CIVIL PROCEDURE
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[5]

Supreme Court Rules

ORDER 23 SUMMARY STAY OR DISMISSAL OF CLAIM AND STRIKING OUT PLEADING

[5.23.20] 23.01 Stay or judgment in proceeding

(1) Where a proceeding generally or a claim in a proceeding:
  (a) does not disclose a cause of action;
  (b) is scandalous, frivolous or vexatious; or
  (c) is an abuse of the process of the Court,
  the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

(2) Where the defence to a claim in a proceeding:
  (a) does not disclose an answer;
  (b) is scandalous, frivolous or vexatious; or
  (c) is an abuse of the process of the Court,
  the Court may give judgment in the proceeding generally or in relation to the claim.

(3) In this Rule a claim in a proceeding includes a claim by counterclaim and a claim by third party notice and a defence includes a defence to a counterclaim and a defence to a claim by third party notice.

[5.23.23] Purpose. Rule 23.01 applies where all or part of a claim or defence is flawed on one of the grounds mentioned in the rule and such flaw or flaws cannot be saved by amendment. If the relevant claim or defence is proven to be so flawed, the applicant will be entitled to seek that it be determined summarily: *Matzat v The Gove Flying Club Inc* [1994] NTSC 17 at [8]. Whilst similar in nature, the purpose of r 23.01 is different to that of r 23.02 – as to the latter, see [5.23.103].

[5.23.26] "Abuse of process". The possible varieties of abuse of process are only limited by "human ingenuity". Injustice in the context of abuse of process is not limited to the purpose for which the proceedings were brought but includes a consideration of the consequences of the proceedings for the person invoking the court's power: *Hamilton v Oades* (1989) 166 CLR 486 at [502]; *Branir Pty Ltd v Wallco Pastoral Company Pty Ltd* [2006] NTSC 70 at [24].

[5.23.28] Summary determination – exercise of discretion. The power to enter a judgment or to grant a stay on the basis that the proceeding or a claim in the proceeding discloses no reasonable cause of action should be exercised only in plain and obvious cases: *General Steel Industry Inc v Commissioner for Railways* (1964) 112 CLR 125; *Tsangaris v Inner Red Shell P/L Katapodis* [2003] NTSC 44 at [35]. In the exercise of a proper judicial discretion, such as a refusal to grant an adjournment, no judge ought to make such an order as would defeat the rights of a party and destroy them all together, unless satisfied that the party has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion: *Maxwell v Keun* [1928] 1 KB 645 at 657 (Atkin LJ); *Tsangaris v Inner Red Shell P/L Katapodis* [2003] NTSC 44 at [34].

In *Matzat v The Gove Flying Club Inc* [1994] NTSC 17 at [11], Mildren J identified two lines of authorities regarding the circumstances under which a court will grant relief under r 23.01. One line of authority suggests that the defendant must show that the pleading "is demurrable, and showing something worse than demurrable" (*Republic of Peru v Peruvian Guano Company* (1887) 36 Ch D 489 at 495) such that no legitimate amendment can save it (*Arbon v Anderson* (1942) 1 All ER 264 at 266) or that the action is so manifestly groundless as to not admit of argument (*Wall v The Bank of Victoria Ltd* (1890) 16 VLR 2 at 4). The power should only be used in "plain and obvious cases" where the claim is simply unarguable (*Uranium Mines Pty Ltd v BTR Trading (Qld) Pty Ltd* (unreported, SCNT, Muirhead AJ, 2 June 1987); *Drummond Jackson v British Medical Association*

(1970) 1 WLR 688 at 696; see also *Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd* [1899] 1 QB 86 at 91 (Lindley MR)). Another line of authorities suggests that the case need not be so clear that argument is unnecessary to demonstrate the futility of the plaintiff's claim; that the court may choose to hear argument in order to reach a conclusion – and if it does, the court has a discretion to rule on the issue even if the answer is not "plain and obvious" or "clear beyond doubt", although great care must be exercised before depriving a plaintiff of the opportunity of a trial: see, eg, *General Steel Industries v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129; *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30; *Matzat v The Gove Flying Club Inc* [1994] NTSC 17.

In *Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd* [1996] NTSC 45, Thomas J held (at [25]) that the court will not make an order under r 23.01 unless it is clear on the pleadings or from the extrinsic evidence that the claim is unsustainable in law (see also the authorities cited at [26]-[27]). What must be shown is that the proceedings are "seriously and unfairly burdensome, prejudicial or damaging" and "productive of serious or unjustified trouble and harassment": *Hamilton v Oades* (1989) 166 CLR 486 at [502]; *Branir Pty Ltd v Wallco Pastoral Company Pty Ltd* [2006] NTSC 70 at [24]. As a general principle, the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice from being perverted for an unjust end: *McHenry v Lewis* (1882) 22 Ch D 397 at 408 (Bowen LJ); *Moore v Inglis* (1976) 50 ALJR 589 at 591-592.

The plaintiff should be able to state the cause of action – where a plaintiff's lawyers are experiencing extreme difficulty in formulating the cause of action with clarity and particularity it is often a very good indication that there is no cause of action: *Trau v Sydney University* (1989) 34 IR 466 at 475 (Gleeson CJ); *Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd* [1996] NTSC 45 at [37].

In the quasi-criminal context, the Full Court of the Supreme Court of the Northern Territory has observed that the power to stay on the ground of abuse of process will be exercised only "in most exceptional circumstances" to ensure that the court's processes are used fairly by State and citizen alike and not for oppression or injustice: see *Bakewell v The Queen* [2008] NTSC 51 at [55], [137]-[140] citing *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 31; *Williams v Spautz* (1991) 174 CLR 509 at 520. The same principle will have application to civil proceedings. See also [5.23.26].

CASES – *Matzat v The Gove Flying Club Inc* [1994] NTSC 17 (paragraph alleging defendant breached duty struck out where no facts alleged which would give rise to such a duty); *Tsangaris v Inner Red Shell P/L Katapodis* [2003] NTSC 44 (an order under LCR 28.01 that judgment be entered in favour of respondents due to plaintiff's failure to disclose reasonable cause of action amounted to denial of natural justice where appellant was refused adjournment and opportunity to cross-examine).

[5.23.35] Burden of proof. The burden of proof lies on the applicant: *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27 at 57; *Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd* [1996] NTSC 45, at [25] (Thomas J). The applicant bears a heavy burden: *Brett Philip Moore v Hebron* [1996] NTSC 80; *Wilson v Union Insurance Co* [1992] NTSC 107. To succeed in a claim that a pleading is deficient, it must be shown that the plea is "obviously unstainable", "obviously untenable" and "manifestly faulty": *Foster v Lindsay* [1998] NTSC 62; *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62 at 91 (Dixon J). The fact that the case is weak and not likely to succeed is no ground for the dismissal of the action: *Arbon v Anderson* (1942) 1 AER 264 at 266 (Luxmoore LJ) (cited in *Waters v Paul Scott and Demar Pty Ltd* [1987] NTSC 7 at [12]).

CASES – *Brett Philip Moore v Hebron* [1996] NTSC 80 (summary judgment granted in favour of defendant solicitor where no evidence existed of misconduct or abuse of process by acting while knowing action unsustainable); *Matzat v The Gove Flying Club Inc* [1994] NTSC 17 (application to strike out statement of claim refused where plaintiff not yet provided particulars as, until such time, court not able to decide whether claim should be struck out).

[5.23.38] "Cause of action". Equitable estoppel operates as a source of substantive rights and is thus enforceable as a cause of action in its own right. A party entitled to equitable relief to make good some detriment suffered in reliance on a promise or assumption has a cause of action rather than a mere defence to a claim made by the other party: *Foster v Lindsay* [1998] NTSC 62.

[5.23.41] Parallel proceedings. It is prima facie vexatious and oppressive to sue concurrently in two courts in Australia with respect to the same subject matter: see *Moore v Inglis* (1976) 50 ALJR 589 at 591-592 and the authorities cited therein (in *Lidden v Composite Buyers Ltd* (1996) 139 ALR 549, Finn J stated (at 559) that one of the two actions "should at least by (*sic*) stayed where ... the hearing of the first will effectively dispose of the need for the hearing of the second"). Likewise, it is prima facie vexatious and oppressive to commence a second or subsequent action in an Australian court if an action is already pending with respect to the matter in issue in another country: *Henry v Henry* (1995) 185 CLR 571 at 590-591 (Dawson, Gaudron, McHugh and Gummow JJ); *Caloundra Boatyard Pty Ltd v The Almonta* (1968) SASR 325 at 327 (Bray CJ); *Branir Pty Ltd v Wallco Pastoral Company Pty Ltd* [2006] NTSC 70 at [20].

CASES – *Branir Pty Ltd v Wallco Pastoral Company Pty Ltd* [2006] NTSC 70 (stay refused where application to remove caveat brought by originating motion after writ for specific performance issued despite fact proceedings involved same parties and subject matter); *Henry v Henry* [1995] HCA 64 (stay granted where parallel divorce proceedings on foot in Monaco).

[5.23.100] 23.02 Striking out pleading

Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:

(a) does not disclose a cause of action or defence;
(b) is scandalous, frivolous or vexatious;
(c) may prejudice, embarrass or delay the fair trial of the proceeding; or
(d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

[5.23.103] Operation. Rule 23.02 operates on the basis that the opposing party has an arguable claim or defence but that an endorsement of claim or pleading is flawed on one of the grounds referred to in the rule. If the relevant endorsement of claim or pleading is proven to be so flawed, the applicant will be entitled to seek that it be struck out or amended (as opposed to seeking that the entire proceedings be struck out under r 23.01): *Matzat v The Gove Flying Club Inc* [1994] NTSC 17 at [8]. Whilst similar in nature, the purpose of r 23.02 is different to that of r 23.01 – as to the latter, see [5.23.23].

[5.23.106] Exercise of discretion. There is a heavy onus to warrant exercise of the power under r 23.02: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99; *Webster v Lampard* (1993) 177 CLR 598 at 602-603 (cited in *Otter Gold NL v Barcon Pty Ltd & Sankey* [2000] NTSC 65 at [22]). Pleadings will not be struck out where they are merely ambiguous and could easily be cured by amendment: *Waters v Paul Scott and Demar Pty Ltd* [1987] NTSC 7 at [14].

It is unacceptable to merely make "pleas of conclusion" which offer no clue as to the particular means by which, for example, a breach is alleged to have occurred: *TPC v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114; *NTA v John Holland Pty Ltd* [2008] NTSC 4 at [16].

CASES – *Otter Gold NL v Barcon Pty Ltd & Sankey* [2000] NTSC 65 (defendant's application to strike out paragraphs of plaintiff's statement of claim dismissed where was arguable that allegations pleaded, if proved, may establish a fiduciary duty); *NTA v John Holland Pty Ltd* [2008] NTSC 4 (statement of claim struck out as being "pleas of conclusion" offering no indication as to particular means by which alleged breaches occurred).

[5.23.198] Cases. *Mann v Hogan* [1988] NTSC 13 (paragraphs of pleadings struck out for being argumentative, unintelligible, repetitious, containing incomplete cross-references and failing to disclose material facts in summary form); *Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd* [1999] NTSC 68 (most of plaintiff's statement of claim struck out where action in large measure was obviously unsustainable); *Waters v Paul Scott and Demar Pty Ltd* [1987] NTSC 7 (application to strike out pleading for failing to disclose cause of action dismissed where merely ambiguous and easily cured by amendment); *Kemsley v Foot* (1951) 1 AER 331 (application to strike out refused where unnecessary for all facts to be stated to admit defence of fair comment where sufficient indication given of facts on which comment based); *Arbon v Anderson* (1942) 1 AER 264 (statement of claim struck out as embarrassing with liberty to put in amended statement of claim where case arguable but no cause of action disclosed).

[5.23.200] 23.03 Summary judgment for defendant

On application by a defendant who has filed an appearance, the Court at any time may give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits.

[5.23.203] Test. The relevant test to be applied in an application for summary judgment is whether the plaintiff's case is so clearly untenable that it cannot possibly succeed: *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 (Barwick CJ); *House v Diamond Leisure Pty Ltd* [1987] NTSC 6 at [10].

[5.23.300] 23.04 Affidavit evidence

(1) On an application under rule 23.01 or 23.03 evidence shall be admissible for a party by affidavit or, if the Court thinks fit, orally.
(2) On an application under rule 23.02 no evidence shall be admissible on the question whether an endorsement of claim or pleading offends against that rule.
(3) Rule 22.07 applies to an affidavit under subrule (1).

[5.23.400] 23.05 Declaratory judgment

No proceeding is open to objection on the ground that only a declaratory judgment or order is sought in the proceeding, and the Court may make binding declarations of right whether or not a consequential relief is or could be claimed.

[5.23.403] Exercise of discretion. It is not essential in order to obtain declaratory relief under r 23.05 that the plaintiff be unable to establish a legal cause of action: *Australian Agricultural Company v Oatmont Pty Ltd* [1992] NTSC 14 at [14]; *Crouch v The Commonwealth* [1948] HCA 41.

[5.23.406] Granting of declaratory relief. As to the granting of declaratory relief, see s 18 ("Declaration of right") of the *Supreme Court Act* at [8.18.0] and associated commentary.

ORDER 36 AMENDMENT

[5.36.20] 36.01 General

(1) For the purpose of determining the real question in controversy between the parties to a proceeding or of correcting a defect or error in a proceeding or of avoiding multiplicity of proceedings, the Court may at any stage order that a document in the proceeding be amended or that a party have leave to amend a document in the proceeding.

(2) In this Order ***document*** includes originating process, an endorsement of claim on originating process and a pleading.

(3) An endorsement of claim or pleading may be amended under subrule (1) notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceeding.

(4) A mistake in the name of a party may be corrected under subrule (1) whether or not the effect is to substitute another person as a party.

(5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.

(6) The Court may, notwithstanding the expiration of a relevant limitation period after the day a proceeding is commenced, make an order under subrule (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.

(7) For the purpose of subrule (6) ***any other party to the proceeding*** includes a person who is substituted as a party by virtue of an order made to correct a mistake in the name of a party.

(8) Subrule (6), with the necessary changes, also applies to an application under rule 14.03(2).

(9) Subrule (1) does not apply to the amendment of a judgment or order.

[5.36.23] Operation. Order 36 imposes three limitations on a person's right to amend. There must be a mistake; the mistake must be "in the name of a party"; and the court may only make the order where it is satisfied that any other party to the proceeding would not, by reason of the order, be prejudiced in the conduct of its claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise: *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231; *Smart v Stuart* (1992) 2 NTLR 43; [1992] NTSC 19 at [14]-[15]; *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119.

The rule does not mean that a person can simply sue any person and then at a later time substitute another person for the original defendant: *Mannin Pty Ltd*, above.

[5.36.26] Scope. The High Court has taken a generous view of the circumstances in which the power to amend can be exercised. In relation to an identical provision to r 36.01(4), McHugh J, with whom Brennan and Dean JJ agreed, said that the rule is remedial and should be given a beneficial interpretation and that "it is proper to give it the widest interpretation which its language will permit": *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260-261; see also *Smart v Stuart* (1992) 2 NTLR 43; [1992] NTSC 19 at [19]; *Timor Transport Pty Ltd (in liquidation) v Murlroam Pty Ltd* [1992] NTSC 61 at [15].

[5.36.29] Exercise of discretion. Rule 36.01 gives the court a broad discretionary power to allow amendments. Many and diverse factors will bear on the exercise of this discretion and it is not possible to enumerate them all: see, eg, *Brooks v Wyatt* (1994) 99 NTR 12; [1994] NTSC 90 at [27] and [34].

The court's role is to decide the rights of parties. Provided the party seeking to amend has not acted in bad faith and any injury occasioned by the amendment can be compensated for by costs or otherwise, an amendment should be allowed unless it is obviously futile: *Elders Rural Finance*

Limited v Tapp [1993] NTSC 20 at [4]; *Cropper v Smith* (1884) 26 Ch D 700 at 710 (Bowen LJ); *Tildesley v Harper* (1878) 10 Ch D 393 at 396 (Bramwell LJ); *Clarapede and Co v Commercial Union Association* (1883) 32 WR 262 at 263 (Brett MR); *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344 at 345 (Taylor J); *Clough and Rogers v Frog* (1974) 48 ALJR 487 at 482. For a general review of authorities, see the judgment of Asche CJ in *Woodhead Australia (SA) Pty Ltd v The Paspalis Group of Companies* (1991) 103 FLR 122.

It has been held that regard should be had to three factors in particular in deciding whether to grant leave to amend (but these are not the only relevant considerations). First, whether the defendant made the application in good faith; secondly, whether the proposed amendments are "so obviously futile" that they would be struck out if they had been pleaded when the defence was filed; and thirdly, whether the amendments would cause the plaintiffs injustice that could not be corrected by an appropriate costs order: *Brooks v Wyatt* [1994] NTSC 90 at [33] and [36]; *Northern Territory Fuels Pty Ltd v Hart* (1985) NTJ 1 at 13.

The question of good faith, as a matter of commonsense and convenience, is a threshold question to be answered before considering the substantive question of prejudice. An applicant for leave bears the onus of establishing that it does so in good faith and of rebutting any allegation of *mala fides*: see, eg, *Brooks v Wyatt* [1994] NTSC 90 at [37]; *Northern Territory Fuels Pty Ltd v Hart* (1985) NTJ 1 at 13. Three factors relevant to ascertaining whether the applicant acted in good faith are (but these are not the only factors): the circumstances in which the application was made; the conduct of the proceeding so far on behalf of the applicant; and the multiplicity of the defences sought to be relied upon: *Brooks*, above, at [38]; *Northern Territory Fuels Pty Ltd*, above.

The question of injustice is not simply whether the prejudice the plaintiff would suffer, if the amendment were granted, would be overcome by an appropriate award of costs to the plaintiff: *Brooks*, above, at [51].

On any application to amend, the public policy of *interest reipublicae ut sit finis litium* (it is in the interests of the State that there be an end to litigation) must be kept in mind: *Brooks v Wyatt* (1994) 99 NTR 12; [1994] NTSC 90 at [22].

For additional relevant considerations to be taken into account when exercising the discretion to allow amendments, see the commentary at [5.36.56] regarding considerations that have been identified by the courts specifically in the context of amending pleadings.

CASES – *Liddle v North Australian Aboriginal Legal Aid Service Inc* [1993] NTSC 78 (defendant not permitted to amend pleadings to raise defence of contributory negligence where on balance would be an injustice to plaintiff having regard to delays already incurred); *Brooks v Wyatt* (1994) 99 NTR 12; [1994] NTSC 90 (leave to amend counterclaim refused, although not obviously futile, on following bases: lack of good faith as defendant failed to explain why it sought to amend defence so late in trial and to indicate quality or weight of evidence it proposed to rely on; and unjust as plaintiffs would have suffered considerable prejudice, which could not be remedied by costs orders, due to lateness of application and fact that complexity of issues would increase); *Couchman v Power and Water Authority* [1989] NTSC 18 (pursuant to r 36.01(1), leave granted to amend writ and endorsement to add date of accident giving rise to personal injury and a s 44 *Limitations Act* endorsement); *North Australian Aboriginal Legal Aid Service Inc v Liddle* [1994] NTSC 84 (if respondent demonstrated would suffer prejudice if appellant allowed to file defence raising contributory negligence, held would be proper for appellant to be given opportunity to file defence upon condition that it pay costs of application and respondent's costs thrown away if adjournment necessary on respondent's application); *Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd* [1999] NTSC 68 (unsuccessful contention that plaintiff estopped from attempting to change its pleading via proposed amended statement of claim); *Trau v University of Sydney* (1989) 34 IR 466 (leave to amend refused where proposed amendments indicated there was no cause of action).

[5.36.29] Amendment late in trial. To allow an amendment before a trial begins is quite different from allowing it at the end of the trial. For instance, to permit an application made on behalf of some of the defendants to amend defences and raise a plea that the claims were time barred pursuant to the statue of limitations would be "to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence": *Ketteman v Hansel Properties Ltd* (1987) 1 AC 189 at 220; (1988) 1 All ER 38 at 62 (Lord Griffiths) (see also *Brooks v Wyatt* [1994] NTSC 90 at [34]-[35]). A court is reluctant to give leave to amend pleadings late in a trial unless the grounds for doing so are very good and the application is strongly justified. In general, and particularly when the amendments could result in a party being faced with a substantial new case, leave will not be granted after the whole of the evidence is in: see, eg, *Brooks v Wyatt* [1994] NTSC 90 at [54]. There will be cases in which justice will be better served by allowing the consequences of negligent conduct of litigation to fall upon a lawyer's own head, rather than by allowing an amendment at a very late stage of proceedings: *Ketteman*, above, at 220 (Lord Griffiths). See also *North Australian Aboriginal Legal Aid Service Inc v Liddle* [1994] NTSC 84 at [33]-[34].

Usually, where a new cause of action is first sought to be relied upon by a late amendment, the question of any resulting prejudice to the defendant needs to be addressed by the plaintiff seeking leave to do so. It should provide "a broad outline of the evidence by which [the new cause of action] is to be proved": *Perkins v Nationwide News Pty Ltd* [1992] ACTSC 36; (1992) 106 FLR 368 at 372; *Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd* [1999] NTSC 68 at [22]. The burden lies on the plaintiff to show that the amendment would not cause an injustice to the defendant which would outweigh the plaintiff's need to amend: *Woodleigh Nominees Pty Ltd*, above, at [22]. Where the only prejudice of the late amendment is to deprive the defendant of a limitation defence, that does not amount to "prejudice" within the meaning of the term in r 36.01(6) – see [5.36.47].

CASES – *Ketteman v Hansel Properties Ltd* (1987) 1 AC 189 (new defence refused where application made during closing speeches, even though amendments could not reasonably have been refused if had been brought forward at any time up to start of trial).

[5.36.32] Caseflow management. For a general discussion of the relevance of caseflow management principles when assessing whether to allow the filing of a new defence out of time, see *North Australian Aboriginal Legal Aid Service Inc v Liddle* [1994] NTSC 84 at [34]-[36]. As to late amendments in the context of procedural rules dealing with case flow management issues, see *Grljusich v Grljusich* (unreported, SCWA, Seaman J, 6 May 1993).

[5.36.35] "Mistake" (sub-rr (4), (5), (7)). Whether a decision or event is a mistake must be judged according to the facts and circumstances that existed when it happened and not according to the wisdom of hindsight: *Tomsimmat & Associates Pty Ltd v G & R Investments Pty Ltd* (1993) 25 1PR 545 at 551 (Bryson J). In categorising the mistake, the question to be answered is "what were the intentions of the person who lodged the writ at the time they caused the writ to issue?", and to assess the evidence of those intentions in the light of the surrounding circumstances, including their state of knowledge and belief, at that time: *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119.

[5.36.38] "Mistake" – in name of party (sub-rr (4), (5), (7)). Where a mistake has been made in the name of a party to proceedings, it may be corrected whether or not the effect is to substitute another person as a party. The rule applies as much to plaintiffs as defendants: *Smart v Stuart* (1992) 2 NTLR 43; [1992] NTSC 19 at [1].

Regarding the types of mistakes that can be corrected under the rule, Asche CJ stated in *Creedon v Measey Investments Pty Ltd* (1990) 100 FLR 42; [1990] NTSC 15 at [46]:

> In my view the possible ambiguity in the word "mistake" is clarified in the Rules. Obviously if a plaintiff sues the wrong party he can be said to be mistaken. But his mistake may be as to liability or identity, and it is only to the latter that the rules refer. For the phrase used is "mistake in the name". R.36.01(4). If A sues B in the belief that B is in breach of some duty to him, and in fact that duty is not owed by B but by C then A

> has made a mistake; but not one that can be corrected under R.36.01(4). For A has always intended to sue B and has made no mistake in the name. It is not a misnomer; and there is no case for substitution. Substitution involves some person standing in the place of another; and there is no justification for saying that C shall stand in the place of B where B has no connection at all with the proceedings. A must either start again or, in some circumstances, particularly where there are numerous parties, A may seek to join C as a defendant. This course is neither substitution nor correction of a misnomer. It is a new action. Naturally the problem usually arises in a case where the new defendant has a defence based on the *Statute of Limitations*. R.36.01(4) and (5) are in my view designed to ameliorate the position when the mistake is to identity only and the defendant could have been under no real misapprehension as to who the real defendant should be. If that is the case then these rules preclude the new defendant from taking what would then be the unfair defence of the Statute of Limitations. The rules achieve this by providing that in those circumstances "the proceeding shall be taken to have commenced with respect to that person on the date the proceeding commenced".

The test propounded by Menhennitt J in *Her Majesty's Attorney-General for England v Sorati* (1969) VR 88 (adopted in *Hubbard Association v The Attorney-General for Victoria* (1976) VR 119; cited in *Creedon*, above, at [46]) applies to plaintiffs and defendants alike. Menhennitt J stated (at 94-95):

> The proposed plaintiff should not be substituted unless, as from the time of service of the original proceedings, the defendant in fact did or ought reasonably to have proceeded on the basis that the actual plaintiff was in reality the plaintiff proposed to be substituted. Accordingly, for the plaintiff to justify the substitution he must establish ... two things, first, that the name of the actual plaintiff was a misnomer or misdescription of the plaintiff proposed to be substituted and, secondly, that from the time of the service of the proceedings the defendant knew or ought reasonably to have known that this was so ... The same basic principles are ... applicable where the application is to substitute a defendant, but the task of a plaintiff is often easier in such a case, particularly if the defendant proposed to be substituted is the person who has actually been served with the proceedings, because then that person served is likely to ask the question, 'Was it me that was meant?'

A party should not be shut out from relief if the other party is misdescribed or misnamed by reason of a genuine mistake. Authorities suggest that a misnomer or misdescription can obviously be seen as an error and generally will not deceive the other party, will make no difference to the cause of action relied upon and will not really prejudice the other party: *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133; [1991] NTSC 4 at [22]-[28]; *Davies v Elsby Brothers Ltd* (1960) 3 All ER 672; *Whittam v WJ Daniel and Co Ltd* (1962) 1 QB 271; *J Robertson and Co Limited (in liquidation) v Ferguson Transformers Pty Limited* (1970) 44 ALJR 441; *Rainbow Spray Irrigation Pty Ltd v Hoette* (1963) 80 WN (NSW) 142; *HM A-G for England v Sorati* (1969) VR 88; *Metropolitan Oils Pty Ltd v Fortron Industrial Lubricants Pty Ltd* (1986) 11 FCR 335.

A plaintiff may make a mistake "in the name of a party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake in the name of a party because, although intending to sue a person whom the plaintiff knows by a particular description, the plaintiff is mistaken as to the name of the person who answers that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties that is or are peculiar to that person, but is mistaken only as to the name of that person. In the first case, the properties which identify the person are personal characteristics; in the second case, they are the properties which are of the essence of the description of that person. For the purpose of r 36.01(4), however, that distinction is irrelevant. There is no warrant for treating r 36.01(4) as dealing only with the case where the properties which identify the party are inherent properties. In both cases, a mistake in the name of the party has occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else: *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 103 ALR 607 at 628 (McHugh J); *Smart*, above; *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119. A mistake in the name of a party will arise where, for example, a solicitor for an insurer, intending to issue proceedings in the name of a person whom he identified by a particular description, was mistaken as to the name of the person who answered that description: *Dee Jay Engineering Pty Ltd v Moline Management Pty Ltd* [1996] NTSC 60 at [21].

In *Davies v Elsby Brothers Ltd* (1960) 3 All ER 672 it was said that the "test must be: how would a reasonable person receiving the document take it?" (at 676 (Devlin LJ)). Toohey J, in *Metropolitan Oils Pty Ltd v Fortron Industrial Lubricants Pty Ltd* (1986) 11 FCR 335, commented on this as follows (at 340):

> The test is a useful one when the issue is whether there has been a misdescription or misnomer ... But I do not think it is determinative of the outcome, particularly where the application to amend is by an applicant. The question, "Am I being sued by the right person?" may simply not have arisen in the mind of the respondent.

Strictly, the correction of a misnomer still involves a substitution but looking to the realities, it is a very different situation where it is clear that a particular entity has always been intended to be named but named incorrectly, to where it is discovered that an entity entirely different from the one originally selected is sought to be substituted: *Berno*, above, at [28].

A personal representative of a deceased person is a different legal person to a relative, notwithstanding that he or she may be one and the same. The rule accordingly enables a person, in their capacity as a relative, to be substituted as a party for the same person previously named as a party in their capacity as a personal representative: *Smart v Stuart* (1992) 107 FLR 119; 83 NTR 1; 2 NTLR 43; [1992] NTSC 19 at [1].

CASES – *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119 (leave to amend refused where appellant sought addition of party with different description and different cause of action to appellant); *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 103 ALR 607 (leave to amend denied where mistake was in suing owner of vessel as owner of that vessel rather than as carrier of goods on vessel where vessel had been chartered to different carrier); *Rainbow Spray Irrigation Pty Ltd v Hoette* (1963) 80 WN (NSW) 142 (leave to amend granted as court accepted that amendment to name of plaintiff company was correction of a misnomer and not a substitution); *HM A-G for England v Sorati* (1969) VR 88 (application refused where eight individuals suing as trustees sought to be replaced by an incorporated body); *Metropolitan Oils Pty Ltd v Fortron Industrial Lubricants Pty Ltd* (1986) 11 FCR 335 (leave granted to amend name of one party due to mistake at start of proceedings; was not essential that respondents knew or ought to have known true name); *Smart v Stuart* (1992) 2 NTLR 43; [1992] NTSC 19 (leave to amend granted where plaintiff commenced action as personal representative of deceased but intended to sue in own capacity); *Creedon v Measey Investments Pty Ltd* (1990) 100 FLR 42; [1990] NTSC 15 (r 36.01(4) and (5) had no application where plaintiff erroneously sued defendant as representative of estate when defendant had never consented to be representative of deceased as this constituted mistake as to liability of defendant rather than misnomer or mistake as to identity).

[5.36.41] "Mistake" – substitution vs addition of another person. Rule 36.01 deals with substitution but not with the addition of plaintiffs. However, where, for example, the owners of an asset are A, B and C but the plaintiff's solicitor, intending to sue in the name of whoever the owner was, thought the owner was only A, the mistake is one in the name of a party. There is no reason why the use of the singular "party" in r 36.01 should not include the plural (see s 24 of the *Interpretation Act*). It is not an abuse of language to substitute two parties in the place of one: *Dee Jay Engineering Pty Ltd v Moline Management Pty Ltd* [1996] NTSC 60 at [24]. Rule 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit: *Bridge Shipping v Grand Shipping SA* [1991] HCA 45 at 260-261 (McHugh J); *Dee Jay Engineering Pty Ltd*, above, at [24].

CASES – *Dee Jay Engineering Pty Ltd v Moline Management Pty Ltd* [1996] NTSC 60 (addition of two parties amounted to a substitution for purposes of r 36.01 where manager of a joint venture originally listed as plaintiff without two joint venturers); *Davies v Elsby Brothers Ltd* (1960) 3 All ER 672 (case of substitution, not amendment, where plaintiff failed to specify date of incident and described defendant as "a firm" when in fact had been taken over by a company, as failure to specify date prevented court from concluding which entity was intended).

[5.36.44] Amendment to raise new defence. There is nothing in principle to distinguish a proposed amendment to raise a new defence and the filing of a defence out of time pursuant to r 3.02: *North Australian Aboriginal Legal Aid Service Inc v Liddle* [1994] NTSC 84 at [30] (see also authorities cited therein).

[5.36.47] "Prejudiced" (sub-r (6)). Where the only prejudice of a late amendment is to deprive the defendant of a limitation defence, that does not amount to "prejudice" within the meaning of the term in r 36.01(6). The relevant "prejudice" for the purpose of the provision is prejudice in the defendant's "conduct of [its] defence": *Woodleigh Nominees Pty Ltd v CBFC Leasing Pty Ltd* [1999] NTSC 68 at [22]; *Jovanovich v Diamond Leisure Pty Ltd* [1995] NTSC 121 at [9]; *Ketteman v Hansel Properties* (1987) AC 189 at 203; *Mehta v Commonwealth Bank* (1990) 12 ATPR 41-026.

[5.36.50] *Limitation Act* – avoidance of limitation period. Under r 36.01(5), an amendment which corrects the name of a party under r 36.01(4) relates back to the date of the issue of the writ: *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133; [1991] NTSC 4 at [30]. On the other hand, it is common practice to refuse leave under r 9.06 to add or substitute a plaintiff once the limitation period applying to the claim against the defendant has expired. Thus, in opting to substitute a party under r 36.01(4), the prospect of being faced with a limitation defence under O 9 may be avoided. This is a significant fact where the relevant limitation period has expired: *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119.

Weldon v Neal (1887) 19 QBD 394 decided (at 395) that there was an injustice to the other side if the amendment permitted the amending party to prejudice the rights of the opposite party as existing at the date of the amendment (that is, by defeating the *Statute of Limitations*) and that such an amendment would only be allowed in special circumstances: *Mabro v Eagle Star and British Dominions Insurance Company Limited* (1932) 1 KB 485 at 489 (Greer LJ); *Bradshaw v Hair Transplant Pty Ltd* (1986) 13 FCR 1 at 4 (Toohey J); *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133; [1991] NTSC 4 at [17]-[20]. However, the rule in *Weldon v Neal* was abrogated by s 48A(1) of the *Limitation Act* (inserted by s 20 of the *Supreme Court (Rules of Procedure) Act 1987*) and powers of the court to substitute a new party after the time limit has expired is expressly contemplated by r 36.01(6). However, r 1.07 provides that r 36.01(6) does not apply to a "pending proceeding", which is defined in r 1.01 as a civil proceeding in the court commenced before the commencement date of the current Supreme Court Rules: *Berno,* above, at [21]; *Krueger v Jansen* [1990] NTSC 11 at [20]-[26].

Before the commencement of the rules, Asche CJ acknowledged in *v Jansen* [1990] NTSC 11 at [30] (see also the authorities cited therein) the presence of a great deal of authority that amendments which do not amount to new causes of action may be permitted even if made after the expiration of the relevant limitation period. The test propounded by Kelly J (adopted by Asche CJ in *Krueger*) in *Goldski v Kirk* (1987) 72 ALR 443 (at p 451) was:

> a plaintiff should not be allowed to introduce new claims by amendment which in substance amount to the bringing of a new action for claims already barred by statute. However, where the proposed amendments do not change the cause of action but do no more than particularise the facts by which the respondent proposes to sustain it even though the facts sought to be brought forward under the amendments are quite different from those originally alleged, amendment will be allowed.

CASES – *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133; [1991] NTSC 4 (cause of action of new party statute-barred as r 36.01(6) could not be relied on in application to substitute party made before commencement of Supreme Court Rules); *Hristeas v GMH Proprietary Limited* (1968) VLR 14 (plaintiff permitted to amend claim in action in negligence after limitation period had expired because no new cause of action involved); *Krueger v Jansen* [1990] NTSC 11 (rule in *Weldon v Neal* applied but case fell within rule's "special circumstances" exception because no new cause of action where amended statement of claim put forward different facts to sustain claim).

ORDER 62 SECURITY FOR COSTS

[5.62.20] 62.01 Definitions

In this Order, unless the contrary intention appears:

defendant includes a person against whom a claim is made in a proceeding.
defence includes a defence to a counterclaim and defence to a statement of a third party claim.
plaintiff includes a person who makes a claim in a proceeding.

[5.62.100] 62.02 When to give security

(1) Where:
- (a) the plaintiff is ordinarily resident out of the Territory;
- (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues not for his own benefit but for the benefit of another person and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;
- (c) a proceeding by the plaintiff in another court for the same claim is pending;
- (d) subject to subrule (2), the address of the plaintiff is not stated or is not stated correctly in his originating process;
- (e) the plaintiff has changed his address after the commencement of the proceeding in order to avoid the consequences of the proceeding; or
- (f) under an Act or the *Corporations Act 2001* the Court may require security for costs,

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.

(2) The Court shall not require a plaintiff to give security by reason only of subrule (1)(d) if in failing to state his address or to state his correct address the plaintiff acted innocently and without intention to deceive.

Related content. **[5.83.1000]** r 83.11 ("Security for costs"); **[5.85.650]** r 85.13 ("Security for costs").

[5.62.108] Scope and operation. The rationale behind security for costs is that a party should not be put at risk of not being able to recover costs in defending a claim against an impecunious party, where that party is ultimately unsuccessful in its claim. A party whose position is defensive will not be ordered to give security for costs because the party who is the aggressor in the litigation takes upon itself the risk of not being able to recover costs: *Karlovsky v Q-Built Constructions Pty Ltd* [2008] NTMC 16 at [3]. A plaintiff is entitled to know from the defendant the amount for which security is being sought: *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13 at [33].

Where an applicant for security for costs makes a counterclaim, the applicant may only seek an order relative to the prospective cost of defending the claim. The applicant cannot require the party to give security for costs it incurs in pursuit of its own claim: *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715 (cited in *Karlovsky v Q-Built Constructions Pty Ltd* [2008] NTMC 16 at [9]).

Superior courts of common law, including the Supreme Court, have an inherent jurisdiction to order security for costs: *Iskander v Merparti Nusantara Airlines* [2006] NTCA 3 at [11] (citing *J H Billington Ltd v Billington* [1907] 2 KB 106; *Harpur v Ariadne Australia Ltd* (1984) 2 Qd R 523 at 526; *Thunderdome Racetiming and Scoring Pty Ltd and Anor v Dorian Industries Pty Ltd and Anor* (1992) 36 FCR 297 at 304-305).

[5.62.112] Exercise of discretion. Factors to be considered in the exercise of the discretion to grant security for costs include: whether the order will frustrate the plaintiff's claim; the merits of the claim; the cause of the plaintiff's impecuniosity; and any delay in bringing the application for security for costs: *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 512-515 (cited with approval in *Milingimbi Educational and Cultural Association Inc v Davis* [1990] NTSC 35 at [15] (Kearney J)). Relevant factors have also been held to include: whether the plaintiff is in fact unable to pay; whether the claim is bona fide and has a reasonably good chance of success; whether the proceedings taken by the plaintiff are in the nature of a defence against "self-help" measures taken by the defendant; and the question of the defendant's counterclaim: see, eg, *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 at [20]-[24]. None of these factors alone will determine the outcome; all of them should be weighed in the balance to determine what is just between the parties: *Milingimbi Educational and Cultural Association Inc*, above, at 10; *Summerglen Pty Ltd*, above (Mildren J); *Ayyoush*, above; *Andado Pastoral Company Pty Ltd v Northern Territory of Australia* [2002] NTSC 56 at [20]. These factors are not exhaustive: *Ayyoush*, above, at [17].

There is no predisposition in favour of the defendant. The inability of the plaintiff to pay the defendant's costs is itself a substantial factor in the exercise of the discretion: *Watkins v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27 at 34; *Pearson v Naydler* (1977) 1 WLR 899; *Ayyoush v Samin* [1994] NTSC 45 at [15]; *Milingimbi Educational and Cultural Association Inc*, above, at [14]. The court is required to form an opinion about what the financial position of the plaintiff will be at the time of judgment and immediately thereafter. The financial position of the plaintiff at the time when the application is made will be an important guide, but is not the sole consideration: *Beach Petroleum NL v Johnson* (1992) 7 ASCR 203; 10 ACLC 525 at 526; *Lexcray Pty Ltd v Northern Territory of Australia* [2000] NTSC 24 at [22]-[23].

Where the court considers that the claim is bona fide and has reasonably good chances of success, this may weigh against the making of an order: *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 11 ACLR 616 at 626 (Smart J); *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 at [21]; see also *Ayyoush*, above, at [7].

The factors applicable where the plaintiff is a corporation apply where the plaintiff is a natural person: *Ayyoush*, above, at [16]; *Pearson*, above, at 902-905.

[5.62.114] Exercise of discretion – security resulting in frustration of claim. It is possible that an order requiring that security be given could frustrate the plaintiff's claim, but that in turn depends to some degree on the nature of the security required to be given: *Bell Wholesale Co Ltd v Gates Export Corporation* [1984] FCA 34; (1984) 2 FCR 1 at 4; *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18 at [16]. Where one form of security for costs might frustrate the plaintiff's claim, another may not necessarily have that effect: *Andado Pastoral Company Pty Ltd v Northern Territory of Australia* [2002] NTSC 56 at [37]-[41]. A court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless the party resisting an order for security establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders, creditors or beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter: *Bell Wholesale Co Ltd v Gates Export Corporation* [1984] FCA 34; (1984) 2 FCR 1 at 4; *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation*), above, at [16]; *Andado Pastoral Company Pty Ltd*, above, at [34].

[5.62.116] Exercise of discretion – assessing merits of plaintiff's case. However, it is unusually difficult to assess the merits of a case of reasonable complexity at an interlocutory stage. In the ordinary course of events, the strength of the plaintiff's case will depend upon the evidence. Consideration of the merits of such a case at an interlocutory stage would be a waste of resources. Further, where a judge who hears the interlocutory proceedings may also try the case, it would be inappropriate to address the merits in detail during interlocutory proceedings: *Andado Pastoral*

Company Pty Ltd v Northern Territory of Australia [2002] NTSC 56 at [42]-[43]. Likewise, it has been held that, for practical reasons, the court should not allow the issue of whether it is likely that the plaintiff will succeed in its action to be investigated in detail in connection with security for costs: *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18 at [9].

Numerous authorities support the proposition that the merits of the plaintiff's claim are relevant to the exercise of the discretion to order a plaintiff corporation to give a security for costs. For example, in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609 at 626, Denning MR included amongst the matters which might be taken into account:

> whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success ... The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim.

[5.62.119] Exercise of discretion – delay. It is well established that delay in applying for security for costs may be ground for refusing to order security: *Smail v Burton; Re Insurance Associates Pty Ltd (in liq)* [1975] VR 776 at 777; *Andado Pastoral Company Pty Ltd v Northern Territory of Australia* [2002] NTSC 56 at [53]. The relevance of delay was explained in *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313 (at 1315) (cited in *Karlovsky v Q-Built Constructions Pty Ltd* [2008] NTMC 16 at [28]):

> an application for security of costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiff's claim, while it is finding the security, or if it is going to frustrate the plaintiff's claim completely and stop the action, it does so early on before the plaintiffs have incurred too many costs. An early hearing of such an application also benefits the defendant because it stops the plaintiff's claim before the defendant has incurred too many costs.

Applications for security of costs should be made promptly and before considerable expense is incurred by the party resisting the security order sought: *Grant v The Banque Franco-Egyptienne* (1876) 1 CPD 143; *In re Vagg* (1886) 13 VLR 172 at 184-185; *In re Clough, Bradford Commercial Banking Company v Cure* (1887) 35 Ch D 7; *King v The Commercial Bank of Australia Limited* [1921] VLR 48 at 54. Delay of itself will not bar an order for security of costs if a good reason can be put forward to explain the delay: see, eg, *Karlovsky v Q-Built Constructions Pty Ltd* [2008] NTMC 16 at [34]. If there are reasonable causes for delay, including the conduct of the party resisting the security order, different considerations might apply: *In re Indian, Kingston, and Sandhurst Mining Company* (1882) 22 Ch D 83 at 84-85; *Pooley's Trustee v Whetham* (1886), 33 Ch D 76 at 79; *Ellis v Stewart* (1887) 35 Ch D 459; *Forsyth v Burns* (1889) 15 VLR 359.

CASES – *Aspendale Pastoral Co Ltd v W J Drever Pty Ltd* (1983) 7 ACLR 937 (no delay by defendant in making application for security and security ordered confined only to estimated costs that would be incurred up to date upon which action was set down for trial); *Andado Pastoral Company Pty Ltd v Northern Territory of Australia* [2002] NTSC 56 (order for security for costs refused where defendant agreed with plaintiff to leave proceedings in abeyance pending outcome of other cases but periods during which plaintiff actively pursued its claim, and incurred significant costs, gave defendant ample opportunity to seek security at early point in time); *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301 (security for costs sought where length of hearings not foreseen when commenced); *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 115 (security for costs sought where length of hearings not foreseen when commenced). For cases involing delay in the Local Court, see [42.31.60].

[5.62.121] Exercise of discretion – application for leave to appeal. As to the principles applicable to the granting of security for costs of an application for leave to appeal, see [5.83.1007].

[5.62.130] Exercise of discretion – corporations (sub-r (1)(b)). The exercise of the power under Rule 62.02(1)(b) requires as a pre-condition that the court believe that the plaintiff has insufficient

assets in the Territory to pay the costs of the defendant if ordered to do so and that there is reason for that belief. If that pre-condition is satisfied, the discretion to order security for costs is unfettered and must be exercised having regard to all the circumstances of the case. There is no predisposition in favour of the defendant: *Watkins v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27 at 33-34 (Nader J); *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 at [20]; *Lexcray Pty Ltd v Northern Territory of Australia* [2000] NTSC 24 at [8] (Thomas J). In exercising the discretion, the court will apply considerations of what is just and reasonable in all the circumstances: *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18; *Milingimbi Educational and Cultural Association Inc v Davies* [1990] NTSC 35. The court will weigh up the competing interests of the parties having regard to all of the facts and circumstances: *Drumdurno v Braham* (1982) 42 ALR 563 at 565 per Sweeney J; *Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd* [1992] NTSC 3 at [8]. If the company is impoverished, weight must be given to that fact as it is that matter which enlivens the exercise of the discretion: *Territory Broadcasting*, above, at [8].

In *Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd* [1992] NTSC 3 at [7], it was stated that the rationale behind r 62.02(1)(b) is likely the same as that behind the like provisions of companies legislation, as expressed by Street CJ in *Buckley v Bennell* (1974) 1 ACLR 301 (at 303) as being a reflection of

> the concern of the legislature that, in permitting the incorporation of a limited liability entity, it was necessary to ensure that persons who might have dealings, whether voluntary or involuntary, with such an entity should have a measure of protection against the consequences of limited liability … Where, however, a company commences litigation against another party, that other party could find himself involuntarily prejudiced by the limited liability character of the plaintiff who had commenced proceedings against him.

An application that a corporation give security for costs is not within the *Corporations Law* such that the application cannot be made without the leave of the court: *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857; *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13 at [35].

Insolvency of itself will not attract a requirement that a corporation give security for costs. Rather, this simply satisfies the threshold test that gives rise to a consideration of the exercise of the discretion to make an order: *Livingspring Pty Ltd v Kliger Partners (A Firm)* [2007] VSC 443 (cited in *Karlovsky v Q-Built Constructions Pty Ltd* [2008] NTMC 16 at [11]).

Order 62 is very limited in its operation and a party that is unable to bring itself within the terms of the rule may seek to rely upon the court's inherent jurisdiction to award security for costs (see [5.62.109]): see, eg, *Iskander v Merparti Nusantara Airlines* [2006] NTCA 3 at [12].

CASES – *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 (no costs order made where trustee plaintiff company impecunious but on balance circumstances did not justify order).

[5.62.133] Exercise of discretion – corporations (sub-r (1)(b)) – orders against directors/ shareholders. It has been held that an order for security for costs may be satisfied by being given by a person having an interest in the benefit sought to be derived by the plaintiff company in the proceedings. Fairness requires that a defendant be placed in an equal position with a plaintiff company "by the company providing or having provided by those concerned in the fruits of the litigation a means of the defendant sued recovering his costs, if he wins": *Pacific Acceptance Corporation Ltd v Forsyth* (1967) 2 NSWR 402 at 407 (Moffitt J); *Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd* [1992] NTSC 3 at [8]; see also *Harpur v Ariadne Australia Ltd* (1984) 2 Qd R 523. In *Bell Wholesale Co Pty Ltd v Gates Export Corporation* [1984] FCA 34; (1984) 52 ALR 176 at 179, the Full Court of the Federal Court included in this class of persons the shareholders, creditors and, in that case, beneficiaries under a trust of which the company was trustee. However, whilst there is authority for the proposition that the objects of the rules and Act have been achieved if the person who stands behind the plaintiff company makes their assets

available for the payment of costs, Master Coulehan noted in *Tsakirios v Bayridge (Northern Territory) Pty Ltd* [1996] NTSC 72 at [11] that reservations about such an approach have been expressed (citing *Erolen v Baulkham Hills Shire Council* 10 ACLR 441 at 456 (Powell J)). Master Coulehan went on (at [12]) to approach the question of security on the basis that there is no presumption that an acceptance of liability by shareholders is necessarily sufficient.

CASES – *Tsakirios v Bayridge (Northern Territory) Pty Ltd* [1996] NTSC 72 (directors and shareholders of plaintiff company ordered to provide security for costs for plaintiff in form of written guarantee and undertaking not to transfer or encumber certain real estate); *Territory Broadcasting Pty Ltd v Darwin Broadcasters Pty Ltd* [1992] NTSC 3 (joint and several guarantee required for security where undertaking by directors of impecunious plaintiff company to indemnify defendants up to $25,000 was insufficient to provide adequate security for defendant); *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18 (court ordered company to give security and director to give personal guarantee after considering success of appeal, delay, costs, frustration of claim an order could cause and means of company director).

[5.62.135] Corporations (sub-r (1)(b)) – operation. A defendant should seek an application for security for costs promptly following the appointment of an administrator to a plaintiff company: *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 13 ACLC 437; *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13 at [34].

[5.62.136] Corporations (sub-r (1)(b)) – onus of proof. Under r 62.02(1)(b), the requirement that there be "reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so" places the onus upon the defendant/respondent to produce evidence to give the court the necessary reason, but a prima facie case is sufficient: *Churchills Ltd v Pilcher* (1940) 57 WN (NSW) 109; *Pucciarmati v Walker Nominees Pty Ltd* [2002] NTSC 13 at [33]; *Lexcray Pty Ltd v Northern Territory of Australia* [2000] NTSC 24 at [24]. Being in liquidation affords the evidence needed and the onus is then upon the plaintiff to show that it will be able to pay: *Pucciarmati*, above, at [33]. A "practical" but not a legal onus falls upon the plaintiff where the defendant establishes a prima facie case that there is reason to believe that the plaintiff would be unable to pay costs awarded against it. Where the plaintiff fails to adduce evidence, the court may draw any inference from the existing evidence which the circumstances can reasonably justify: *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 at [16] and [18]; *Milingimbi Educational and Cultural Association Inc v Davis* [1990] NTSC 35; see also *Pucciarmati*, above, at [33]. A plaintiff corporation seeking to resist an application for security should place before the court a full and frank statement of its assets and liabilities as well as those of its shareholders: *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18.

CASES – *Darwin Joinery and Furniture Manufacturing Pty Ltd (In Liquidation) v Finch* [1991] NTSC 18 (liquidator seeking security for costs required to adduce evidence of other party's financial situation to establish "reason to believe").

[5.62.140] Corporations (sub-r (1)(f)) – *Corporations Act 2001* (Cth). Security for costs may be obtained under s 1335 ("Costs") of the *Corporations Act 2001* (Cth), which is reproduced at [363.1335.0].

[5.62.144] Inference of impecuniosity. Where the defendant has established a prima facie case and, despite the appearance that the plaintiff has sufficient assets to meet any costs order, the plaintiff fails to attempt to show that it could meet a costs order, it is open to the court to infer that there is a reason to believe that the plaintiff would not be able to meet a costs order made against it: *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 at [19] (citing *Black v Tung* (1953) VLR 629 at 630-631 and 634; *Taylor v Spence* (1965) NSWR 961 at 965).

CASES – *Summerglen Pty Ltd v Steppes Pty Ltd* [1993] NTSC 96 (inference that plaintiff trustee company would not be able to meet costs order where trust's assets, taken at face value, appeared

sufficient to meet award for costs but plaintiff made no attempt to show its main asset was current asset or likely to be realisable).

[5.62.200] 62.03 Manner of giving security

Where an order is made requiring the plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs.

[5.62.203] Form of security. An order to give security for costs may take many forms aside from payment of cash into court. For example, security for costs may be ordered to be in the form of a bank guarantee or a bond: *Andado Pastoral Company Pty Ltd v Northern Territory of Australia* [2002] NTSC 56 at [37]-[38].

CASES – *Memutu Pty Ltd v Lissenden* (1983) 8 ACLR 364 (security for costs ordered in form of indemnity by principal beneficiary under trust where plaintiff trustee had no assets); *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97 (security for costs ordered in form of undertaking by director of plaintiff company that if costs were awarded against plaintiff he would execute charge over his interest in certain real estate to meet a claim for costs up to a specified amount). See also the case summaries at [5.62.133] regarding forms of security required to be provided by directors and shareholders.

[5.62.300] 62.04 Failure to give security

Where a plaintiff fails to give the security required by an order, the Court may dismiss his claim.

[8]

Supreme Court Act

Division 2 – Jurisdiction

[8.14.0] 14. Jurisdiction

(1) In addition to the jurisdiction conferred on it elsewhere by this Act, the Court –

(a) has jurisdiction –

(i) in a proceeding between the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and the Territory, or a person suing or being sued on behalf of the Territory;

(ii) in a proceeding between the Territory, or a person suing or being sued on behalf of the Territory, and any other person, or a person suing or being sued on behalf of that other person; and

(iii) in a proceeding between the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and any other person, or a person suing or being sued on behalf of that other person;

(b) has, subject to this Act and to any other law in force in the Territory, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911;

(c) has such jurisdiction, whether civil or criminal, as was, immediately before the commencement of this Act, vested in or conferred on the former Supreme Court or is from time to time vested in or conferred on the Court by any law in force in the Territory (including a law passed or made before the commencement of this Act, as affected by section 6);

(d) has jurisdiction in a proceeding in which a writ of mandamus or prohibition or an injunction or other relief is sought against an officer of the Commonwealth or of the Territory, being a proceeding arising in, or under a law in force in, the Territory; and

(e) has jurisdiction, with such exceptions and subject to such conditions as are provided by a law in force in the Territory, to hear and determine appeals from all judgments of inferior courts in the Territory given or pronounced after the commencement of this Act.

(2) The jurisdiction of the Court referred to in subsection (1) is in addition to the jurisdiction that the Court has under any Imperial Act.

[8.14.6] Operation – supervisory jurisdiction (sub-s (1)(b)). Section 14(1)(b) of the *Supreme Court Act* in effect gives the Supreme Court a supervisory jurisdiction to prevent injustice in the Court of Summary Jurisdiction: *Wills v Trennery* [1999] NTSC 2 at [20].

[8.14.9] Operation – review of decisions of Coroner's Court (sub-s (1)(b)). The general jurisdiction vested in the Supreme Court under s 14(1)(b) includes the common law power of superior courts of record to review the decisions of Coroner's Courts. That such a power exists at common law is well established: *Director of National Parks and Wildlife v Baritt* [1990] NTSC 37 at [17] (citing *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1; *Bilbao v Farquhar* (1978) 1 NSWLR 528 at p 532; and *In re Rapier (dec'd)* (1988) QB 26 at p 28).

CASES – *Director of National Parks and Wildlife v Baritt* [1990] NTSC 37 (application to quash findings of Coroner could be heard in Supreme Court but dismissed as Coroner within power in making those findings).

[8.14.11] Operation (sub-s (1)(d)). The Northern Territory has been invested with jurisdiction under s 67C(b) of the *Judiciary Act* (Cth) to grant writs of mandamus or prohibition or an injunction against the Commonwealth or an officer of the Commonwealth. Section 14(1)(d) of the *Supreme Court Act* contains a like power. Whether the source of the court's jurisdiction in respect of an officer of the Commonwealth arises under the Commonwealth or Territory statute or both is not clear.

However, both powers remain and are available in appropriate cases: *Alcoota Aboriginal Corporation v Justice PRA Gray* [2002] NTSC 48 at [232]-[235].

CASES – *Alcoota Aboriginal Corporation v Justice PRA Gray* [2002] NTSC 48 (powers under both s 67C(d) of *Judiciary Act* and s 14(1)(d) of *Supreme Court Act* available in regards to Aboriginal Land Commissioner who was officer of Commonwealth).

[8.14.13] Jurisdiction of Supreme Court of SA (sub-s (1)(b)). Section 14(1)(b) of the *Supreme Court Act* provides that the Supreme Court has the same original jurisdiction as the Supreme Court of South Australia immediately before 1 January 1911. In *Scott v NTA* [2005] NTCA 1 (cited in *Iskander v Merparti Nusantara Airlines* [2006] NTCA 3 at [11]), Mildren J outlined the jurisdiction of the Supreme Court of South Australia as at that date (at [17]-[19]):

> The jurisdiction of the Supreme Court of South Australia as at [1 January 1911] was relevantly contained in *Act 31 of 1855-6* ss 7, 8, 9 and 15; the *Equity Act 1866-7* (No 20 of 1866-7) s 7; and s 1 of the *Supreme Court Procedure Act 1866* (No 7 of 1866). Those provisions conferred jurisdiction on the court in respect of "all pleas, civil, criminal, and mixed, and jurisdiction in all cases whatsoever … as Her Majesty's Courts of King's Bench, Common Pleas, and Exchequer, at Westminster, or either or them, lawfully have or hath in England"; it also conferred on the court jurisdiction as a Court of Oyer and Terminer and Gaol Delivery; and it conferred on the court equitable jurisdiction. Section 9 of the *Act 31 of 1855-6* provided:
>
> That the said Supreme Court shall be a Court of Ecclesiastical Jurisdiction, with full power to grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of this Province and its dependencies, and of all other persons who shall die and leave personal effects within this Province or its dependencies, and to commit letters of administration under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid who shall die intestate or who shall not have named an executor resident within the said Province or its dependencies …
>
> Although further powers were conferred on the court by the *Supreme Court Act of 1878* (No 116 of 1878), the Supreme Court of South Australia was not invested with the like jurisdiction as the ecclesiastical courts of England. Unlike other English laws, the laws of England relating to ecclesiastical matters did not become part of Territory law through the settled colonies principle ...

[8.14.15] Exhumation. The Supreme Court has jurisdiction at common law to order the exhumation of a body for the purposes of forensic examination of the remains whenever it is necessary to do so for the furtherance of the administration of justice. The jurisdiction is not confined to cases falling within the court's criminal jurisdiction. However, the power is limited to those persons who are buried in the Northern Territory unless there is some statutory power enabling the court to exercise jurisdiction in respect of a body which is not buried in the Northern Territory: *Scott v NTA* [2005] NTCA 1 at [27]-[28] (see also the discussion at [20]-[26] and authorities cited therein regarding the source and development of this power).

CASES – *R v Clarkson* (1850) 1 Legge 593 (court ordered coroner to exhume deceased's body and to reinter body immediately after examination completed); *R v J G Beaney* (1866) 3 WW & a'B (L) 73 (SCV ordered exhumation of body for purposes of forensic examination for evidential purposes).

PART III – COURT OF APPEAL

[8.50A.0] 50A. Application

This Part does not apply to an appeal under Division 2 of Part X of the Criminal Code.

[8.51.0] 51. Right of appeal

(1) Where the jurisdiction of the Court in a proceeding or a part of a proceeding was exercised otherwise than by the Full Court, a party to that proceeding may, subject to this Act, appeal to the Court from a judgment given in that proceeding or part, as the case may be.

(2) The Court, when exercising its appellate jurisdiction under subsection (1), may be known as the Court of Appeal of the Northern Territory of Australia.

Related content. [8.53.0] s 53 "Appeal from interlocutory judgment"); **[8.57.0]** s 57 ("Stay of proceedings").

[8.51.3] "A judgment given". The "giving" or "pronouncing" of a judgment is quite distinct from the "passing", "entering" or "authenticating" of a judgment: *Trippe Investments Pty Ltd v Henderson Investments Pty Ltd* (1990) 72 NTR 18; [1990] NTSC 34 at [18]; *Holtby v Hodgson* (1890) 24 QBD 103 at 107; *Turner v Manier (No 1)* (1958) VR 350. It is also distinct from the giving or delivering of reasons for judgment: *Trippe*, above, at [18]; *Blackmore v Flexhide Pty Ltd* (1979) 1 NSW LR 103.

CASES – *Horne v Carlon* [2007] NTCA 2 (no right of appeal on question of sentence where judgment of single judge limited to conviction).

[8.51.6] Nature of appeal. Gallop J commented on the nature of an appeal in *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239; [1992] NTSC 86. His Honour stated (at [5]-[7]):

> The appeal from the Supreme Court to this Court is not confined to a question of law ...
>
> Section 54 provides that this Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence. Those powers are prescribed by s55 and are quite extensive, and include the power to grant a new trial.
>
> Those provisions, in my opinion, grant a right of appeal not confined to questions of law and really amount to an appeal by way of rehearing. The nature of the appeal so provided certainly appears to provide for an appeal other than an appeal in the strict sense.

Similarly, in *Barclay Bros Pty Ltd v Sellers* [1994] NTSC 57, Gallop J stated (at [3]-[4]):

> The appeal is brought pursuant to s.51 of the *Supreme Court Act 1979* which confers a right of appeal on fact and law on the evidence given in the proceedings out of which the appeal arose with power to receive further evidence.
>
> The principles to be applied are well settled ... If, from the judge's reasons, it appears that any error of principle was made or there was any misapprehension of the facts, the appellate court is bound to interfere. It will not interfere merely because the judges of the appellate court would themselves have awarded a different sum. Allowance must be made for the advantages of the trial judge in seeing and hearing the witnesses.

The situation is different where the original appeal was brought from a lower court to the Supreme Court, where that original right of appeal was limited to questions of law, and an appeal under s 51 is subsequently brought to the Court of Appeal from the Supreme Court as an intermediate court of appeal. In *Tiver Constructions*, the appeal from the magistrate to the Supreme Court was brought pursuant to s 26 of the *Workers' Compensation Act 1949*, which was limited to an appeal "on a question of law". So far as appeals of that nature were concerned, Gallop J stated (at [13]):

> On the appeal to this Court from the Supreme Court, the exercise is the review of the Supreme Court's decision as an intermediate court of appeal. The appeal to the Supreme Court was on a question of law. The appeal from the Supreme Court to this Court ought to be similarly confined. It would be inappropriate, in my

> opinion, to do otherwise. This Court's function should be more akin to hearing a case stated. Our jurisdiction should be confined to whether the Supreme Court was right or wrong. It is difficult to conceive of a situation where the extensive powers of this Court under the above appellate provisions of the *Supreme Court Act* would call to be exercised in an appeal from a decision of the Supreme Court as the intermediate court of appeal.

That analysis in relation to appeals from the Supreme Court as an intermediate court of appeal, in circumstances where the original appeal was limited to questions of law, was endorsed by Martin CJ and Gallop J in *Hicks v Bridgestone Australia Ltd* [1997] NTSC 65 in the following terms:

> It is well established that the nature of an appeal pursuant to s51(1) of the *Supreme Court Act* is as set out in *Tiver Constructions Pty Ltd v Clair* [1992] NTSC 86; (1992) 110 FLR 239 and in *Wilson v Lowery* (1993) 110 FLR 142 namely, that on appeal to the Court of Appeal, it would be inappropriate to allow the appeal on any basis other than a question of law in the same way as the restricted appeal from the Work Health Court to the Supreme Court. Gallop J expressed that opinion in *Tiver Constructions* (supra) and in a separate judgment, Martin and Mildren JJ expressed a similar opinion. They said that an appeal pursuant to s51(1) is restricted to a question of law and an appeal from that court to a Court of Appeal obviously cannot be on any other question particularly one involving a question of fact. That decision was followed in *Wilson v Lowery* (supra).

See also *Wilson v Lowery* (1994) 4 NTLR 79 at 83-84. As appeals from the Local Court to the Supreme Court are also limited to questions of law, the same principles will have application.

[8.51.9] Scope of powers. Section 55 of the *Supreme Court Act* shows the very wide powers of the Court of Appeal in dealing with an appeal under s 51. The powers of the court on appeal from a single judge are at least as wide as the powers of that judge on the appeal to him or her: *Ross v Munns* [1998] NTSC 33.

Whenever a new court or tribunal is established, there is no appeal from it unless it is conferred by statute: *Holmes v Angwin* (1906) 4 CLR 297 at 304 (Griffiths CJ). Accordingly, both the nature of the appeal and the powers of the court in disposing of the appeal must be found in the wording of the statute: *Da Costa v Cockburn Salvage and Trading Pty Ltd* [1970] 124 CLR 192 at 202 (Windeyer J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] NTSC 78 (Mildren J).

In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] NTSC 78, Mildren J considered the scope of implied, or incidental, powers the court would necessarily have in conducting an appeal:

> Where, by an Act of Parliament, a right or a power is created, there must by implication carry with it the power to do everything which is indispensable for the purpose of exercising the right or power, or fairly incidental or consequential to the power itself ... ; *Re Sterling* (1978-9) 30 ALR 77 at 83 per Lockhart J, (who applied the principle to imply a power in the Federal Court of Australia to set aside a bankruptcy notice); *Dunkel v Deputy Commissioner of Taxation* (NSW) (1990-91) 99 ALR 776 at 780; *Australian Securities Commission v Bell* (1991) 104 ALR 125, esp at 137 per Sheppard J; *Johns v Conner* (1992) 104 ALR 465 at 473; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 574.
>
> The question, then, is what is indispensable, or fairly incidental or consequential upon a power conferring a right of appeal upon a question of law? The answer to this question must depend upon whether an error of law is found by the court, and if so, the nature of the error. Obviously if there is no error, the court has power to dismiss the appeal. If error is disclosed, this does not necessarily mean that the appeal must be allowed. An appeal will only succeed on an error of law if the error is one upon which the decision depends and is such as to vitiate the decision appealed from: *Yates Property Corporation Pty Ltd (In Liquidation) v Darling Harbour Authority* (1991) 24 NSWLR 156, esp. at 177 per Handley JA. If the error does vitiate the decision appealed from, then the remedy must be tailored to meet the nature of the error identified. If the Tribunal had made no decision on contested facts, but had erroneously rejected the appeal to it on some legal principle, the court must have a power to order a fresh hearing: see *McMorrow v Airsearch Mapping Pty Ltd* (unreported, NTCA, 7 March 1997) where this course was taken in respect of an appeal under the *Work Health Act*. If the error of law is, as suggested here, that on the facts as found or not in dispute, the correct conclusion, as a matter of law, is that the respondents are entitled to the exemption, the court must, by implication, have the power to substitute the decision of the court for that of the Tribunal. This is

supported by the decision of the High Court in *Zuijs v Wirth Brothers Pty Ltd*, supra, which dealt with the powers of the Supreme Court of New South Wales when dealing with a case stated vide s. 37(4) of the *Workers Compensation Act 1926* (NSW). Apart from empowering the statement of the case, that Act said nothing about the court's powers, although s. 37(7) provided that the decision of the court was binding on the Commission. In *Smith v Mann* (1932) 47 CLR 426, the High Court held that the Supreme Court's decision was not an advisory or consultative opinion but a final determination of the rights of the parties. In *Zuijs v Wirth Brothers Pty Ltd*., supra, at 574 the High Court considered the matter further and said:

> "It remains to consider what order should be made. The nature of the proceeding before the Supreme Court under s. 37(4) of the *Workers Compensation Act 1926-1948* was discussed in *Smith v Mann* (1932) 47 CLR 426 where it was pointed out that the statement of a case after award is a means of invoking the jurisdiction of the Supreme Court so that it may revise or reconsider within the limits of the question of law raised the determination of the commission. 'If the decision of the Supreme Court upon any of those questions means that the order or award of the Commission was erroneously made, that order or award can no longer remain in operation as a determination of the proceedings before the Commission' (1932) 47 CLR, at p 446. On an appeal to this Court, we exercise the function of the Supreme Court anew. The passage quoted describes the position in the present case. The finding that there was no contract of service but an independent contract for the performance of an act cannot stand. For it has an erroneous basis. But what should now be done? There has been no finding that there was a contract of service and although all the facts proved point to that conclusion, the evidence is so bare and meagre that to say that the tribunal of fact was bound in point of law to be satisfied of the issue may be going too far. Sections 37(4) and (7) are expressed very compendiously but there seems no reason to suppose that the powers of the Supreme Court do not extend to what is incidental to giving effect to the decision. In the present case the proper course is to answer the questions as stated and to remit the case to the commission with a direction that the application be reheard by the commission."

It is clear from this passage, and also from the judgement of McTiernan J at 576, that if, as a matter of law, the facts as found or not in dispute fall within or outside of a statutory enactment, so that the fact-finder was legally bound to decide the question only one way, the appellate court has, by implication, on an appeal ... a power so to find and declare.

Parties cannot by consent or otherwise vest appellate jurisdiction in the Court of Appeal outside of s 51(1): *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616; *The Nominal Insurer v Savasti Kamarakis* [1995] NTSC 66 at [62].

[8.51.12] Leave to appeal – exercise of discretion. The principle to be applied in deciding whether to grant an application for leave to appeal was expressed by Asche CJ in *Rogerson v Law Society* (NT) (1993) 88 NTR 1 (at 5) (cited with approval in *Cambridge Gulf Exploration NL v Roberts* [1995] NTSC 127 at [28] (Thomas J)):

> In ... an application for leave to appeal ... the order appealed from must be seen to be clearly wrong or at least attended with sufficient douot (sic) as to whether it is right or wrong and some substantial injustice must be shown as a consequence of the order: see *Supreme Court Act 1979* (NT) s 53; *Neimann v Electronic Industries Ltd* (1978) VR 431; *Nationwide News Pty (t/a Centralian Advocate) v Bradshaw* (1986) 41 NTR 1.

[8.51.15] Interference with discretionary judgment. The test for whether an appellate court should interfere with the exercise of a discretion by a court below it was set out by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 (at 627) (cited with approval in *Cambridge Gulf Exploration NL v Roberts* [1995] NTSC 127 at [26] (Thomas J)):

> the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

[8.51.21] Role of Court of Appeal. In *Lexcray Pty Ltd v Northern Territory of Australia* [2001] NTCA 1, the Court of Appeal provided a detailed summary of recent authorities regarding the role of the Court of Appeal (at [23]-[27]):

> The thrust of the appellant's case on appeal was that the modern law upon the role of an appellate court is the reverse of stressing the obligations of restraint out of recognition of the advantages expressed or necessarily inferred which the trial Judge has enjoyed and which the appellate court has not. Senior counsel for the appellant relied upon the recent case of *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (in liq) and Others [1999] HCA 3; (1999) 160 ALR 588 wherein some Judges of the High Court appeared to have jettisoned for all time the principles enunciated by Barwick CJ in a number of cases terminating in *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296. They favoured what Kirby J described as the "traditional" view which is,
>
> > "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation."
>
> Kirby J went on to say (at p 615),
>
> > "There is no warrant for returning to that position (ie *Edwards v Noble*). In my view, it should be firmly resisted. It cannot stand with the duty imposed on appellate courts by statute to make up their own mind; to conduct appeals on the facts by way of rehearing; to draw inferences from the facts for themselves; to give the judgment and make orders that should have been given at trial; and in exceptional circumstances, even to admit fresh evidence into consideration."
>
> But the majority adhered to what had been said in *Devries v Australian National Railways Commission* [1992] HCA 41; (1993) 177 CLR 472 at 479,
>
> > "More than once in recent years, this court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact (see *Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; (1985) 62 ALR 53; *Jones v Hyde* [1989] HCA 20; (1989) 85 ALR 23; *Abalos v Australian Postal Commission* [1990] HCA 47; (1990) 171 CLR 167. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' (*SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47) or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' (*Brunskill v Sovereign Marine & General Insurance Co Ltd (supra)*."
>
> Most recently, McHugh, Kirby and Callinan JJ said in *Walsh v Law Society of NSW* [1999] HCA 33; (1999) 73 ALJR 1138 at 1148,
>
> > "Some aspects of the appellate procedure will remain the same where the appeal is conducted solely on written materials, whether those materials be technically evidence in a de novo hearing or the record under consideration in an appeal under s 75A of the *Supreme Court Act*. In either case, the appellate court will be bound generally to defer to any conclusions on the questions of credibility formed by the court or tribunal from whom the appeal is brought where the latter has seen and heard the witnesses (*Uranerz (Aust) Pty Ltd v Hale* (1980) 54 ALJR 378 at 381; cf *McCormack v Federal Commissioner of Taxation* [1979] HCA 18; (1979) 143 CLR 284 at 323-324). In particular circumstances, it will be open to an appellate court to reach conclusions contrary to those of the court or tribunal below, notwithstanding a credibility finding (see, for example, *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (In liq) [1999] HCA 3; (1999) 73 ALJR 306 at 321 [63-64], 331-332 [93], 340 [146]). Sometimes it will be authorised to reject those findings where they are 'glaringly improbable' (*Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; (1985) 59 ALJR 842 at 844) or 'contrary to compelling inferences' of the case (*Chambers v Jobling* (1986) 7 NSWLR 1 at 10; *cf State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (In liq) [1999] HCA 3; (1999) 73 ALJR 306 at 331-332 [93]). But the caution required of all appellate courts in such matters has long been recognised and frequently upheld in decisions of this Court."

> This court is, of course, bound to decide this appeal by the application of those principles so recently restated by the High Court. It is still the law that an appellate court must respect findings of fact founded on questions of credibility unless some or other of the circumstances referred to in the passage in *Walsh v Law Society of NSW* (supra) prevail.

[8.51.24] Costs orders. Appeals lie from final costs orders of single judges of the Supreme Court to the Court of Appeal. Section 19 of the *Local Court Act* provides for appeals from final orders of the court and makes no mention of judgments. "Order" is not defined by the *Local Court Act*. It follows that an appeal to the Supreme Court lies as of right from a costs order made at the conclusion of a trial in the Local Court and that such an appeal lies irrespective of whether or not the judgment of the Local Court is also challenged: *Stuart v High North Pty Ltd* [1994] NTSC 39 at [8]-[9].

Where costs are in the discretion of the court, they will likely fall within the category of matters of practice or procedure (for a court of appeal to interfere with a judgment of this category, a higher standard is required – see [8.53.15]): *Wentworth v Rogers (No.3)* (1986) 6 NSWLR 642 at 651 (Priestley JA); *Guernier v Patterson* [1992] NTSC 75 at [22]. As to the grant of leave, the policy of the law is to discourage appeals against orders for costs: *Niemann v Electronic Industries Ltd* (1978) VR 431 at 432, 439; *Nationwide News Pty Ltd v Bradshaw* [1986] NTSC 40; (1986) 41 NTR 1 at 8; *Guernier v Patterson* [1992] NTSC 75 at [28] and [33].

CASES – *Stuart v High North Pty Ltd* [1994] NTSC 39 (competency of appeal to Supreme Court from magistrate's decision on costs orders upheld).

[8.53.0] 53. Appeal from interlocutory judgment

(1) A party to a proceeding may not appeal under section 51(1) from an interlocutory judgment except by leave of the Court of Appeal.
(2) An application for leave to appeal from an interlocutory judgment must be determined in the first instance on the papers by the Court of Appeal consisting of one Judge.
(3) If the application is refused, the party is entitled to have the application determined by the Court of Appeal consisting of not less than 3 Judges.
(4) An appeal from an interlocutory judgment of the Master or a referee must be heard by the Court of Appeal consisting of:
    (a) one Judge – if leave to appeal is granted under subsection (2); or
    (b) 3 Judges – if leave to appeal is granted under subsection (3).

Related content. [5.85.20] SCR O 85 ("Civil appeals").

[8.53.3] Operation. An application for leave heard by the Court of Appeal by a single judge under s 53(1) does not finally determine an application for leave because, under s 53(3), the applicant is entitled to have the application dealt with by the court consisting of three judges. It is not necessary to show that the court constituted by a single judge was wrong. The application before three judges will be heard afresh: *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 at [3].

CASES – *Hudson v Branir* [2005] NTCA 5 (s 53 conferred on applicants, who sought order to set aside subpoena but who were not party to principal action, right of proceeding in court and court had jurisdiction to entertain proceedings).

[8.53.6] "Interlocutory". As to the test for whether a judgment is interlocutory or final, see [400.70.5].

[8.53.9] Nature of discretion. Section 53 does not, in its terms at least, place any fetters on the Court of Appeal in the exercise of its discretion. In general, when a statute confers an unqualified discretion, the courts refuse to regard the occasional pronouncements of judges in applying such a statute as fettering its future application. The unfettered nature of the discretion conferred upon the Court of Appeal does not decide the matter, but rather acts as a caution against formulating rules which, when an unexpected case arises, may have to be modified: *Nationwide News Pty Ltd v Bradshaw* [1986] NTSC 40 at [4].

[8.53.12] Exercise of discretion – interlocutory judgment. An appellate court should adopt a "very stringent" approach to appeals from interlocutory orders: *Brancatisano and Sons Fruit Pty Ltd v Basacar* [1995] NTSC 132 at [17].

In *Wright Engineers Pty Ltd v BTR Trading (QLD) Pty Ltd* [1987] NTSC 66, Asche CJ reviewed the authorities regarding, and provided a summary of, the requirements for the court to grant leave from an interlocutory judgment (at [3]-[8]):

> the principles governing the application of s 53 of the *Supreme Court Act* and upon which this Court would grant leave from an interlocutory judgment were discussed in *Nationwide News Pty Ltd v Bradshaw* [[1986] NTSC 40]. O'Leary C.J. stated:-
>
> > "The initial matter to be considered by the Court is the application for leave to appeal, and since this is the first such application to come before the Court I think it would be as well if I were to state what I perceive to be the principles that should guide the Court, and the considerations that it should take into account in deciding whether or not leave to appeal should be granted in a case such as this."
>
> His Honour comprehensively reviewed the authorities and commented:-
>
> > "It is clear that the discretion there vested in the Court to grant or refuse leave to appeal from an interlocutory judgement is a broad one; it is left quite unfettered by the legislature. In principle, therefore, the Court should not fetter it by laying down rigid and exhaustive criteria for the granting or refusal of leave. Nevertheless I think it emerges clearly from the cases I set out that some general rules or guidelines can be stated as to the manner in which the court will exercise its discretion."

> His Honour then set out the rules and guidelines which we summarise as follows:-
>
> 1. The prima facie presumption is against an appeal from an interlocutory judgment and in favour of the correctness of the decision in question.
>
> 2. If leave to appeal is to be granted some prima facie case must be made out, short of hearing the appeal itself, for interfering with the exercise of his discretion by the primary judge.
>
> 3. If it appears prima facie on the application for leave that the order from which it has sought to appeal is clearly wrong or that the exercise of discretion by the primary judge has clearly miscarried, leave will be given.
>
> 4. Even if it does not appear prima facie that the order made by the primary judge is wrong but it does appear that some injustice will occur from it the Court will generally give leave to appeal.
>
> 5. If, on the other hand, the Court forms a clear opinion that the appeal could not succeed leave to appeal will generally be refused.
>
> Nader J. commented that "the general effect of these provisions is that there is no right to appeal from an interlocutory judgment. Therefore appellant Courts will not ordinarily hear appeals from such judgments. The situation is therefore contrasted with appeals from final orders which lie as of right." His Honour came to the conclusion that "when considering whether to grant leave to appeal from an interlocutory judgment the Court will regard its discretion as unfettered, but, as a general guide the applicants will be expected to show that the interests of justice make it desirable to grant leave." Later His Honour formulated the following test. "It should be sufficient therefore, when the correctness of the primary judge's decision is called into question, that the appellate court entertains real doubt as to its correctness and forms the view that in the event that the decision is wrong substantial injustice may or will flow if leave to appeal were not granted."
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> Asche J. followed the remarks of Murphy J. in *Niemann v Electronic Industries Pty Ltd* (1978) VR 431 that the onus lies on the party who applies for leave to satisfy the Court of Appeal that the decision of the primary Judge was attended with sufficient doubt and that substantial injustice would be done by leaving the erroneous decision unreversed.
>
> While not entirely cognate, these decisions can, we think, be relied upon in the general sense that it must be shown that the trial judge wrongly exercised his discretion or that his decision is attended with sufficient doubt to warrant granting of leave; but it must also be established that it would be in the interest of justice to grant leave, and the prima facie position is against the granting of leave to appeal from an interlocutory judgment.

In regards to the expectation that the applicant will show that the interests of justice make it desirable to grant leave, Nader J stated in *Nationwide News Pty Ltd* (at [13]):

> This ... requirement must remain very broad in connotation and may include injustice that might flow directly to the applicant from a refusal to hear the appeal, or injustice in a wider sense: perhaps, for example, where the court may wish formally to put an end to a certain approach by judges at first instance that may be prevalent but seen by the Court of Appeal as wrong. The court may regard a formal decision by it, in such a case, as desirable in the interests of justice in a more general sense than as relating specifically to the applicant himself.

For additional authorities, see: *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 at [5]-[7]; *Heller Financial Services Ltd v Solczaniuk* [1989] NTSC 36 at [42].

CASES – *Wright Engineers Pty Ltd v BTR Trading (QLD) Pty Ltd* [1987] NTSC 66 (leave to appeal refused as court not satisfied primary decision gave rise to sufficient doubt or substantial injustice if leave not granted); *City Building Contractors (Hiring) Pty Ltd v Roadcon Pty Ltd* [1987] NTSC 56 (leave to appeal granted as trial judge's discretion vitiated due to errors in inferences drawn).

[8.53.15] Exercise of discretion – order regarding practice and procedure. If an appeal from an interlocutory order lies from the exercise of a discretion in a matter of practice or procedure, a court of appeal will not, as a general rule, interfere unless it is satisfied that the judge has applied a wrong principle of law or that injustice will result from his or her order, and only if it is clearly satisfied that he or she is wrong: see, eg, *Nationwide News Pty Ltd v Bradshaw* (1986) 41 NTR 1 at 4; *Brancatisano and Sons Fruit Pty Ltd v Basacar* [1995] NTSC 132 at [17]. The principles which require leave of the court to appeal from interlocutory decisions apply with special force in relation

to such decisions. In other words, "[i]n the case of an appeal from an interlocutory judgment dealing with a matter of practice and procedure, a more stringent test is usually required than in other cases": *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 at [5]. This restraint is partly explained by the policy described by Jordan CJ in *Re the Will of F B Gilbert (Deceased)* (1946) 46 SR (NSW) 318, where his Honour stated (at 323) (cited in *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 at [5]):

> there is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed indeterminably, and costs heaped up indefinitely. If a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercise of discretion in interlocutory applications from a judge in chambers to a Court of Appeal.

The restraint is also partly explained by the increasing realisation of the public costs involved in litigation and the public interest that necessitates a high respect for finality: *Wentworth v Rogers (No.3)* (1986) 6 NSWLR 642 at 644 (Kirby P); *Guernier v Patterson* [1992] NTSC 75 at [21]. In the context of the similar provision of s 101(2)(c) of the *Supreme Court Act 1970* (NSW), Kirby P said in *Wentworth v Rogers (No.3)* (1986) 6 NSWLR 642 (at 644) (see also the comments of Priestley JA at 651):

> It is normally necessary for a claimant to show something more than that the appeal court would, if exercising its discretion afresh, have come to a conclusion different to that reached by the trial judge. Some error of principle in the exercise of the discretion, a consideration of irrelevant matters or some other manifest mistake is needed to take the case out of the ordinary situation in which, wherever a discretion is to be exercised, minds may differ on the result; cf *Maiden v Maiden* [1909] HCA 16; (1909) 7 CLR 727 at 742; *McCauley v McCauley* [1910] HCA 16; (1910) 10 CLR 434 at 455.

In *Cambridge Gulf Exploration NL v Roberts* [1995] NTSC 127 at [27], Thomas J applied the following principle expressed by O'Leary CJ in *Nationwide News Pty Ltd (t/a Centralian Advocate) v Bradshaw* (1986) 41 NTR 1 (at 4):

> Where ... the appeal is from the exercise of a discretion in a matter of practice or procedure ... the approach of an appellate court is rather more stringent. In *Thompson v Thompson* (1942) 59 WN(NSW) 219, Jordan CJ expressed the difference in these terms (at 220): 'It is established by the authorities that if an appeal lies from the exercise of a discretion which is determinative of substantive legal rights, the appellate court must exercise its own discretion: *In Re Ryan* (1923) 23 SR (NSW) 354, but if it lies from the exercise of a discretion in a matter of practice or procedure, a Court of Appeal will not as a general rule interfere unless it is satisfied that the judge has applied a wrong principle of law or that injustice will result from his order, and only if it is clearly satisfied that he is wrong: *Evans v Bartlam* (1937) AC473 at 480, 481 and 486-7, and *Charles Osenton and Co v Johnston* (1942) AC 130.'

Where costs are in the discretion of the court, they will likely fall within the category of matters of practice or procedure – see [8.51.24].

[8.53.18] Exercise of discretion – correct decision for wrong reason. In relation to an application for leave to appeal an order that was correct but for the wrong reason, Nader J stated in *Nationwide News Pty Ltd v Bradshaw* [1986] NTSC 40 (at [13]-[14]):

> in cases where the proposed grounds of appeal [from an interlocutory judgment] call into question the correctness of the primary judge's decision, [the court] will expect the applicant to show either that the decision was wrong or that there is real doubt whether it was correct. In many cases, for example, an application for leave to appeal from the granting or refusal of an adjournment of trial, the very correctness or otherwise of the decision may depend entirely on whether or not the decision was an in just one. There may be cases other than applications to appeal from a self-executing order that could justify leave even where the primary judge was correct, however unlikely that may be. But, I would resist the temptation to lay down in advance fixed principles. I would do so recognizing that the infinite kaleidoscope of situations may throw up other cases that require yet more exceptions to be made.
>
> ... when I speak of a decision being wrong, I am referring to the interlocutory order or judgment itself and not to the reasoning process by which it was reached. An order that is not wrong cannot be the cause of a party to the proceedings suffering injustice merely because it was made for the wrong reasons. The

> possibility of a right order for the wrong reasons is a real one because, in many cases, the primary judge is presented with only two alternative decisions with the consequence of a high statistical possibility of a right answer irrespective of the way he has tackled the problem. If the reasoning process is seen to be wrong, the appellate court may, unless it hears the appeal, be in real doubt as to the correctness of the order, which doubt may form part of the basis for giving leave to appeal in an otherwise appropriate case. As I have pointed out, the court should not shut itself out entirely from the opportunity to give leave to appeal from a discretionary interlocutory order, even where the order is seen to be correct and cannot therefore be the cause of injustice to a party, but where the stated reasons for the order are seen to be wrong and, for broader considerations concerning the administration of justice, the court thinks a formal correction should be made. In such a case, which would be rare, the court might grant leave to appeal notwithstanding that the appeal itself would be disallowed.
>
> ... the criteria referred to should be regarded as a guide and not as inflexible principle ...

For additional authorities, see also *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 at [7].

CASES – *Nationwide News Pty Ltd v Bradshaw* [1986] NTSC 40 (leave to appeal refused as decision of primary judge was open to be made and not prima facie wrong); *Angell v P North Consultants Pty Ltd* [2007] NTCA 3 (leave to appeal refused as applicant did not show Master erred).

