



Précis Paper

The Legitimate Forensic Purpose of Subpoenas

A discussion of a recent case in the NSW Court of Appeal, *Gilmore Finance Pty Ltd v Aesthete No 3 Pty Ltd* [2019] NSWCA 181, which raised issues concerning the legitimate forensic purpose of subpoenas.

Discussion Includes

- Facts of the case
- Grounds of the appeal
- Why were no medical providers subpoenaed?
- The Department of Home Affairs
- Proving the subpoenas were necessary
- Oppression
- Multiple legal firms
- Outcome
- Takeaways for practitioners

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The Legitimate Forensic Purpose of Subpoenas

1. In this edition of BenchTV, Andrew Fernon (Barrister, University Chambers) and Steven Griffiths (Director, BenchTV) discuss a recent case in the NSW Court of Appeal, *Gilmore Finance Pty Ltd v Aesthete No 3 Pty Ltd [2019] NSWCA 181*, which raised issues concerning the legitimate forensic purpose of subpoenas.

The facts of the case

2. *Gilmore Finance Pty Ltd v Aesthete No 3 Pty Ltd [2019] NSWCA 181* was an appeal from a cost decision handed down by the District Court of NSW in January 2018.
3. This was an appeal from a cost review decision issued by the cost review panel, which in turn related to an argument that began in the Supreme Court of NSW where the appellant in this case appointed a receiver to the assets of Andrew Fernon's client Aesthete, who was operating a property development site near Penrith in western Sydney.

Grounds of the appeal

4. The primary judgment was handed down in January 2018. In December 2018 an appeal was lodged against the decision of the District Court.
5. Given that the dispute was lodged many months later, a dispute arose as to whether or not leave should be granted for the appellant to lodge that appeal out of time.
6. One of the issues raised by the appellant was his own inability to respond to the judgment that was handed down and his own inability to give instructions to prosecute an appeal. A number of subpoenas were issued on this issue, and the appellant took issue with these subpoenas.
7. The grounds of the appeal were against the decision of the District Court to hand down its decision, with an assertion that the District Court did not have the jurisdiction to grant the award that it did.

Why were no medical providers subpoenaed?

8. The medical issues complained of by the appellant were substantive and the medical issue was not the main issue in this case.
9. The subpoenas were more concerned with the consequences of those medical problems, and whether they were in fact preventing him from doing the things that he said he was prevented from doing.

The Department of Home Affairs

10. The Department of Home Affairs were subpoenaed to provide information.
11. There was evidence that the appellant had travelled widely around the world during this period when he said he was incapable of attending to his affairs.

Proving the subpoenas were necessary

12. Mr. Gilmore wanted Aesthete to prove that the subpoenas might materially assist the issues at hand.
13. Mr Gilmore had himself sworn an affidavit in support of his assertions that he was not capable of attending to his affairs. The subpoenas were directed at his communications with his lawyers or communications or work that had been undertaken during this period of his alleged incapacity.

Oppression

14. Evidence has been put on in this case that the solicitor representing Gilmore Finance gave evidence that he had had his staff review the various files from lawyers, and a large number of those files were identified as potentially including privilege.
15. It was asserted that it would take many hours to review these files for the purpose of determining privilege. It was said to be oppressive in the circumstances.
16. This argument was being brought forward by Gilmore, not the recipient of the subpoena.

Multiple legal firms

17. The particular partner in this case had left the original firm and moved to another firm
18. There was also another firm in Sydney that had been the solicitor on the record in relation to the original Supreme Court proceedings.

Outcome

19. The court dismissed the application to set aside the subpoenas, finding that there was a legitimate forensic purpose for all of them.
20. It was found that the privilege/oppression argument was a matter that is best determined when the documents were in fact produced.

Takeaways for practitioners

- 21.** Don't forget *Rule 1.9 Uniform Civil Procedure Rules 2005 (NSW)* which deals with the process on how to deal with objections that have been raised in relation to subpoenas.
- 22.** Subpoenas are generally a very important matter in relation to the process of applications. Courts will rely on documents to resolve disputes to a large extent, so subpoenas are a fundamental part in the document gathering and evidence gathering.

BIOGRAPHY

Andrew Fernon

Barrister, University Chambers, Sydney

Andrew has a Bachelor of Economics from the Australian National University, a Bachelor of Laws (with Honours) from the Australian National University and a Master of Laws from the University of Sydney. He was admitted to practice as a solicitor in New South Wales on 1 July 1988, admitted to practice as a barrister in New South Wales on 25 February 2000 and admitted to practice as a barrister and solicitor in the A.C.T. in June 1988. Has been practicing as a barrister for over 18 years from University Chambers, Level 19, 65 Martin Place, Sydney. Andrew has worked in all jurisdictions, including High Court, Supreme Court (including Court of Appeal), Federal Court, Family Court, District Court, Local Court, NSW Civil and Administrative Tribunal (in particular in relation to retail leasing) and other tribunals. His practice is principally commercially based, including corporations, property, leasing, insolvency, trade practices, partnership, insurance, building, professional negligence and other commercial based disputes.

Steven Griffiths

Director, BenchTV, Sydney

Steven Griffiths graduated from the Queensland University of Technology (QUT) in 2003 obtaining a Bachelor of Laws. He had previously studied at University of New South Wales, obtaining a Degree in Sport Science. He was admitted as a solicitor in 2004 to the NSW Supreme Court and worked as a Government solicitor from 2004 to 2017 advising senior departmental staff and appearing in a wide variety of matters in the NSW court and tribunals including Supreme, District and Local courts as well as the State Parole Authority and Coroner's Court. He opened his own practice in 2017 specialising in criminal law and is currently the Director of Bench TV.

BIBLIOGRAPHY

Focus Case

Gilmore Finance Pty Ltd v Aesthete No 3 Pty Ltd (NSWCA)

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_26-07-2019_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5d364502e4b08c5b85d8b1fb>

Legislation

Uniform Civil Procedure Rules 2005 (NSW)