HIGH COURT OF AUSTRALIA

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File Number:	D2/2020
File Title:	Roy v. O'Neill
Registry:	Darwin
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	29 Jun 2020

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D2 of 2020

BETWEEN: Aileen Roy
Appellant

and

Julie O'Neill
Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise submissions in reply

a) "Proactive Policing"

2. The respondent mounts a generalised defence of "proactive policing" (RS [10]). The appellant has, however, advanced no generalised critique of proactive policing nor contended that entry to "communicate with community members in a proactive way" (RS [10]) will always, or even often, be beyond the scope of an implied licence. The appellant's case is, simply, that the implied licence does not extend so far as to authorise a police officer to enter onto private residential property for the purpose of investigating whether or not the occupier is committing an offence.

3. Whatever its connotations in other contexts, to describe this investigation or "check" as "proactive" was, on the evidence, to say that the police had had no dealings with the appellant or Mr Johnson for two weeks, had received no recent complaint about the appellant or the residence, and did not otherwise have reasonable grounds to suspect that the appellant had been noncompliant with her DVO. Nor did they have any such grounds to suspect that for this or any other reason Mr Johnson's welfare was at risk.

b) The respondent concedes that the licence is limited by purpose

4. The respondent concedes that "the implied licence is [not] unconfined by any reference to purpose" (RS [54]). This is the better view of *Halliday* and was emphatically the view of Spigelman CJ (with whom Mason P and Grove J agreed) in *TCN v Channel Nine Pty Ltd v Anning*.[1] The respondent makes two further significant concessions: first, that the "core rationale of the licence … is to facilitate communication or exchange with persons on the premises"; second, that "[p]urposes which contradict [that] rationale … fall outside the licence".

5. On that analysis, the police entry in this case was beyond the scope of the implied licence. The evidence was that the police entered for the purpose of "checking" on, or investigating, the appellant's compliance with her domestic violence order and, in that way, checking on Mr Johnson's welfare. This "check" or investigation may well have involved a modicum of communication. But it is reductive to conclude that "lawful communication" was the purpose of the entry in a case where the only communication between the police officers and either occupier consisted of a *direction* to a person "to come to the door, for the purpose of a domestic violence order check",[2] a request that she submit to a breath test and a reminder that she was obligated to comply with that request.[3]

c) Multiple occupancy

6. Multiple occupancy might materially affect the scope of an implied licence; but it does not do so here. That is because the claim that a licence was given by "Mr Johnson to investigate suspected offending in which he was the victim" (see RS [17]) is unsustainable on the objective facts. Mr Johnson was not the applicant for the DVO (AS [6]); nor, on an application by police, was his consent required in order to confirm it. True, the order proscribed some behaviours by the appellant to which Mr Johnson

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[1] (2002) 54 NSWLR 333 at 341-344, esp 344 [48]-[51]; see also, *Lincoln Hunt Australia Pty Ltd v Willesee* at 460 per Young J; *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 732 per Eichelbaum CJ.

[2] Transcript of Proceedings, *O'Neill v Roy* (Local Court of the Northern Territory, 21815687, Judge Woodcock, 13 November 2018) at 9 (AFM 13).

[3] Transcript of Proceedings (13 November 2018) at 9, 14 (AFM 13, 18). It should also be noted that, having attended, breathalysed and arrested the appellant, there was no evidence of any conversation with *Mr Johnson* regarding his welfare, whether physical, psychological or, as Constable Elliott suggested, "economic". There was no other evidence that the police intended to have such a conversation at the time of the entry.

might have objected. But it also proscribed behaviours by the appellant, such as drinking, which Mr Johnson may well have tolerated or encouraged.

7. Where the investigated party does not reside at the premises and has been observed committing a criminal offence by the police, it may be accepted that the majority of Australian householders would not "desire to convert [their] driveway … into a haven for minor miscreants".[4] Thus, as *Pitt v Baxter* demonstrates,[5] an implied licence might have been granted to the police by all the tenants in common of the property at 41 Victoria Highway to enter the common area of the property to investigate anti-social behaviour by a trespasser, visitor or, even, an occupier of one of the units.

8. Not so when police attend on property comprising a part of the tenancy of an individual residence to investigate an occupier of that private residence; where the investigated party is the domestic partner of the only co-occupier of the residence; and where there is no indication, let alone a complaint, that the investigated party is doing, or is about to do, anything to which the co-occupier objects. In those circumstances, it cannot be inferred that the majority of Australian householders in the position of the co-occupier would consent to the entry onto their property by police for the purpose of investigating and, potentially, arresting and charging their domestic partner. [6]

9. Finally, it may also be accepted that domestic violence overwhelmingly occurs in the home, is less visible than other crime, and that victims of domestic violence may be more reticent to disclose offending by, or invite the investigation of, their partners. While it is important to be "mindful of [these] difficulties",[7] they do not bear upon the likelihood that the majority of Australian householders would consent to the entry. Instead, they explain why, for reasons of public policy, parliaments might determine to derogate from private rights to exclusive possession by arming police with specific and carefully confined powers of entry in cases of domestic violence,[8] or a general and less confined power to "enter a place and stay for a reasonable time on the place to inquire into or investigate a matter … *without* the consent of the occupier".[9]

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[4] *Halliday v Nevill* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[5] (2007) 34 WAR 102.
[6] See, eg, *Howden v Ministry of Transport* [1987] 2 NZLR 747 at 751.
[7] *Kuru v New South Wales* (2008) 236 CLR 1 at 13 [38] per Gleeson CJ, Gummow, Kirby, Hayne JJ.
[8] See, *Domestic and Family Violence Act 2007* (NT), s 126A.
[9] See, *Police Powers and Responsibilities Act 2000* (Qld), s 19 (emphasis added).

d) Dual purposes

10. It remains to say something brief by way of reply to the respondent's submissions regarding the "dual" purpose of the entry. First, at AS [45]-[47] the appellant does no more than press the case it made fairly in the Local Court, Supreme Court and Court of Appeal. That case was endorsed in the Supreme Court by Mildren AJ, who was in as good a position as the Court of Appeal to characterise the purpose established on the facts. It may be accepted that "difficult questions of characterisation arise wherever it can be said that entry upon land is actuated by more than one purpose."[10] But the respondent identifies no reason why this Court would not engage with them.

11. Second, that the entry might have been for a "dual" purpose does not mean that the investigation of the appellant's compliance with her DVO and the check on Mr Johnson's welfare were independent purposes. On the evidence, to describe the entry as being for a dual purpose was to say that the police entered for the purpose of investigating whether the appellant had put Mr Johnson's welfare at risk by breaching a condition of her DVO. As Constable Dowie affirmed, in a statement that was neither challenged nor qualified by the prosecutor, "the only reason why we [the police] had attended that address [was] to conduct proactive domestic violence *order* checks".[11] The balance of the evidence did not support any broader conclusion that the purpose with respect to Mr Johnson went beyond the concern that the appellant might have breached her DVO. The Court of Appeal did not conclude that it did.

12. Third, for the reasons given at AS [48], even if the entry was for a "dual" purpose, and even if the constitutive purposes were not wholly interdependent, the purpose of investigating the appellant's compliance with her DVO was, on the evidence, clearly the substantial and dominant purpose of the entry.

13. Fourth, even if the entry was for a "dual" purpose, even if the constitutive purposes were not wholly interdependent, and even if the purpose of checking on Mr Johnson's welfare was an actuating purpose, the implied licence is limited as to purpose and, as Spigelman CJ observed[12] in *TCN Channel Nine Pty Ltd v Anning*, "such 'limited

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[10] *TCN Channel Nine* (2002) 54 NSWLR 333 at 342 [30] per Spigelman CJ (Mason P and Grove J agreeing).
[11] Transcript of Proceedings, *O'Neill v Roy* (Local Court of the Northern Territory, 21815687, Judge Woodcock, 13 November 2018) at 15 (AFM 18).
[12] *TCN Channel Nine* (2002) 54 NSWLR 333 at 344 [51] per Spigelman CJ (Mason P and Grove J agreeing).

purposes' will generally only confer permission to enter 'exclusively for the particular purpose', to use the terminology of Brennan J and Deane J in *Barker v The Queen*".

e) The respondent's reliance on Tararo v The Queen

14. In *Tararo*, a plurality in the Supreme Court of New Zealand justified the existence of the "licence" on the basis that it would be "quite unsatisfactory, as a matter of social and legal policy, to hold that" the police were not entitled to enter for the purpose of covertly surveilling the appellant-occupier while purchasing cannabis from him.[13] On the plurality's view the implied licence is not the occupier's "implied or tacit licence",[14] or "consent by implication",[15] at all; it is a novel common law authority – "either invented or articulated"[16] in *Robson* – to enter private property *irrespective* of the occupier's consent, for purposes that are desirable in a court's view "as a matter of social and legal policy". Not only is this inconsistent with the essentially factual nature of the inquiry described in *Halliday*, it is irreconcilable with basal principles of Australian law requiring "express authorization by statute of any abrogation or curtailment of the citizen's common law rights or immunities",[17] and "strictly confining any exception to the principle that a person's home is inviolable."[18]

Dated: 26 June 2020

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[13] *Tararo v The Queen* [2012] 1 NZLR 145 at 169 [5]-[6], 172 [15].
[14] See, *Halliday v Nevill* (1984) 155 CLR 1 at 8 per Gibbs CJ, Mason, Wilson and Deane JJ.
[15] *Tararo v The Queen* [2012] 1 NZLR at 171.
[16] *Tararo v The Queen* [2012] 1 NZLR 145 at 171 [11], citing *Howden v Ministry of Transport* [1987] 2 NZLR 747 at 751.
[17] *Coco v The Queen* (1994) 179 CLR 427 at 435-436 per Mason CJ, Bennan, Gaudron, McHugh JJ; see also, *Plenty v Dillon* (1991) 171 CLR 635 at 648 per Gaudron and McHugh JJ.
[18] *Smethurst v Commissioner of Police* [2020] HCA 14 at [22] per Kiefel CJ and Keane J.