IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S163 of 2019

BETWEEN:

DONNA GRECH
Appellant

and

THE QUEEN
Respondent

APPELLANT'S ORAL OUTLINE

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Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced

The notice of contention

2. The question of the standard of appellate review commences with the identification of the appellate jurisdiction being exercised and, therefore, the proper construction of the statutory provision providing for review.

Section 5F(3A)

3. It is apt to describe s5F(3A) as 'an appeal by way of rehearing' but this label is an incomplete description of the incidents of such an appeal: *SZJFW* per Gageler J at [29]; *BWM* per Gleeson CJ at 261. An appeal by way of rehearing may well be an appeal to which *House* applies: *DAO* per Allsop P at [84]; Appellant Submissions (**AS**) **[44]**.

4. On its proper construction, s5F(3A) requires demonstrated error, because: **(a)** the appeal is interlocutory (**AS [39]**); **(b)** the text and structure of s 5F make it difficult to distinguish s5F(2) and s5F(3A) appeals (**AS [42]**); **(c)** permitting the CCA to overturn interlocutory decisions without demonstrated error in fact, law or principle creates a second trial chamber (**AS [40]-[41]**); **(d)** the legislature should not be assumed to intend s5F(3A) to significantly exacerbate the imbalance between the Crown and an accused by permitting the CCA to overturn a trial judge's decision based merely on a difference of opinion: **AS [43]**.

5. Depending on the subject matter of the appeal, this may involve application of the principles in *House*.[1]

Section 138

6. The fact that s138 ultimately produces a determination as to the admissibility of evidence is not conclusive of the standard of review of a s138 ruling: **AS [45]-[46]**.

7. The following features of the provision reveal that a s138 ruling can aptly be labelled as "discretionary", i.e. a decision-making process in which "*no one [consideration] and no combination of [considerations] is necessarily determinative of the result*" (*Coal & Allied Operations* at [19]), specifically a structured discretion, comprising a series of interconnected determinations:

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[1] See *DAO* per Spigelman CJ at [57]-[60]; *R v Matovski* (1989) 15 NSWLR 720 per Gleeson CJ at 723.

a. the section mandates a number of factual and qualitative findings, both anterior to and following the evaluation of impropriety/illegality, each of which may involve contested and conflicting evidence, and which typically require findings as to credibility, particularly s138(3)(d), (e) and (h): **AS [47]**;

b. the section requires a qualitative assessment of each mandatory factor in sub-s(3), some of which are interrelated and may point in different directions, with no statutory indication as to the effect of each factor: **AS [53]**;

c. the mandatory considerations in sub-s(3) are *non-exhaustive*, such that two decision-makers may properly take into account, and give different weight to, *different* considerations: **AS [47]-[50], [54]**;

d. the weighing exercise, with an in-built proviso presuming exclusion, requires the Court to weigh incommensurables at sub-s(1), including "high public policy" considerations that go well beyond the straightforward application of legal principles to a factual matrix: **AS [52]-[54]**;

e. the common law antecedents of s138 and the history of the provision support the conclusion the section was intended to operate as a statutory discretion.[2]

No basis upon which to identify error

8. The purported errors identified by the CCA did not form a proper basis upon which to allow the appeal in part, whether or not the proper standard of review is *House*.

9. **In respect of the recordings**: The error identified was that the trial judge (**TJ**) failed to assess the first recording in isolation from the subsequent recordings: **AB 81-82 [105], [107]**. However,

a. the TJ expressly gave separate consideration to the difficulty of obtaining evidence of criminal activity before and after the first recording was obtained, and so the purported error was based upon a misreading of the judgment: **AB 31, 35-36, 39**; **AS [61]-[63]**;

b. in circumstances where the case for admissibility became weaker after the first recording, as conceded by the Crown **AB 31.20**, it was logical to assess the Crown's case at its highest, namely by reference to the first recording: **AS [65]**;

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[2] See ALRC 26, Vol 1 at [964], [968]; *Bunning v Cross* (1978) 141 CLR 64 at 71-72; *R v Swaffield* (1998) 192 CLR 159 per Toohey, Gaudron and Gummow JJ at [68]; *Em v The Queen* (2007) 232 CLR 67 per Gummow and Hayne JJ at [95]; *Employment Advocate v Williamson* (2001) 111 FCR 20 per Branson J at [78].

c. it would have been erroneous for the TJ to assess the gravity of the contravention in respect of the first recording in *isolation* where there were subsequent repeated breaches: **AB 81 [104]-[105]**; **AS [64]**;

d. even if the TJ *had not* separately considered the difficulties in obtaining the first recording, such a matter could not, in any event, constitute *House* error, given the TJ addressed each applicable s138(3) mandatory consideration with respect to all of the evidence; at most there was a difference of opinion between the TJ and the CCA as to the appropriate *weight* to be accorded to one s138(3) factor (namely, s138(3)(h)) with respect to the first recording: **AB 80 [99]**; **AS [66]-[67]**;

e. in any event, the TJ's decision to exclude the first recording was plainly correct. The evidence underlying the purported difficulty in legally obtaining the first recording was correctly described by the TJ as "*sheer speculation*": **AB 35, 38.41**. The CCA rejected the Crown challenge to this ruling: **AB 82 [106], Kadir Subs at [46]-[48], AS [69]**.

10. **In respect of the RSPCA evidence**:

a. Animals Australia's illegal conduct in obtaining the recordings was directly relevant to the Court's assessment of the admissibility of the RSPCA evidence, as that illegal conduct wa a fundamental feature of "*the way in which*" the RSPCA evidence "*was obtained*" (s138(1)): **AB 42**; **AS [74]**;

b. the CCA's finding of error (**AB 89-90 [124]-[126]**) elevates form over substance; while "*the way in which*" the RSPCA evidence "*was obtained*" differed in a technical sense from the way in which the recordings were obtained (given that the recordings were obtained *in contravention* of an Australian law (s138(1)(a)) whereas the RSPCA evidence was obtained *in consequence* of a contravention of an Australian law (s138(1)(b)), as a matter of substance, the way in which both forms of evidence were obtained was the same.

The CCA fell into error

11. Even if the trial judge did err, the CCA itself fell into error in applying s138 because: **(a)** the CCA failed to apply the onus of proof as required by s138: **AB 83 [111]**, **84 [112]**, **88 [122]**; **AS [80]-[81]**; **(b)** the CCA's determination was founded on Ms White's subjective concerns, being the very evidence on that fell away in the *voir dire*. The Crown's challenge to the TJ's rejection of that evidence failed: **AB 82**: *Betts* (2016) 258 CLR 420 at [59].

Tim Game **Kirsten Edwards** **Kate Lindeman**