



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D2 of 2020

BETWEEN:

AILEEN ROY

Appellant

and

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JULIE O'NEILL

Respondent

OUTLINE OF ORAL SUBMISSIONS OF APPELLANT

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Part I: Certification

1. The appellant certifies that this document is suitable for publication on the internet.

Part II: Outline of oral argument

a) *Halliday v Nevill* (1984) 155 CLR 1

2. *Halliday* establishes that, where not negated or revoked, the implied licence authorises entry by any member of the public, including a police officer, for a *legitimate* purpose that in itself involves no interference with the occupier's possession nor injury to the person or property of the occupier, or the occupier's guests: *Halliday* at 8.
- 10 3. *Halliday* was not a "lawful communication" case and only established the legitimacy of the police purpose that arose on its facts: the purpose of "arresting a [trespasser or lawful visitor] whom [the officer] had observed committing an offence on a public street in the immediate vicinity of [a] driveway": *Halliday* at 8; AS [26]-[28].

b) Determining the scope of the licence

4. Whether a purpose of entry is legitimate is a matter of "common sense", which may be "reinforced" by, but not subordinated to, public policy.
 - a. Common sense directs attention to the expectations of ordinary occupiers; to whether there is a "customary invitation" to do what is sought to be done: AS [22], [43]; *Florida v Jardines* (2013) 569 US 1 at 9. That is what it means to say that the licence "arises from the known habits of city life": AS [22], citing *Lipman v Clendinnen* (1932) 46 CLR 550 at 557.
 - 20 b. Public policy may indirectly inform, reinforce or confirm the common sense conclusion. But the licence does not permit a court to give effect to public interests, such as the public interest in the investigation and prosecution of crime, where there is no customary invitation to enter for that purpose: AS [25]; *Halliday* at 19; cf *Tararo v The Queen* [2012] 1 NZLR 145 at 169 [5]-[6], 172 [15]. Otherwise, the licence would be a closer to a revocable *power* than the consent, leave or licence of the occupier: Reply [14]; *Halliday* at 19-20.
5. In an ordinary case, "lawful communication" with the occupier is a legitimate purpose.
 - 30 But "lawful communication" does not mean any communication that is lawful: AS [42]; Reply [5]; cf Respondent's Outline [4](a). "Lawful communication" describes such

communication as is necessary to make the occupier aware of the business on which the entrant comes and to seek a permission to remain to conduct that business: *Robson v Hallett* (1967) 2 QB 939 at 953-954; *Halliday* at 19, citing *Brunner v Williams* (1975) 73 LGR 266 at 272.

c) Police do not enter as if they are any ordinary member of the public

6. Like any member of the public, the law will imply a licence in favour of a police officer to enter for any legitimate purpose. The legitimacy of a police officer's purpose is not, however, determined on the fictional basis that they *are* any ordinary person entering for any ordinary purpose.

10 a. It 'is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings": *Kuru v New South Wales* (2008) 236 CLR 1 at 15; *Halliday* at 20.

b. Investigation has a special status in Australian law and comprises a part of the accusatorial process: AS [34]-[35]. The investigation of an occupier has a distinct significance as a matter of common sense.

c. Unlike an ordinary person, police officers have significant powers – of arrest; search; seizure; to compel a person to provide particulars; to compel a person to submit to a procedure – not enjoyed by an ordinary person: AS [37]-[38].

20 Moreover, once accrued, these powers may frustrate, or nullify the practical utility of, an occupier's right to revoke the licence: AS [39].

7. It would be "contrary to the inference ordinarily to be drawn from the facts" to conclude that there is a customary invitation to enter private residential premises for the purpose of investigating the occupier for a criminal offence; particularly is that so when that investigation is intended by the entrants to involve not just questioning but the exercise of coercive powers, such as the power to request a sample of breath under reg 6 of the *Domestic and Family Violence Regulations 2008* (NT).

d) Whether or not that is so, the entry was not for the purpose of "lawful communication"

30 8. On any view, the police did not enter for the purpose of lawful communication. Rather, they entered for the purpose of exercising, and did exercise, reg 6 of the *Domestic and Family Violence Regulations*, a power that precluded the effective exercise of the appellant's right to revoke the licence.

- a. The appellant was obliged to comply with the request; if the appellant instead attempted to revoke the licence she would have contravened Condition 3 of the DVO and commit an offence contrary to s 120(1) of the *Domestic and Family Violence Act 2007* (NT);
- b. Thus, any attempt to refuse police permission to be on the property to carry out their business necessarily gave rise to a power of arrest under s 123 of the *Police Administration Act 1978* (NT) as well as the associated powers of entry to effect the arrest under ss 123 and 126(2A)(b) of that Act.

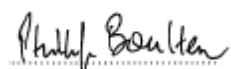
e) Police entered for a purpose that interfered with appellant's possession

- 10 9. For the reasons given at [6](a)-(c), above, the purpose of entry interfered with the appellant's "right to control access by others", which is fundamental to possession: *Smethurst and Another v Commissioner of Police* (2020) 376 ALR 575 at 605 [120] per Gageler J; *Plenty v Dillon* (1991) 171 CLR 635 at 647, 654-655.

f) In view of the illegitimate purpose, no other legitimate purpose authorised the entry

10. Any "concern" for Mr Johnson was not a purpose of the entry. It was a motive that explained one officer's interest in checking on the appellant's compliance with her DVO: The trial judge found to that effect; the evidence supports that finding: AS [44]-[47].
11. To the extent that the concern constituted a part of a "dual" purpose, the purpose of checking on the appellant's compliance with her DVO was, on balance, the dominant
20 purpose of entry: AS [48].
12. In any event, the implied licence is limited as to a particular purpose and such licences will 'generally only confer permission to enter "exclusively for the particular purpose": *TCN v Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344 [50]-[51], citing *Barker v The Queen* (1983) 153 CLR 342 at 365. This would conform with the common law power to enter for the purpose of *preventing*, but not preventing *and* investigating, a breach of the peace: *Kuru v NSW* (2008) 236 CLR 1 at 17.

Dated: 7 September 2020



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