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LEGAL PRACTICE



COVID-19 and the impact on bail applications

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Applications for bail are usually required where the police have objected to a defendant being granted bail. The current COVID-19 pandemic has seen a change in the way Queensland courts (and indeed courts across the nation and internationally) are addressing bail applications.

The following recent cases provide an indication of how courts have, to date, dealt with the COVID-19 pandemic in terms of bail applications.

Bail generally

- Objections to bail are usually made on the basis that the defendant may fail to appear based on:
- the seriousness of the offence;
- the risk to witnesses or defendant themselves; and/or
- the likelihood the defendant will commit further offences.

For most bail applications a Magistrate hears an application for bail. They can refuse bail and remand the defendant in custody; or grant bail and release the defendant from custody on certain conditions.

If unsuccessful, the bail application can be re-enlivened if there is a change of circumstances. Alternatively, a further application can be brought in the Supreme Court.

Queensland courts' response to bail applications

In Queensland, the Magistrates Court has been clear that it will continue to hear, and will place a priority on hearing, bail applications and applications to vary bail. See Practice Direction No. 3 of 2020**.**

Additionally, and relevant to Supreme Court bail applications, the courts are acutely aware of the infection risk and the pressure on Corrective Services involved in prisoners entering and leaving remand and correctional centres.

Recent bail applications where COVID-19 has impacted decisions

Given the above, the general attitude of the courts recently has been to grant bail in circumstances where in the past a grant of bail may have been unlikely.

There have been a number of instances demonstrative of this in Queensland of late.

For example, an application for bail was granted to a defendant charged with terrorism-related offences which were alleged to have been committed in New South Wales.

Queensland's Deputy Chief Magistrate found that the following exceptional circumstances existed in permitting the grant of bail:

- The significant delay associated with the defendant being transferred to New South Wales and obtaining a jury trial, resulting in him spending considerable time on remand;
- The difficulty for the defendant to have contact with his family and legal team for a significant period of time; and
- The threat to the defendant of contracting the virus in New South Wales and in custody, being higher.

Higher court decisions interstate and overseas

A number of higher court decisions (so far, from interstate and overseas) have expressed approval and the desirability of bail being granted in light of the COVID-19 situation.

Victoria

On 19 March 2020, the Victorian Supreme Court was the first superior court to acknowledge the impact of COVID-19 on defendants who are not granted bail.

In the matter of *R v Broes* [2020] VSC 128, the applicant, Mr Broes, was charged with drug trafficking.

The court found the following factors relating to COVID-19 were exceptional circumstances to warrant a grant of bail:

- The impact by COVID-19 on the already significant delay on court proceedings (especially due to the suspension of jury trials);
- This would result in the time he spent on remand exceeding any sentence imposed; and
- The consequences to the applicant if the virus spreads causing a prison lockdown.

The factors in *Broes* were also cited as reasons for granting bail in subsequent Victorian applications for bail.

This includes:

- *Re Tong* [2020] VSC 141 - note though, the court's warning that the current health crisis will not always lead to bail and that surrounding circumstances still need to be considered; and
- *Re McCann* [2020] VSC 138 - where additionally, the applicant was not receiving his medication in custody.

These were also drug trafficking matters.

New South Wales

In New South Wales, the Supreme Court granted bail on 14 strict conditions, to a defendant charged with two serious domestic violence offences in *Rakielbakhour v DPP* [2020] NSWSC 323.

The court said factual issues arising out of COVID-19 were relevant to a number of factors the court was to consider under the *Bail Act* (NSW).

These factors included:

- the need for the applicant to be free for lawful purposes (namely, to protect himself from infection and to support his father, as he was in ill health);
- the inevitable significant delay associated with a trial;
- the difficulty accessing lawyers due to the strain on video link facilities at correctional centres;
- that imposing 'house arrest' on the applicant was in line with the general requirement for citizens to self-isolate in their homes;
- that inmates are subject to more onerous conditions now that all personal visits have been suspended; and
- the general vulnerability of prisoners and risk to them of contracting the virus.

Australian Capital Territory

The Supreme Court in the Australian Capital Territory in *R v Stott (No 2)* [2020] ACTSC 62 found COVID-19 constituted a change of circumstances since the Applicant's previous application for bail was made and refused in January 2020.

Bail was granted considering two main factors:

- That the applicant was more likely to contract the virus in custody; and
- The curtailment of prison visiting rights.

Internationally

Overseas, similar attitudes have been expressed to the grant of bail during the COVID-19 pandemic.

The Supreme Court of Justice in Ontario, Canada in the matter of *R v J.S.*, 2020 ONSC 1710 (20 March 2020) granted bail considering the following:

- There is a greatly elevated risk to detained inmates as compared to house arrest;
- The risks to health in jail (typically a confined space with many people) is significantly greater. The virus is easily transmitted but social distancing or self-isolation is limited, if not impossible, where inmates do not have single cells;
- Concerns, not only for the applicant's health but the preservation of scarce hospital resources to treat patients.

In summary

The courts' attitude to granting bail, confirmed in the cases described above, gives considerable scope for successful bail applications to be made where new charges are commenced and also where a defendant may have previously been unsuccessful in an earlier bail application.

If a family member or friend is in custody, contact us to discuss the prospects of bringing a bail application in light of the COVID-19 pandemic.

Legal advice and assistance during COVID-19

We are delighted to advise that we returned to normal operations from our CBD premises on Monday 29 June 2020.

We continue to provide the best criminal law services during the coronavirus pandemic.

You can contact us by phone or email to arrange a consultation.

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.