would remain the same in all but name or description if the amendment were allowed. If so, then there is a misnomer or misdescription and the rule applies ... If not, and the effect of the amendment would be, not to correct the name of the party, but to alter the identity of the party, then that rule does not apply.

However, it is the approach of McHugh J in *Bridge Shipping*, being that of the majority, that must be applied: *Knott*, above, at [25]).

CASES – *Knott v JN Mousellis Civil Contractors Pty Ltd* [2016] NTSC 59 (leave granted for plaintiff to correct name of second corporate defendant, resulting in substitution of a different but related corporate entity, where plaintiff had obtained incorrect entity from a form used by both corporations but which referred solely to named corporation; error was one as to name of party as plaintiff had always intended to sue employer's contractor).

[5.36.706] Slip rule – exercise of discretion.

In *Anchung Pty Ltd v NTA (No 2)* [2016] NTSC 34, Master Luppino stated (at [36]):

> [I]n my view, this Court has jurisdiction to, and full discretion to, vary its own orders where appropriate. I can see no more appropriate case where an unjust result follows from a party's failure to comply with its obligations. That must be dissuaded.

In *Anchung*, the defendant successfully sought an order increasing the quantum of security for costs previously ordered. At the time of the order, the plaintiff had failed to fully comply with its obligation to disclose the value of all its assets, resulting in a reduction in the amount of security ordered that would otherwise not have occurred.

[5.42.300] 42.04 Setting aside or other relief

[5.42.397] Setting aside subpoena – legal principles.

In essence, a court will set aside a subpoena (or a summons where that is the relevant process) if it is not issued legitimately for the purposes of the proceedings concerned, if it is unnecessary for those purposes, or if it is being used for an improper purpose: *Jenkins v Screening Authority* [2016] NTSC 64 at [30].

…

Further, if the party cannot show that the documents or evidence sought will assist its case, it may alternatively show that they will weaken the other side's case: *Jenkins*, above, at [31] (citing *Senior v Holdsworth; Ex parte Independent Television News Ltd* [1976] QB 23; *Morgan v Morgan* [1977] 2 WLR 712; *Bank of NSW v Withers* (1981) 52 FLR 207 at 225-226; *Botany Bay Instrumentation & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98).

…

Cassidy concerned a subpoena for the production of documents. However, the same general considerations apply to a subpoena to give evidence: *Jenkins,* above, at [34].

…

A judicial officer cannot be subpoenaed to give evidence about what happened in a proceeding before him or her: *Hennessy v Broken Hill Co Pty Ltd* [1926] HCA 32; (1926) 38 CLR 342 at 349 (applied in *Jenkins v Todd* [2017] NTSC 26 at [37]).

CASES – *Jenkins v Todd* [2017] NTSC 26 (incomprehensible subpoenas, which should not have been accepted and stamped by the registry but were because of appellant's difficult and

confrontational manner towards registry staff, set aside); *Jenkins v Screening Authority* [2016] NTSC 64 (leave to appeal against order of Local Court setting aside summonses issued by applicant in proceedings for review of decision by screening authority not to issue clearance in respect of applicant refused where summonses not issued legitimately for purposes of proceedings, amounted to fishing expedition, did not support applicant's case and failed to identify documents sought with requisite specificity or particularity).

[5.47.150] 47.04 Separate trial of question

[5.47.153] "Question".

In *Reading Australia Pty Ltd v Australian Mutual Providence Society* [1999] FCA 718; (1999) 217 ALR 495, Branson J outlined the difference between a "question" and an "issue" in the context of equivalent O 29 r 1 of the Federal Court Rules. Branson J stated (at [8]) (cited with approval in *Groote Eylandt Aboriginal Trust Inc v Deloitte Touche Tohmatsu* [2016] NTSC 39 at [17] per Hiley J):

> [T]he term "question" in O 29 r 1 includes any question or issue of fact or law in a proceeding. The distinction in the rule between an "issue" and a "question" is the distinction between that which, when resolved, will result in an adjudication in favour of one party or the other, being an "issue", and less decisive matters of dispute being "questions" (*Landsal Pty Ltd (in liq) v REI Building Society* [1993] FCA 121; (1993) 113 ALR 643 at 647).

[5.47.156] Exercise of discretion.

In *Groote Eylandt Aboriginal Trust Inc v Deloitte Touche Tohmatsu* [2016] NTSC 39, Hiley J observed (at [17]) that most of the relevant principles were summarised in the reasons of Branson J in *Reading Australia Pty Ltd v Australian Mutual Providence Society* [1999] FCA 718; (1999) 217 ALR 495 in the context of equivalent O 29 r 2 of the Federal Court Rules. In that case, Branson J relevantly stated (at [8]-[9]):

> The principles that govern the circumstances in which an order will be made under O 29 r 2 are relatively well established. They may be summarised as follows:
>
> (a) …
>
> (b) a question can be the subject of an order for a separate decision under O 29 r 2 even though a decision on such a question will not determine any of the parties' rights (*Landsal Pty Ltd (in liq) v REI Building Society* [[1993] FCA 121; (1993) 113 ALR 643] at 647);
>
> (c) however, the judicial determination of a question under O 29 r 2 must involve a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties (*Bass v Permanent Trustee Co Ltd* [1999] HCA 9 at para 45);
>
> (d) where the preliminary question is one of mixed fact and law, it is necessary that the question can be precisely formulated and that all of the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable either as facts assumed to be correct for the purposes of the preliminary determination, or as agreed facts or as facts to be judicially determined (*Jacobson v Ross* [1995] VicRp 24; [1995] 1 VR 337 at 341, referring to *Nissan v Attorney-General* [1969] UKHL 3; [1970] AC 179 at 242-243 per Lord Pearson; *Bass v Perpetual Trustee* at para 53);
>
> (e) care must be taken in utilising the procedure provided for in O 29 r 1 to avoid the determination of issues not "ripe" for separate and preliminary determination. An issue may not be "ripe" for separate and preliminary determination in this sense where it is simply one of two or more alternative ways in which an applicant frames its case and determination of the issue would leave significant other issues unresolved (*CBS Productions Pty Ltd v O'Neill* [(1985) 1 NSWLR 601] per Kirby P at 606);
>
> (f) factors which tend to support the making of an order under O 29 r 2 include that the separate determination of the question may -
>
> (i) contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to disposal of the action; or
>
> (ii) contribute to the settlement of the litigation (*CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 per Kirby P at 607);

(g) factors which tell against the making of an order under O 29 r 2 include that the separate determination of the question may -

(i) give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial (*GMB Research & Development Pty Ltd v The Commonwealth* [1997] FCA 934);

(ii) result in significant overlap between the evidence adduced on the hearing of the separate question and at trial - possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding (*GMB Research & Development Pty Ltd v The Commonwealth*; *Arnold v Attorney-General for Victoria* [1995] FCA 727). This factor will be of particular significance if the Court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding; or

(iii) prolong rather than shorten the litigation (*GMB Research & Development Pty Ltd v The Commonwealth*).

Ultimately the issue for the Court to determine when consideration is being given to the making of an order under O 29 r 2 is whether it is "just and convenient" for the order to be made (*Arnold v Attorney-General for the State of Victoria*). There are classes of proceedings in which it is commonly recognised that it is just and convenient for an order under O 29 r 2 to be made. One such class is proceedings concerning intellectual property rights where an applicant cannot be compelled to make an election as between damages and an account of profits at least until all of the evidence has been received so that, if an order has not been made separating the determination of the issues of liability and relief, the parties will have to call evidence to deal with both damages and an account of profits (*Dr Martens Australia Pty Ltd v Bata Shoe Company of Australia Pty Ltd* (1997) 75 FCR 230). Another class is proceedings in which an application in the nature of a demurrer is appropriately made. An application of this kind assumes the truth of the pleaded facts. In a case in which it is clear that the pleadings contain all of the relevant facts but one party contends that the pleading does not disclose a cause of action, or a defence or a matter of reply, as the case may be, an application in the nature of a demurrer will have obvious utility (*Bass v Permanent Trustee Co Ltd* at para 50).

In *Groote Eylandt Aboriginal Trust*, Hiley J summarised various principles and authorities regarding the exercise of the discretion in the following terms (at [19]-[24]):

Ordinarily all issues of fact and law should be determined at the one time following a trial. However the power to determine issues or questions separately from and preliminary to the trial of the whole action has been exercised in a wide range of circumstances, including those where the questions of capacity or competence have been raised.[*Reading*, above, at [7]]

Factors which tend to support the making of an order for the determination of separate questions include that the determination may contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to disposal of the action, or contribute to the settlement of litigation.[*Reading*, above, at [8(f)]]

The making of an order for the preliminary determination of questions will entail a trial of the questions, including the final determination of any facts relevant to the questions, unless such facts can be assumed or are admitted.[*Bass v Permanent Trustee Company Ltd* [1999] HCA 9; (1999) 198 CLR 334 at [45], [53]; *Reading*, above, at [8(a)]] Where the split trial will be one of mixed fact and law, it is important that there be precision in specifying the facts upon which it is to be decided and that all the facts that are on any fairly arguable view relevant to the question, are ascertainable.[*AWB Ltd v Cole (No 2)* [2006] FCA 913; (2006) 233 ALR 453 at [32], [33]]

Counsel … submitted that it would therefore be appropriate to refuse a split trial where the Court is not satisfied those facts have been properly investigated, and can be properly determined, by the time the application for a split trial is heard, citing *AWB Ltd* at [56] and *Vale* [*v Daumeke* [2015] VSC 342] at [31(i)]. For the same reason, it is in most cases inappropriate to order the trial of preliminary questions before discovery of documents relevant to the questions, citing *Vale* at [31(j)].

Counsel also pointed to other circumstances that may weigh against the hearing and determination of preliminary questions:

(a) the likelihood of significant (but different) contested factual issues having to be determined at the early trial and at the principal trial;[*Reading*, above, at [8(g)(i)]]

(b) where there may be a significant overlap between the evidence adduced at both hearings, possibly involving the calling of the same witnesses, particularly where the court will be required to form a view as to the credibility of witnesses who may give evidence at both stages of the trial;[*Reading*, above, at [8(g)(ii)], [13]

(c) where the preliminary determination may prolong rather than shorten the litigation,[*Reading*, above, at [8(g)(iii)]] including where an appeal is likely.[*AWB Ltd*, above, at [84]]

Counsel … also pointed to the following observations by Kirby and Callinan JJ in *Tepko* [*Pty Ltd v Water Board* [2001] HCA 19; (2001) 206 CLR 1] at [168] & [170], that:

(a) the attractions of trials of issues rather than of cases in their totality, are often more chimerical than real;

(b) the additional potential for further appeals to which the course of the trial on separate issues may give rise is a factor militating against a split trial; and

(c) single-issue trials should only be embarked upon when their utility, economy and fairness to the parties are beyond question.[see also *Save The Ridge Inc v Commonwealth* [2005] FCAFC 203; (2005) 147 FCR 97 at [15] per Black CJ and Moore J and *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 at 141-2 per Giles J]

The discretion should only be exercised with great caution and only in a clear case: *Groote Eylandt Aboriginal Trust*, above, at [18].

CASES – *Groote Eylandt Aboriginal Trust Inc v Deloitte Touche Tohmatsu* [2016] NTSC 39 (order granted for two preliminary questions, regarding standing and validity of a trust, to be determined ahead of trial where trial likely to be complex and very lengthy and time and cost likely to be wasted if trial proceeded but either question answered adversely to plaintiff would be very large, even though second question would itself require considerable amount of time to prepare and argue); *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718 (application for order that question of respondent's liability, in case alleging misleading and deceptive conduct, be determined separately from question of damages refused where, among other things, parties had not reached agreement as to facts and preliminary determination of liability unlikely to lead to settlement of proceeding).

[5.48.550] 48.12 Settlement conference

[5.48.555] Operation. Rule 48.12(1) enables the court to set a settlement conference to explore the possibility of settlement if it is of the view that a proceeding is capable of settlement or ought to be settled. That can be ordered even if the parties have a different view of the prospects of settlement: *LO v NTA* [2017] NTSC 24 at [1].

[5.48.576] Evidence of settlement negotiations (sub-r (8)) – inconsistency with Uniform Evidence Act. Section 131(1) of the *Evidence (National Uniform Legislation) Act* (NT) ("UEA") provides for a general prohibition, subject to certain exemptions set out in s 131(2), in respect of adducing evidence of communications in the course of settlement negotiations and, ordinarily, would equally apply to communications at a settlement conference held pursuant to r 48.12: *LO v NTA* [2017] NTSC 24, above, at [19].

In *LO*, Master Luppino considered the impact of the principle of repugnancy on the validity of r 48.12(8) in view of s 131(2)(h) of the UEA (at [33]-[34]) and concluded that, in accordance with that principle, r 48.12(8) of the Supreme Court Rules was delegated legislation and did not prevail over any statutory provision, or any other substantive law, with which it is inconsistent. However, that finding appears to overlook the operation of the *Supreme Court (Rules of Procedure) Act 1987* (see commentary at [8.86.5]). Section 7 of that Act provides that, to the extent that the Rules are inconsistent with any Act, the Rules shall prevail. By operation of that legislation, the Rules govern all matters relating to the practice and procedure of the Supreme Court of the Northern Territory and the Rules, as made on 31 July 1987, prevail over all other Territory Acts with continuing effect. Even amendments to the Rules made outside the sunset clause will prevail over the principal legislation if they are matters falling within the rule-making power: see *Supreme Court (Rules of Procedure) Act 1987*, ss 8, 9 and 10.

[5.48.579] Costs – failure to participate in settlement conference (sub-r (9(b)).

In *LO v NTA* [2017] NTSC 24, Master Luppino considered the operation of r 48.12(9)(b) and factors that may be taken into account when determining whether a party has refused to participate in a settlement conference. The Master said (at [35], [37]):

> … I now consider the application of Rule 48.12(9)(b) divorced from the bar to admissibility in Rule 48.12(8). Although costs are generally in the discretion of the Court the circumstances set out in Rule 48.12(9) of the SCR restricts that discretion in that it mandates a liability for costs on the finding of any of the various specified factors. The wording of the rule is very specific. It is based on participation at the settlement conference. There is no reference to making concessions or offers as a basis for determining liability for costs. Although concessions and offers are an aspect of participation at a settlement conference, participation overall is distinct and I think it has to be assessed against all the circumstances of a particular case.
>
> …
>
> On my reading of Rule 48.12(9)(b)(i), only events occurring in the course of the settlement conference can be taken into account. Although some matters in the lead up to a settlement conference may be able to be used in a limited way for this purpose in that they may put other pertinent facts in context, (for example, if a party fails to submit a précis as ordered) that would be the limit of the use which could be made of background events. In my view the wording of Rule 48.12(9)(b) confines the enlivening features to the conduct or comments made during the settlement conference. As that rule overrides the Court's usual discretion in respect of costs orders by mandatorily requiring an order for costs to be made once the enlivening features are made out, it should be strictly interpreted. (citations omitted)

A party agreeing to seek instructions in respect of an offer by the other party is indicative both that the party did not have any pre-determined intention to refuse to make an offer and of participation in the settlement conference. Similarly, rejecting an offer and failing to make a counter offer does not in itself mean that the relevant party has failed to participate in the settlement conference: see *LO*, above, at [43]-[44]. In regard to the relevance of a party's decision not to make a counter offer, Master Luppino stated in *LO* (at [45]-[47]):

> The decision as to whether or not a party will make an offer, whether at a settlement conference or otherwise, is entirely a decision for the relevant party and is not something that the Court can, or should generally look behind. In my view the measure of whether a party participates in a settlement conference is not whether it is prepared to make an offer. Otherwise a party with a very strong defence, such as the Defendant in the current matters, might nonetheless face a costs risk if it refused to make an offer to a party with poor prospects of success. Although the process of without prejudice negotiations is designed to attempt to facilitate a settlement and to encourage genuine negotiations, it cannot compel a party to make an offer. Where that party regards the opponent's position as unlikely to succeed or having little merit, it cannot be inappropriate to refuse to make an offer, a decision of the Defendant at the time which was totally vindicated by the ultimate result.
>
> It can be said that even if the Defendant had a preconceived view of the merits of the Plaintiffs' claims, i.e., because the Defendant considered the Plaintiffs' cases to be weak, or of the assessment of any likely award of damages, it can nonetheless be said that there has been participation in the settlement conference if the Defendant attends to better ascertain the nature of the Plaintiffs' claim and its merits and to attempt to demonstrate the strength of its own case. A robust approach to negotiations and an unyielding resistance to putting offers could reinforce that in appropriate circumstances. If, as occurred in the current matters, a Plaintiff fails to persuade a Defendant that it has a worthy claim, that can justify a refusal to make an offer. Rule 48.12(9) cannot be interpreted in such a way that it absolutely requires a response to an offer with a counter offer. Had that been intended then I would have expected that to be clearly expressed. Instead the Legislature has chosen to set the enlivening condition by reference to participation in the conference process and that therefore means something other than making offers.
>
> A wider interpretation is not warranted for the reasons outlined and in any case a too liberal interpretation may have the effect of encouraging spurious claims in the belief that a Defendant is likely to pay something to simply end the proceedings for practical reasons, notwithstanding that a claim has no merit. That approach should not be encouraged.

In the absence of an order pursuant to r 48.12(9), the costs of and incidental to attending a settlement conference are costs in the proceeding pursuant to r 48.14 ("Costs of directions hearings, settlement conferences and mediations"): *LO*, above, at [42].

CASES – *LO v NTA* [2017] NTSC 24 (defendant held to have participated in settlement conference where it did not make counter offer, submitted its précis as ordered, responded to

Master's queries regarding its position, raised relevant matters and addressed arguments made on behalf of plaintiffs; costs order sought by plaintiff pursuant to r 48.12(9) refused and costs of settlement conference ordered to be costs of proceedings pursuant to r 48.14).

[5.48.595] Costs – offer of settlement (sub-r (12)).

Rule 48.12(12) provides an exception to r 48.12(8). On its wording, however, that is limited to the costs of the substantive proceedings and is only relevant to a cost decision once final judgment has been given: *LO v NTA* [2017] NTSC 24 at [18]. Any order for costs made at the conclusion of the proceedings is entirely in the court's discretion and the court would be permitted to take into account the extent of offers made, or the failure to make an offer, in arriving at that decision. The requirement to record offers stipulated in r 48.12(12) is intended to facilitate that process: *LO*, above, at [42].

[5.53.20] 53.01 Application

[5.53.25] Operation.

CASES – *Northern Territory Land Corporation v Rigby* [2016] NTSC 18 (order for recovery of possession of land in favour of registered proprietor, who held Crown lease in perpetuity conferring exclusive possession, against respondents occupying land without licence or consent and claiming Aboriginal sovereignty).

[5.56.20] 56.01 Judgment or order instead of writ

[5.56.25] Certiorari – jurisdictional error vs error within jurisdiction.

CASES – *Work Health Authority v Outback Ballooning Pty Ltd* [2017] NTSC 32 (order in nature of certiorari made quashing magistrate's dismissal of complaint where magistrate fell into jurisdictional error by denying existence of jurisdiction to hear complaint by finding Commonwealth legislation fully covered field to exclusion of Northern Territory legislation, when it did not) (*note*: overturned on appeal on other grounds – see *Outback Ballooning Pty Ltd v Work Health Authority* [2017] NTCA 7).

[5.56.26] Natural justice.

CASES – *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 (order in nature of *certiorari* granted quashing purported adjudication determination under *Construction Contracts (Security of Payments) Act* as a nullity where adjudicator failed to comply with essential requirements of natural justice).

[5.56.30] Natural justice – apparent bias.

CASES – *Jenkins v Todd* [2017] NTSC 26 (no apprehension of bias where a judge, who had earlier found offender guilty of contempt of court and imposed suspended sentence, was determining whether offender had breached conditions of that sentence and, if so, any subsequent penalty).

[5.56.37] Natural justice – adjudication.

The court can and will restrain any party from proceeding with an adjudication, or enforcing an adjudication determination, which is found to be an abuse of process: *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7 at [9]; *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 at [32] per Kelly J.

CASES – *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 (order in nature of *certiorari* granted quashing purported adjudication determination under *Construction Contracts (Security of Payments) Act* as a nullity where adjudicator failed to make bona fide attempt to comply with essential requirements of natural justice, to provide sufficient reasons for decision or to consider response to adjudication application as required by Act and, consequently, to make bona fide attempt as required by Act to determine whether defendant liable to make payment to plaintiff).

[5.56.45] Natural justice – provision of reasons.

Where an adjudicator is obliged to provide reasons for a determination under a provision of the relevant Act authorising the adjudication, he or she must make a bona fide attempt to provide reasons for the determination: *CH2M Hill Australia Pty Ltd*, above, at [91]. In *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791, the Supreme Court of New South Wales addressed this requirement in the context of the *Building and Construction Industry Security of Payment Act 1999* (NSW) in the following terms (quoted with approval in *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 at [92] per Kelly J):

> The reasons should show that the adjudicator has turned his, or her, mind to the dispute and has addressed the issues raised by the parties in support of, and in opposition to, the Payment Claim. He or she should analyse each of the documents to the best of his, or her, ability for the purposes of identifying the claims made by the plaintiff in its response to the adjudication application.

The mere fact that "an adjudicator blandly says he or she has read 'all of the submissions and accompanying documents' or simply that he or she is 'satisfied' without more in relation to a particular issue under consideration may not, subject to viewing the determination as a whole survive as adequate reasons … [I]t will always be a matter of degree": *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466 at [38] per Sackar J (quoted with approval in *CH2M Hill Australia Pty Ltd*, above, at [93]). A consideration of whether an adjudicator has complied with his or her statutory duties is made from the content of the relevant determinations rather than from a statement or claim by the adjudicator in the determination that he or she has so complied: *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94 at [27] per Bergin J (applied in *CH2M Hill Australia Pty Ltd*, above, at [95]). Generally, the concept of "reasons" requires an explanation connecting any findings of fact with the ultimate decision: *Public Service Association v Secretary of the Treasury* (2014) 242 IR 318; [2014] NSWCA 112 at [46] per Basten JA (cited with approval in *CH2M Hill Australia Pty Ltd*, above, at [94]). Not every inadequacy in reasoning will result in invalidity: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [93].

Adjudicators work under considerably greater time pressures than judges. Their reasons should not be scrutinised with the attention to detail to which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal. However, the reasons must indicate why it was that the adjudicator arrived at the determination. Further, there is a presumption with adjudicators, as there is with judges, that the stated reasons are all of the reasons for coming to the conclusion expressed: *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [23] (applied in *CH2M Hill Australia Pty Ltd*, above, at [113]).

In *CH2M Hill Australia Pty Ltd*, Kelly J was inclined to the view that a failure by an adjudicator to make a bona fide effort to comply with the requirement in s 38 of the *Construction Contracts (Security of Payments) Act* to provide reasons for a determination would, in itself, amount to a jurisdictional error which would render the determination void as, in those circumstances, the adjudicator would have failed to comply with an essential pre-requisite for the existence of a determination under the Act (at [111]). However, it was not necessary to, and his Honour did not, decide the question conclusively.

CASES – *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd* [2016] NTSC 42 (order in nature of *certiorari* granted quashing purported adjudication determination under *Construction Contracts (Security of Payments) Act* as a nullity where adjudicator failed to comply with requirement under s 38(d) of Act to provide reasons for determination, to ensure reasons meaningfully engaged with issues raised by plaintiff and to ensure reasons addressed material submitted by plaintiff).

[5.62.100] 62.02 When to give security

[5.62.112] Exercise of discretion.

In regard to determining the quantum of security, Master Luppino stated in *Anchung Pty Ltd v NTA (No 2)* [2016] NTSC 34 at [33]:

> [T]here can be no precision in respect of an order fixing the quantum of security for costs, nor is there ever precision in the amount of work required to prepare a case for trial or, for that matter, the

duration of the trial. Those vagaries are effectively taken into account when assessing quantum of costs and is the reason for the broad approach routinely taken when assessing the amount of security.

[5.62.142] Application for increase in amount of security previously ordered.

In *Anchung Pty Ltd v NTA (No 2)* [2016] NTSC 34, Master Luppino outlined the principles relating to an application for an increase in an amount of security previously ordered. Master Luppino stated (at [11]):

> In law there is nothing to prevent a party making a second application for security for costs or an application to vary the amount of the security previously ordered. This stems from the power of the Court to order security in the first place as the Court retains a jurisdiction to vary or discharge its own order. Courts however impose limits on further applications to avoid re-litigation of issues and a second application, or an application for increased security, will only be entertained where there has been a material change of circumstances or where there is new material which impacts on the order made on the first application. In Colbran, *Security for Costs* authorities are stated for the proposition that increased security may also be ordered where delays caused by the Plaintiff tend to make the Defendant's costs run higher than expected or simply that the security originally ordered was insufficient to secure the Defendant's costs. (citations omitted)

Where a party has failed to fully comply with its obligation to disclose the value of its assets, resulting in a lower amount of security for costs being ordered than would otherwise have been the case, this will constitute strong grounds for an order for an increased amount of security: see *Anchung (No 2)*, above, at [36].

CASES – *Anchung Pty Ltd v NTA (No 2)* [2016] NTSC 34 (quantum of security for costs previously ordered of $80,500 increased by $25,000 where plaintiff had failed to fully comply with its obligation to disclose value of its assets, resulting in a reduction in security ordered that would otherwise not have occurred).

[5.63.200] 63.03 General rule

[5.63.214] Exercise of discretion – refusal of part or all of costs.

It "is not uncommon for a successful party to fail on some issues, but recover the costs of the trial or appeal as the case may be. A failure to succeed on some issues does not ordinarily, of itself, mean that the successful party should suffer in costs": *Lawrie v Lawler (No 2)* [2016] NTCA 4 at [5] per Doyle and Duggan AJJ.

CASES – *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd (No. 2)* [2016] NTSC 43 (successful plaintiff awarded costs on standard basis despite only being successful on one of several arguments; plaintiff had not been unreasonable in making unsuccessful arguments and should not be penalised for canvassing all reasonable issues relevant to case).

[5.63.260B] Company administrator.

Where a voluntary company administrator has acted in litigation in a way that constructively facilitated resolution of the issue of the validity of his or her appointment and, in so doing, did not abandon a position of neutrality in favour of some partisan role, there is a case for making a costs order in his or her favour, including for interlocutory matters: *In the matter of Condor Blanco Mines Ltd (No 2)* [2016] NSWSC 1304; *Blackadder v McQuinn (No.2)* [2017] NTSC 57 at [51], [53].

[5.63.309] Early taxation (sub-r (4)) – exercise of discretion.

CASES – *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu [No 3]* [2017] NTSC 30 (third defendant ordered to pay plaintiff's costs of determination of preliminary question for which plaintiff incurred significant costs, payable immediately).

[5.63.400] 63.05 Costs of question or part of proceeding

[5.63.406] Apportionment of costs – exercise of discretion.

The courts have shown an increasing preparedness to award costs by reference to particular issues in appropriate cases, especially where the issue is in fact separate and distinct from other important issues and has involved a significant cost to the party who succeeded on that issue: *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu [No 3]* [2017] NTSC 30 at [4] per Hiley J (see also the authorities cited therein).

…

In *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 325, Finkelstein J stated (at [5]; quoted with approval in *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu [No 3]* [2017] NTSC 30 at [5]):

> [I]n a case where there has been a split trial of disputed questions of fact or law and it is possible at each stage of the case to identify the successful party, the ordinary rule which is applied after a final hearing should also be applied to the split trial. That is, there is no justification for implying to the discretionary power to award costs a limitation to the effect that costs should only be ordered once the outcome of the whole action is known.

In *Lawrie v Lawler (No 2)* [2016] NTCA 4, Heenan AJ summarised the position (in a dissenting judgment on the relevant costs issue) in the following terms (at [18]-[19]):

> The considerations noticed by courts when awarding a successful party less than all their costs, or by excluding any costs for a particular question or issue on which that party failed, have been closely examined in *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63]-[66] and *Griffith v Australian Broadcasting Corporation (No 2)* [2011] NSWCA 145 and need not be repeated. These authorities stress that, generally, there is a disinclination to refuse or restrict costs of a successful party by reference to certain issues upon which that party failed but, in the end, that it is always a matter for discretion in each individual case. Some of the reasons for this initial disposition have to do with the need to assess the position of the parties fairly, having regard to the case as a whole and to the prominence or influence of the issue on which the successful party failed. Other reasons include the frequent difficulty of determining how prominent or time consuming that particular issue was and the risk of making an arbitrary assessment in cases where even approximate estimates of its significance are scarcely possible.
>
> One factor is, however, clear. It is that where the successful party failed on an issue which was dominant and severable, that party may be deprived of costs on that issue.

CASES – *Lawrie v Lawler (No 2)* [2016] NTCA 4 (unsuccessful appellant to pay respondent Commissioner's costs of two appeals in proceedings relating to procedural fairness; barrister to pay costs of unsuccessful application to be joined or heard on appeal by appellant; appellant to pay costs of application for trial judge to disqualify himself where application had limited prospects of success – respondent Commissioner to pay appellant's costs of successful appeal against order for costs on indemnity basis where respondent was only entitled to costs on standard basis).

[5.63.214D] Exercise of discretion – Departure from *Hardiman* principle.

The *Hardiman* principle, drawn from the obiter comments of the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13, protects the independence and impartiality of administrative decision makers in circumstances where their decision is subject to judicial review and in which there is a possibility that the decision may be set aside and remitted to the original decision maker to re-determine. In that case, the Australian Broadcasting Tribunal had contested the prosecutors' case for relief and presented a substantive argument to this effect. The High Court said (at [54]):

> In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

In *Lawrie v Lawler (No 2)* [2016] NTCA 4, Heenan AJ summarised the principle in the following way (in a dissenting judgment on the relevant costs issue) (at [20]):

> The *Hardiman* principle must be adapted to the circumstances. This is clear from the formulation of the principle in the original decision (at [54]). There the High Court explained that the presentation of a case by the Tribunal should be regarded as exceptional and where it occurs it should, in general, be limited to submissions going to the powers of the Tribunal. This admits of occasions where a Tribunal or administrative officer subject to judicial review may appear and assist the court, although the emphasis is plainly on playing a neutral role. If there is no intervention by an Attorney General and no other contradictor, the Tribunal or officer may appear by counsel as a party to respond substantially to the application … but in such cases there is nothing to suggest that any departure from neutrality in presenting that party's case has been contemplated. (citations omitted)

Heenan AJ also observed (at [22]) that there is some authority to the effect that adherence to the principle is not necessary if there is no likelihood of subsequent proceedings before the Tribunal or officer (see *Viscariello v Legal Profession Conduct Commissioner* [2015] SASC 132 at [61]), but that this is not necessarily so.

In regard to the costs implications of a failure to observe the *Hardiman* principle, Heenan AJ stated (at [25]):

> Non-observance of the *Hardiman* principle is not a reason to apportion costs against the decision maker but it is a reason to depart from the convention of not awarding costs against a decision maker who simply submits or adopts a neutral position … However, where non-observance of the *Hardiman* principle involves the introduction of a substantial collateral issue on which the Tribunal or officer fails, it means that there may be even less justification for introducing that issue.

CASES – *Lawrie v Lawler (No 2)* [2016] NTCA 4 (respondent Commissioner not required to pay any costs where he was successful on substantive appeal relating to procedural fairness but had engaged in possible departure from *Hardiman* principle by unsuccessfully raising new waiver issue in the judicial review proceedings, with little prospects of success, and making new allegations impeaching integrity of appellant and her counsel and solicitor; issue of waiver did not occupy disproportionate or inordinate amount of time and some evidence tendered on issue of waiver was relevant to argument on procedural fairness (by 2:1 majority)).

[5.63.1000] 63.11 No order for costs required in certain cases

[5.63.1050] Extension or abridgement of a time (r 63.11(5)).

Rule 63.11(5) "is to the effect that the party applying for an extension of time is to pay the costs of that application. The rule reflects the position, colloquially known as the indulgence principle, which is to the effect that as the party seeking the extension has not complied with an order, they consequently seek an indulgence from the Court and usually bears the costs of that application": *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17 at [7]. The position under r 63.11(5) contrasts to the position under the general rule in respect of interlocutory applications that each party bears their own costs unless the Court otherwise orders (see r 63.18).

Rule 63.11(5) is only a starting point as r 63.11(9) provides that sub-rule (5) is subject to such other order that the court makes. No criteria are set in sub-rule (9) and, consequently, the court has an unfettered discretion, limited only by the usual principles that the judicial discretion must be properly exercised and having regard to all relevant facts and circumstances: *Halikos Hospitality*, above, at [8].

…

CASES – *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17 (costs of successful application for extension of time by defendant for filing of affidavits ordered to be costs in the proceedings where proceedings were complex, defendant had expressed view in case management conference that time might not be sufficient, application for extension made before time period lapsed, defendant had made genuine attempts to comply with orders and no evidence that plaintiff suffered prejudice).

[5.63.1700] 63.18 Interlocutory application

[5.63.1705] Costs of interlocutory application – legal principles.

An example of where special circumstances may exist, causing the court to make a costs order otherwise, is where r 63.11, which in effect provides that a party applying for an extension of time is to pay the costs of that application, is applicable: see *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17 at [7].

…

In *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd (No. 2)* [2016] NTSC 43, Kelly J stated (at [12]):

> By Rule 63.18, each party is to pay its own costs of interlocutory matters unless the court otherwise orders. In the case of interlocutory injunction applications however, it is common for those costs to be awarded to the successful party.

In that case, Kelly J held (at [12]) that, as the plaintiffs were successful in both the injunction application and the main proceeding, the defendant should pay the plaintiffs' costs of both.

CASES – *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd (No. 2)* [2016] NTSC 43 (plaintiffs awarded costs of interlocutory injunction application where was successful on both that application and main proceedings).

[5.63.2800] 63.29 Where indemnity basis applicable

[5.63.2805] Operation.

Rule 63.29(2)(b) reflects the position at general law regarding a costs order made in a trustee's favour. This position was outlined by Megarry VC in *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59 at 64 (quoted with approval in *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu [No 3]* [2017] NTSC 30 at [27]):

> [N]o costs shall be disallowed, except in so far as those costs or any part of their amount should not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid, and should for that reason be borne by him personally.

[5.63.2900] 63.30 Party as trustee

[5.63.2903] Operation.

Rule 63.30 and the policy underlying it relates to a trustee's entitlement against the fund, not a third party: *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu [No 3]* [2017] NTSC 30 at [24].

[5.63.7400] 63.74 Interest on costs

[5.63.7403] Rate of interest on costs.

Rule 63.74(2) provides that a rate of interest that the Taxing Master may fix under r 63.74(1) on costs awarded shall not exceed the rate from time to time fixed in accordance with r 59.02 as interest payable on a judgment debt. Rule 59.02(3) states that a judgment debt carries interest from the date of judgment at the rate per annum fixed for s 52(2)(a) of the *Federal Court of Australia Act 1975* (Cth) from time to time.

A higher interest rate may be imposed under para 28 of Practice Direction No 6 of 2009 ("Trial Civil Procedure Reforms") (at [11.10.183]) (as amended by Practice Direction No 10 of 2009), which provides that, "[n]otwithstanding O.63.74, where the Court decides that a party has failed to comply with its duties under the Rules and [the] Practice Direction, the Court may award interest on costs at a rate not exceeding the rate fixed by the Rules, plus 8%". In *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55, Hiley J made the observation (at [72]) that "it is arguable that [para 28 of PD 6] is inconsistent with the intention

if not the wording of SCR 63.74(2)", but did not resolve the question as there was no need to do so in that case.

As to the rate at which interest should be allowed on a sum awarded up to judgment and after judgment, see under ss 84 and 85 of the *Supreme Court Act* respectively (at [8.84.0] and [8.85.0]).

CASES – *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 (application by successful plaintiffs pursuant to para 28 of PD6 for interest on costs to be awarded above SCR rate of 7.5%, where defendants had failed to comply with PD6 and discovery obligations resulting in delays and extra costs, refused).

[5.75.200] 75.05 Application

[5.75.202] Conduct constituting contempt.

Contempt in the face of the court is a species of criminal contempt, which is one whose characteristic attribute is an interference with the due administration of justice, such as misconduct in court which undermines or interferes with the authority, performance or dignity of the court: *Jenkins v Todd* [2016] NTSC 21 at [18] (citing *Witham v Holloway* [1995] HCA 3; (1995) 183 CLR 525 at [8] per McHugh J). In order for words or conduct to constitute contempt in the face of the court or in the course of proceedings, they or it "must be such as would interfere, or tend to interfere, with the course of justice": *Jenkins*, above, at [19] (citing *Lewis v Ogden* [1984] HCA 28; (1984) 153 CLR 682 at [8]). The expression "interfere with the course of justice" is not confined to a physical disturbance of particular proceedings in a court which prevents the court from attending to its business according to law. It includes an interference with the authority of the courts calculated to "shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law" (*R v Dunbabin, Ex Parte Williams* [1935] HCA 34; (1935) 53 CLR 434 at 445 per Rich J): *Jenkins*, above, at [20] (citing: *Ex Parte Tuckerman Re Nash* [1970] 3 NSWR 23 at 27; *Dunbabin*, above). In *Jenkins*, it was held (at [37]) that the making of a blatant statement to the effect that there is patent dishonesty occurring from the bench was contrary to the due administration of justice as it sought to impugn the judicial system and, as such, fell within such category of conduct. This was so regardless of whether or not the judge was offended by the comments.

Conduct which has a tendency to obstruct the course of justice may amount to contempt, regardless of whether it was intended to do so. However, where intent does exist, contempt will be more easily found: see *Jenkins*, above, at [21] and the authorities cited therein.

CASES – *Jenkins v Todd* [2016] NTSC 21 (contempt found in criminal proceedings for failure to adhere to directions of presiding judge, continuously interrupting, failure to cease speaking and speaking over presiding judge).

[5.75.500] 75.11 Punishment for contempt

[5.75.503] Operation.

The Supreme Court of the Northern Territory, as a superior court of record, has inherent jurisdiction to punish criminal contempt: *Jenkins v Todd* [2016] NTSC 21 at [17] (citing *Grassby v The Queen* [1989] HCA 45; (1989) 168 CLR 1 at [21] per Deane J).

The purpose underlying the power to punish for contempt of court was outlined by Lord Denning in *Morris v Crown Office* [1970] 2 QB 114 at 122 (quoted with approval in *Jenkins*, above, at [26]):

> The phrase "contempt in the face of the court" has a quaint old-fashioned ring about it, but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.

The power to punish contempt is not to be used "to supress vigorous advocacy which does not constitute a defiance of the authority of the court" (*Ex Parte Tuckerman Re Nash* [1970] 3 NSWR 23 at 27) and significant latitude is extended to unrepresented parties who may be unfamiliar with court procedures and etiquette or who may be emotionally involved in the proceedings: *Jenkins*, above, at [20].

…

In the case of spontaneous outbursts, a warning followed by ejection may be an appropriate response where the culprit is a member of the public. Where such behaviour is engaged in by a party, the judge has this option and proceeding with the hearing in the party's absence. However, it may be preferable, in the interests of affording the party the fullest opportunity to present his or her case, to allow him or her to remain, to issue a warning and then, if the warning is of no effect, to give a direction to the registrar to summons the party to be dealt with for contempt: see *Jenkins*, above, at [29].

[5.83.800] 83.09 Stay

[5.83.806] Exercise of discretion – stay of execution or proceedings.

The party applying for the stay has the onus of showing why a stay should be granted. There is no evidential onus on the respondent to the application to show why it should enjoy the fruits of victory: *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 at [14].

…

Although it may not normally be relevant for a court to consider the prospects of an appeal against its decision succeeding, the fact that no appeal has been instituted and that the scope of a potential appeal has not been described is relevant: *Ceccon Transport*, above, at [15].

[5.83.898] Cases.

Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2) [2017] NTSC 55 (application for stay of question of costs and of execution of judgment pending outcome of proposed appeal refused where applicant parties had failed to explain why there was any need or imperative to protect subject matter of litigation where much of judgment debt related to admitted facts).

[5.83.1900] 83.20 Procedure at hearing

[5.83.1903] Operation.

The ability of a party to call new evidence pursuant to r 83.20(2) does not mean that the appeal is *de novo*. There is a distinction between an appeal by way of rehearing and an appeal *de novo* (see [400.20.5]). This was outlined by Hiley J specifically in the context of r 83.20(2) in *Hunter v Mental Health Review Tribunal* [2017] NTSC 43 where his Honour said (at [23]):

> The respondent then referred to rule 83.20 of the Supreme Court Rules and submitted that the conferral of such a power on the Court does not lead to the conclusion that the appeal is *de novo*. This point was made by the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [(2003) 230 CLR 194] at 203:
>
> > If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of re-hearing. Although further evidence may be admitted on an appeal of that kind the appeal is usually conducted by reference to the evidence given at first instance, and is to be contrasted with an appeal by way of hearing *de novo*.

[5.84.1200] 84.13 Want of prosecution

[5.84.1203] Operation.

Section 52(2) of the *Supreme Court Act* expressly provides that a single judge may exercise the appellate jurisdiction of the Court of Appeal to dismiss an application for want of prosecution: *Drover v Northern Territory of Australia* [2004] NTCA 10 at [32]. As such, it is complemented by r 84.13: *Jenkins v Registrar of the Supreme Court (No 1)* [2017] NTCA 4 at [22].

For commentary regarding the exercise of discretion to dismiss an action for want of prosecution, see under O 24 ("Judgment on failure to prosecute or obey order for particulars or discovery") at [5.24.23].

CASES – *Johnstone v Top End Cars and Commercials Pty Ltd* [2017] NTSC 21 (appeal against Local Court decision dismissed for want of prosecution where errors claimed by appellant to have been made by court did not raise questions of law or, if did, were unfounded).

[5.84.1500] 84.16 Competency of appeal

[5.84.1503] Composition of Court.

In *Bilioara Pty Ltd v Leisure Investments Pty Ltd* [2001] NTCA 2, Mildren J concluded (at [8]) that a single judge does not have the power to exercise the jurisdiction of a Court of Appeal to dismiss an appeal as incompetent. His Honour said he reached that conclusion "somewhat reluctantly" (at [9]). There is, however, some suggestion that a single judge does have such a power due to the sound policy and practical reasons justifying why such power should reside in a single judge, although this has not been conclusively resolved: see *Drover v Northern Territory of Australia* [2004] NTCA 10 at [28]; *Jenkins v Registrar of the Supreme Court (No 1)* [2017] NTCA 4 at [22].

Supreme Court Act

[8.18.0] 18. Declaration of right

[8.18.10] Negative declaration.

It is settled law that the court may grant relief in the form of a negative declaration and that the grant of such relief is a matter of discretion: *Gwalwa Daraniki Association Inc v Michael Chin* [2017] NTSC 51 ("*Gwalwa*") at [24]. In *Messier-Dowty Ltd v Sabena SA* [2000] EWCA 25; [2001] 1 All ER 275, the Court of Appeal of England said (at 286-287) (quoted in *Gwalwa*, above, at [24]):

> The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where negative declaration would help to ensure that the aims of justice achieved the courts should not be reluctant to grant such declarations. They can and will assist in achieving justice ...
>
> While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to unwilling 'defendant'. This in itself justifies caution in extending the circumstances were negative declarations are granted but, subject to the exercise appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so.

…

In *Gwalwa*, Master Luppino made the following observation (at [22]) in regard to the decision of Latham CJ in *Hume* (see above):

> [T]he primary principle to emerge from that case is the requirement that there be a claim that is "*sufficiently definite and intelligible in its terms to be [a] proper subject of adjudication has been made against him by the defendant*". (original emphasis)

The "question is whether there is a real dispute between the parties on the point raised. The mere possibility of a claim is insufficient and a real dispute will not be created by one party merely reserving its rights": *Mine Trades & Maintenance Electrical Pty Ltd v Freo Group Ltd* (2012) WASC 78 at [15] (quoted with approval in *Gwalwa*, above, at [31]).

In considering the availability of declaratory relief, it is critical that there be more than a hypothetical case as this is what renders declaratory relief different to an advisory opinion, the latter being traditionally avoided by the courts: In *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 (applied in *Gwalwa*, above, at [33]). The possibility of a real, as opposed to a hypothetical, case must be supported by evidence. The onus is on the party seeking joinder to show the existence of a real dispute: *Gwalwa*, above, at [40].

Where a plaintiff has a future potential liability to a third party and would be entitled to recover damages for any such liability from the defendant in current proceedings, the plaintiff is in an unenviable and potentially unjust position, as was demonstrated in both *Gwalwa* and *Messier-Dowty*. Without prior determination of the plaintiff's liability to the third party, or a negative declaration, if the plaintiff succeeds in its proceedings against the defendant, it cannot recover against the defendant any amount to represent the plaintiff's potential future liability to the third party. Injustice could result in that, after successfully obtaining a judgment against the defendant, the third party might obtain judgment against the plaintiff in separate proceedings but, due to issue-estoppel (which would, at no time, bind the third party), the plaintiff would not be able to recover damages for that liability from the defendant. In such circumstances, the plaintiff has the option either to commence separate proceedings against third party and seek a negative declaration, or to wait until the third party commences proceedings, at which point consolidation or a joint-hearing with the current proceedings against the defendant, if not yet concluded, may be appropriate: see *Gwalwa*, above, at [39], [42].

CASES – *Gwalwa Daraniki Association Inc v Michael Chin* [2017] NTSC 51 (application by plaintiff to join third-party developer as additional defendant, in order to obtain negative declaration, refused where developer asserted entitlement to recover payments but had not commenced proceedings in over three years, possibly due to a contractual bar, and evidence was insufficient to show that possible action by developer not merely hypothetical); *Mine Trades & Maintenance Electrical Pty Ltd v Freo Group Ltd* (2012) WASC 78 (joinder and negative declaration sought by contractor against principal refused where contractor sued sub-contractor for defective work in relation to construction of failed desalinisation plant; principal had not made claim against contractor but had made comments that it wanted to discuss costs it had incurred as a result of plant failing with contractor; principal would only able to identify cause of failure, and any potential cause of action, after new plant constructed; insufficient evidence to enable court to assess nature of any potential claim by principal and obligations that sub-contractor had; question was hypothetical as no evidence of claim being made by principal; preferable for contractor to wait and see if principal makes claim and, if so, nature of such claim); *Re Clay* [1919] 1 Ch 66 (negative declaration, which was only relief sought, refused where party proposed to be joined had reserved his position but had not asserted any right to make a claim and court satisfied proposed party had no right to make claim).

[8.52.0] 52. Exercise of appellate jurisdiction

[8.52.70] Operation.

Section 52(2) is complemented by r 84.13, which provides relevantly that where an appellant has not done an act required to be done for the purpose of prosecuting the appeal, or otherwise has not prosecuted the appeal with due diligence, the court may order that the appeal be dismissed for want of prosecution: *Jenkins v Registrar of the Supreme Court (No 1)* [2017] NTCA 4 at [22].

For commentary and case summaries regarding the exercise of discretion to dismiss an action for want of prosecution, see under O 24 ("Judgment on failure to prosecute or obey order for particulars or discovery") at [5.24.23].

[8.84.0] 84. Interest up to judgment

[8.84.21] Rate/amount of interest – past economic loss.

CASES – *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 (higher rate of 9% applied where such rate had been agreed to pursuant to loan agreement, had been no significant change in commercial interest rates since that time and defendants had failed to comply with PD6 and discovery obligations, resulting in delays and extra costs).

Local Court (Civil Jurisdiction) Rules

[42.23.450] 23.10 Objections and setting aside summons

[42.23.451] Legal principles.

Rule 23.10 (2) does not itself identify the grounds on which a summons may, or should, be set aside, or the principles which govern the exercise of the power. For commentary on legal principles regarding the setting aside of a summons (or a subpoena where that is the relevant process), and associated case summaries, see under SCR 42.04 ("Setting aside or other relief") at [5.42.300].

Local Court (Civil Procedure) Act

[45.19.0] 19. Appeal to Supreme Court

[45.19.3] Operation.

On appeal, the Supreme Court cannot enter into the fact-finding process undertaken by the Local Court except insofar as that process discloses error of law: *Johnstone v Top End Cars and Commercials Pty Ltd* [2017] NTSC 21 at [2].

Limitation Act

[285.44.0] 44 Extension of periods

[285.44.09] Operation – sub-s (3)(b).

The residual discretion in s 44(3)(b) applies only to limitation periods provided by the *Limitation Act*, not to such periods provided by other Acts: *Johnson v NTA* [2016] NTSC 49 at [339].

[285.44.65] Tortious claims – personal injury.

CASES – *Johnson v NTA* [2016] NTSC 49 (extension of time granted to commence tort claim seven years out of time after expiry of two month limitation period specified in s 162 of *Police Administration Act 1978* (NT) where substantial records available due to previous police investigation and criminal trial mitigating prejudice defendant would otherwise have suffered).

Miscellaneous Civil Procedure Law

[400.20.10] Appeals – nature of – specific statutes.

Commentary on the nature of appeals under various Northern Territory statutes, as considered by authorities, is set out below.

- …
- *Mental Health and Related Services Act 1998* (NT): Section 142(1) of the *Mental Health and Related Services Act 1998* provides that a person aggrieved by a decision of the Mental Health Review Tribunal may appeal to the Supreme Court. Section 142(3) provides that: "An appeal is to be by way of a rehearing." The Supreme Court's jurisdiction is not confined to cases involving legal error. The Court is able consider factual or discretionary errors, such as the placing of undue weight on a

particular factor. If there is no error, the Court cannot alter the original decision, even if a better decision could have been made. However, appeals from the Tribunal are not appeals *de novo*: *Hunter v Mental Health Review Tribunal* [2017] NTSC 43 at [30]-[31].

[400.20.20] Appeals – questions/errors of law and questions of fact.

An error of law will arise where a tribunal misdirects itself as to the law, or when the law correctly stated is misapplied to the facts as found in order to produce an erroneous conclusion: *Johnstone v Top End Cars and Commercials Pty Ltd* [2017] NTSC 21 at [2] (see also authorities cited therein).

…

It has been observed that a failure by a court to explain a party's right to make application that the judge recuse himself or herself for a relevant reason could be an error of law: see *Johnstone v Top End Cars and Commercials Pty Ltd* [2017] NTSC 21 at [24].

CASES – *Johnstone v Top End Cars and Commercials Pty Ltd* [2017] NTSC 21 (grounds of appeal alleging court made errors interpreting bank statements, by disregarding evidence, by making assumptions about appellant's income and by not giving due weight to certain evidence did not raise any question or error of law).

[400.30.10] Unrepresented party – duty of court.

Doing justice in the case of unrepresented litigants "will sometimes involve a patient consideration of submissions that would be given short shrift if they came from a lawyer, to ensure that the unrepresented litigant perceives that he or she has been given a full and fair hearing": *Jenkins v Todd* [2017] NTSC 26 at [76] per Kelly J.

CASES – *Jenkins v Department of the A-G and Justice* [2017] NTCA 3 (appeal against direction made by Acting Chief Justice to place restrictions on appellant's access to Supreme Court Library dismissed where appellant was querulant, unrepresented and made frivolous claims).

[400.295.12] Practice Direction No 6 of 2009 ("Trial Civil Procedure Reforms") – Costs (paras [13.1], [13.2]).

Where a defendant fails to provide a substantive response to a PD6 letter within an appropriate timeframe, it can be inferred that it has not given early and proper consideration to the matters required in paragraphs [8] to [10] of PD6: *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 at [38]. Such a failure to comply with PD6 is likely to have costs consequences under paragraphs [13.1] and [13.2] of PD6 in view of its flow on effects in regard to the resolution of proceedings. For example, had the party given early and proper consideration to a substantive PD6 response, admissions that it makes much later in the proceedings might have been made much earlier, causing the complexion of the entire litigation to be different. For example, positions based on proper documentary records could have been advanced and discussions at mediation could have had better prospects of resolution prior to the parties becoming more entrenched in their positions and invested in the legal process, resulting in delays and increased costs: see *Ceccon Transport*, above, at [38].

CASES – *Ceccon Transport Pty Ltd v Tomazos Group Pty Ltd (No 2)* [2017] NTSC 55 (defendants ordered to pay costs on indemnity basis under para [13.2] of PD6 where failed to comply with PD6, including 6 month delay without reasonable excuse to meaningfully reply to plaintiffs' PD6 letter, and failing to give proper discovery resulting in unnecessary prolongation of dispute, costs to plaintiffs and court time lost in dealing with facts that should not have been contested).