SUPREME COURT OF QUEENSLAND

CITATION:	*Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107
PARTIES:	**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (applicant) **v** **ELIZABETH ANNE TURNER** (first respondent) **BETTY DUNMALL** (second respondent)
FILE NO/S:	Brisbane No 409 of 2014
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	18 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2016
JUDGE:	Flanagan J
ORDERS:	**1. I declare that the defendant's undertaking as to bail, executed by the defendant on 30 April 2013, be forfeited;** **2. I order that the cash deposit of $70,000 be forfeited and paid to Her Majesty;** **3. I order that the amount of the surety be reduced from $450,000 to $315,000;** **4. I order that the surety in the amount of $315,000 be forfeited and paid to Her Majesty;** **5. I order that the first respondent pay the amount of $315,000 to the proper officer of the Court within six months of the date of these orders;** **6. I order that the first respondent be imprisoned for the term of 12 months if she defaults in paying the amount of $315,000 within six months of the date of these orders to the proper officer of the Court.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – BEFORE TRIAL – where defendant released on undertaking as to bail –

where first respondent and second respondent provided surety for defendant's undertaking – where defendant failed to report in accordance with bail conditions – where first respondent alleges that defendant is dead – where defendant is unable to be located – whether defendant failed to appear in accordance with undertaking

CRIMINAL LAW – PROCEDURE – BAIL – SURETIES – where defendant released on own undertaking before trial – where first respondent and second respondent provided surety for defendant's undertaking – where defendant failed to appear in accordance with undertaking – where applicant seeks forfeiture of surety for defendant's failure to appear

CRIMINAL LAW – PROCEDURE – BAIL - RECOGNISANCES – FORFEITURE AND ESTREATMENT – RELIEF FROM ESTREATMENT AND REDUCTION OF LIABILITY – where first respondent granted leave to file application for relief and reduction of liability to forfeit surety – where first respondent alleges financial hardship – where first respondent alleges that defendant is dead – whether first respondent took all reasonable steps – whether first respondent will suffer financial hardship if surety is forfeited

Bail Act 1980 (Qld), s 20, s 27, s 31, s 32, s32A, s32B, s 36A

R v Mokbel & Mokbel (2006) 199 FLR 176; [2006] VSC 158, applied

Baytieh v State of Queensland [2001] 1 Qd R 1; [1999] QCA 466, considered

Thomakakis v Sheriff of New South Wales (1993) 33 NSWLR 36; 71 A Crim R 265, considered

Re Condon [1973] VR 427, considered

The Director of Public Prosecutions v Lipp & Anor [2008] VSC 203, considered

COUNSEL: G P Lynham with A J Guilfoyle for the applicant
P J Davis QC with J R Jones for the first respondent and the second respondent

SOLICITORS: Commonwealth Director of Public Prosecutions for the applicant
McKays Solicitors for the first respondent and the second respondent

[1] By application filed 8 October 2015 the Commonwealth Director of Public Prosecutions seeks:

(a) a declaration pursuant to s 31(1) of the *Bail Act* 1980 (Qld) (**"the Act"**) that the bail undertaking of Markis Scott Turner (**"the defendant"**) is forfeited; and

(b) an order pursuant to s 32(1) of the Act that the surety and cash deposits that are a condition of the bail undertaking of the defendant be forfeited and paid to Her Majesty ("**the Director's application**").

[2] For reasons published on 28 October 2015[1] I adjourned this application to permit the Director to serve a notice at the defendant's residential address requiring the defendant to personally appear before the Court at 9.30 am Monday, 9 November 2015. The residential address was the address identified in the defendant's undertaking as to bail. The notice requiring the defendant's appearance was served at this residential address on 28 October 2015.[2] The defendant did not appear before the Court on 9 November 2015.[3]

[3] The second respondent, Betty Dunmall has, since the filing of the Director's application, passed away. The Director does not pursue forfeiture of the $30,000 cash deposit provided by Ms Dunmall. Consent orders were made on 21 April 2016 disposing of the Director's application in respect of Ms Dunmall.

[4] If the Court grants the Director's application, the first respondent, Ms Turner, seeks leave to read and file an application pursuant to s 32B of the Act for variation or revocation of any order made by the Court under s 32 or 32A ("**the first respondent's application**").

The relevant background

[5] The relevant background to the Director's application is set out in my reasons delivered 28 October 2015[4]:

> "[8] The defendant was arrested by Australian Federal Police on 27 May 2011. He was charged by police later that evening and remanded in custody.
>
> [9] On 1 June 2011 the defendant applied for and was granted bail in the Supreme Court in Mackay. The defendant was released on his own undertaking with a deposit of money of $150,000 and a surety in the amount of $450,000. Undertakings as sureties were signed by the first respondent who provided a surety of $450,000 and a cash deposit of $70,000 and by the second respondent who provided a reduced cash deposit of $30,000.
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> [10] Paragraph 3 of the defendant's undertaking provides:
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> 'Upon the presentation of an indictment against me, I shall obey the directions of the Court, whether given to me personally or to my Counsel or solicitor, with respect to any further appearance by me and, if I am directed to appear personally, I shall surrender

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1 *Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298.
2 Affidavit of Justin Norman Trembath sworn 9 November 2015.
3 See Exhibit "KED2" to the affidavit of Kristy Emma Dobson sworn 1 April 2016.
4 *Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298 at [8] to [20].

into custody and not depart from the Court unless my bail is enlarged.'

[11] The undertaking identifies the defendant's residential address as 1 Kilgour Street, East Mackay, Queensland 4740. The undertaking does not specify an address for service of notices. Paragraph 4 of the undertaking requires the defendant to give immediate written notice to the Director of Public Prosecutions of any change of address for service of notices or his residential address other than the change that arises if he surrenders into custody.

[12] The undertaking also requires the defendant to report to the Officer in Charge at Mackay Police Station between the hours of 6.00 am and 6.00 pm on each Friday of the week, commencing 3 May 2013.

[13] From an examination of the endorsements on the court's records, the following relevant events took place after the defendant had entered into his undertaking.

[14] On 18 September 2013 an indictment was presented in the Supreme Court at Townsville. The defendant along with his relevant co-accused was indicted with three counts, namely conspiracy to import a commercial quantity of a border control drug and two counts of conspiracy to traffic in a commercial quantity of a controlled drug. Orders were made for the transfer of the matter to the Mackay Registry and the defendant's bail was enlarged. The defendant was legally represented on this occasion.

[15] On 29 May 2014 the defendant was arraigned and pleaded not guilty to all counts. His bail was enlarged until further order.

[16] On 20 April 2015 the trial of the defendant and his co-accused was set down to commence 29 September 2015 at the Supreme Court in Brisbane. The defendant was legally represented.

[17] On 11 September 2015 the applicant applied ex-parte for the defendant's bail to be revoked and for a warrant to be issued for his apprehension. The basis for seeking the revocation was that on 7 September 2015 Federal Police discovered that the defendant, in breach of his reporting conditions, had last reported to the Mackay Police Station at 6.30am on Friday 14 August 2015. The affidavit material filed in support of the application to revoke bail also showed that the defendant's wife and two children departed Australia from the Brisbane International Airport on 22 July 2015 and have not since returned. Attempts to locate the defendant at his residential address have failed. An inspection of the defendant's residence revealed furniture and personal possessions visible in the premises, clothes on the clothesline and a motor vehicle parked in the driveway.

[18] In an affidavit filed by leave on 11 September 2015, Justin Norman Trembath, a Federal Agent, states:

> 'I believe the (defendant) has absconded and will fail to appear before the Supreme Court on Tuesday 29 September 2015, when his trial is listed to commence.'
>
> [19] I made orders revoking the defendant's bail and issued a warrant for his apprehension which remains outstanding. On the same day, namely 11 September 2015, the solicitors for the defendant sought and were granted leave to withdraw as the defendant's legal representatives on the record.
>
> [20] On 25 September 2015 an order was made delisting the defendant's trial. Neither he nor his solicitors (who had already been granted leave to withdraw) appeared on this date."

[6] My conclusion in the Reasons published on 28 October 2015 was that as at 29 September 2015 there had not been a failure on the part of the defendant to appear before the Court in accordance with his undertaking and surrender into custody.

The Director's application

[7] The Director's application raises four issues:

1. Whether on 9 November 2015 the defendant failed to appear before the Court in accordance with his undertaking?

2. Was the defendant deceased prior to 9 November 2015 and, if so, could the defendant fail to appear in accordance with his undertaking?

3. Should a forfeiture order in respect of the surety of $450,000 and cash deposit of $70,000 be made under s 32(1) of the Act?

4. If an order is made under s 32(1) of the Act then, pursuant to s 32A of the Act, what further orders should be made in terms of payment including to whom, time for payment and any period of imprisonment in default of payment?

Issue 1

[8] As to the first issue, the Director relies on the defendant's failure to attend on 9 November 2015 as constituting a "failure to appear in accordance with the defendant's undertaking" for the purpose of s 31(1). This section provides:

> "(1) Where a defendant who has been released on bail fails to appear before the court in accordance with the defendant's undertaking and surrender into custody the court may forthwith declare the undertaking to be forfeited."

[9] The defendant's failure to appear, according to the Director, results in an automatic forfeiture of the defendant's undertaking. As observed by Gillard J in *R v Mokbel & Mokbel*[5]:

> "… once the Court is satisfied that an accused person has failed to observe a condition of bail, the Court is bound to declare that the bail be forfeited, and order that the surety pay the amount undertaken, that in default payment can be exacted by seizing and selling the property of the surety, and that in default in whole or in part, the surety be imprisoned for a term not exceeding two years. In other words, the undertakings given both by the accused and the surety are self-executing and the Court is obliged to make the declaration and the orders.
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> In *R v Baker*[6], Gowans J, dealing with the then s 5 of the Act as amended, held that the Court was obliged to make the necessary orders in accordance with the provisions of the section. His honour held that he had no discretion in the matter and was obliged to make the orders under the section. In my opinion, s 6(1) requires the Court to make the declaration and the orders once it is satisfied that a person has failed to observe a condition of the bail, although the Court has a discretion to allow time to pay, and further the period of imprisonment in default is a matter of discretion."

[10] To similar effect is the statement of Jones J sitting as a member of the Court of Appeal in *Baytieh v State of Queensland*[7]:

> "The consequence for the surety upon a failure by the defendant to appear in accordance with his or her undertaking is to permit a court, judge or justice to order that the amount undertaken by the surety or sureties to 'be paid to the proper officer of the court forthwith or within such time or by such instalments as the court, judge or justice allows'. (Section 14(1) of the *Crown Proceedings Act* 1980). The court has no discretion either in respect of making an order or in respect of the amount to be forfeited (*Thomakakis v Sheriff of NSW* (1993) 33 NSWLR 36). Thereupon the surety has a right to apply, as did the applicant here, pursuant to s 15 of the *Crown Proceedings Act* for relief from such forfeiture."

[11] Jones J continued:

> "It is well recognised that the forfeiture of the amount undertaken to be paid by a surety is not a penalty for the surety's misconduct. Forfeiture desires the recognition that 'the surety has seriously entered into a serious obligation and ought to pay the amount which he or she has promised unless there are circumstances which make it fair and just to pay a smaller sum." (Citations omitted).[8]

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5 (2006) 199 FLR 176 at 181-182; [2006] VSC 158 at [19].
6 [1971] VR 717.
7 [2001] 1 Qd R 1 at [29]; [1999] QCA 466 at [29].
8 *Baytieh v State of Queensland* [2001] 1 Qd R 1 at [30]; [1999] QCA 466 at [30].

[12] Whilst both sections 31(1) and 32(1) of the Act use the word "may" suggesting the Court has a discretion,[9] the better view is that if the Court is satisfied that the defendant has failed to appear in accordance with his or her undertaking then the forfeiture of both the undertaking and any deposit or other security is automatic. A relevant consideration in reaching this conclusion was identified by Kirby P in *Thomakakis v Sheriff of New South Wales*[10] namely that provision is made by another section of the Act for an inquiry into a forfeiture. In the present case, that provision is s 32B which provides for a variation or revocation of any order made under s 32 or 32A. It is therefore in the context of an application pursuant to s 32B of the Act that the Court has regard to all the circumstances in determining whether it would be against the interests of justice to require the surety to pay the amount ordered to be paid.

[13] Kirby P in *Thomakakis v Sheriff of New South Wales* also referred with approval to the decision of the Full Court of the Supreme Court of Western Australia in *Frawley v Layton*[11]:

> "… The use of the expression 'may' in that context, and its subsequent use empowering the Court to make an order forfeiting the reconnaissance and ordering the payment of a sum … are, in our opinion, typical examples of the use of the term 'may' in relation to the exercise of a judicial function which gives 'a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it' per Blackburn J in *Bell v Crane* (1873) LR 8 QB 481 at 482."[12]

[14] The first respondent submits however that the court cannot be satisfied in terms of s 31(1) that there was a failure of the defendant to appear in accordance with his undertaking on 9 November 2015. The onus is on the Director to establish on the balance of probabilities that the defendant failed to appear in accordance with his undertaking.[13]

[15] The essence of the first respondent's submission is that the defendant has not failed to appear in accordance with his undertaking because he was not personally given the notice requiring his attendance. This submission has two limbs, the first of which may be dealt with briefly. The undertaking entered into by the defendant gave details of his residential address but did not provide any details for "Address for Service of Notices". The first respondent submits that to the extent s 36A of the Act enables a "notice" to be given of a requirement to appear, by delivery of a "notice" to an "address for service", the service of such "notice" to the defendant's residential address was ineffective.[14] This submission should be rejected. Section 20(1) of the Act provides that a defendant to whom bail is granted shall, before being released from custody, enter into an undertaking in the approved form. Section 20(2) (which is applicable to the defendant) requires the undertaking to contain the defendant's residential address and an address for service of

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9 Section 32CA(1) of the *Acts Interpretation Act* 1954 provides that in an Act, the word **may**, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion. Section 32CA(3) provides, however, that to remove any doubt it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation.

10 (1993) 33 NSWLR 36 at 53; 71 A Crim R 265 at 281.

11 [1989] WAR 55 at 58.

12 *Thomakakis v Sheriff of NSW* (1993) 33 NSLWR 36 at 54; 71 A Crim R 265 at 282.

13 *R v Mokbel & Mokbel* (2006) 199 FLR 176 at 184; [2006] VSC 158 at [31].

14 Submissions on behalf of the first respondent, 17 March 2016, [29].

notices. Section 20(2A) of the Act further provides that the defendant's address for service of notices may be the same as the defendant's residential address. The first respondent's submission requires the defendant's undertaking to be construed so that it does not comply with the requirements of s 20(2). The undertaking should however be construed so as to comply with the statutory requirements. That construction is that where the Act under s 20(2A) permits a residential address to be the same as the address for service then notification of the residential address in the absence of any other address, also constitutes the address for service.

[16] The second limb of the submission relies on s 20(3A) of the Act which provides:

> "(3A) In the case of bail granted to a defendant following the defendant's committal for trial the undertaking shall be subject to—
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> (a) conditions that the defendant—
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> (i) shall appear or be represented by the defendant's lawyer before the court to which the defendant is committed for trial at the time stated in, and in accordance with, the notice given pursuant to section 27; and
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> (ii) if the notice states that it is intended to ask the court to proceed with the trial at the time stated in the notice—shall surrender into custody and not depart from the court unless the bail is enlarged; and
>
> (iii) shall obey the directions of the court, whether given to the defendant personally or to the defendant's lawyer, with respect to any further appearance and, if directed to appear personally, shall surrender into custody and not depart from the court unless the bail is enlarged; and
>
> (iv) shall notify the director of public prosecutions or, as the case may be, deputy director of public prosecutions in writing forthwith of any change of address for service of notices or residential address other than that arising from the defendant's surrender into custody."

[17] In compliance with s 20(3A)(a)(iii) the defendant's undertaking in paragraph 3 provides:

> "Upon the presentation of an indictment against me, I shall obey the directions of the Court, whether given to me personally or to my counsel or solicitor, with respect to any further appearance by me and, if I am directed to appear personally, I shall surrender into custody and not depart from the court unless my bail is enlarged."

[18] The first respondent submits that properly construed, paragraph 3 of the defendant's undertaking means that any notice requiring his appearance must be given to him personally. According to the first respondent this is to be contrasted with the first two paragraphs of the undertaking which requires the defendant to appear or be represented by counsel or solicitor in accordance with any notice he may receive advising of the date and time for the presentation of the indictment. These paragraphs of the undertaking are

required by s 20(3A)(a)(i) and (ii). In relation to the notice referred to in paragraph 1 of the undertaking the "important explanatory notes", which form part of the undertaking, state:

> "The notice referred to in paragraph 1 below may take the form of a written notice sent to your address for service whereupon it is deemed to have been given to you. Therefore, it is your responsibility to make arrangements to ensure that any notice sent to that address is bought to your attention promptly."

[19] The notice referred to in paragraphs 1 and 2 of the undertaking is that identified in s 27 of the Act being a notice of trial. It may be accepted that the purpose of such a notice is to bring the defendant before the court. A s 27 notice compels the defendant to appear upon presentation of an indictment. The first respondent's submission seeks to draw a distinction between "directions of the court" for the purpose of s 20(3A)(a)(iii) and a s 27 notice. A s 27 notice is a notice that is required to be given under the Act. The service of a s 27 notice may therefore be given in accordance with s 36A of the Act which deals with service of notices. Section 36A provides:

> "A written notice required to be given under this Act shall be taken to have been duly given to the person to whom it is directed if it is served on the person personally or—
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> (a) in the case of a defendant—if it is delivered to the defendant's address for service of notices or sent by prepaid post to the defendant at that address; or
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> (b) in the case of a defendant's solicitor—it is delivered to the solicitor's place of business or sent by prepaid post to the solicitor at that address; or
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> (c) in the case of a surety—it is delivered to the surety's address given with respect to his or her undertaking or sent by prepaid post to the surety at that address."

[20] The first respondent submits that the notice containing the court's direction for the defendant to personally appear on 9 November 2016 does not constitute "a written notice required to be given under this Act" for the purpose of s 36A. The notice requiring the defendant's attendance on 9 November 2015 therefore had to be served personally. This submission should be rejected.

[21] The revocation of the defendant's bail pursuant to s 30 of the Act on 11 September 2015 did not relieve the defendant from compliance with his undertaking. Paragraph 3 of the undertaking reflects the requirement of s 20(3A)(a)(iii). Section 20(3A) simply stipulates the conditions which must be incorporated into an undertaking. Section 20(3A)(a)(iii) is not, nor can it be construed as constituting a requirement that a direction of the court must be given to the defendant personally. It is not a provision which deals with the service of such a direction let alone personal service.

[22] Sections 20(2) and (2A) are provisions of general application which require the undertaking to contain the defendant's residential address and address for service of

"notices". It is not a requirement that is limited to a s 27 notice.[15] The defendant's undertaking also required (in paragraph 4) the defendant to immediately give written notice to the Director of Public Prosecutions of any change of the address for service of notices or his residential address.

[23] I accept the Director's submission that when read as a whole, paragraph 3 of the defendant's undertaking does not stipulate a limitation on the means by which the court's direction can be given to the defendant.[16] The phrase in paragraph 3 "whether given to me personally or to my counsel or solicitor" should be construed as simply drawing a distinction between the direction being given to the defendant as opposed to being given to his lawyers. As submitted by the Director, the use of the word "whether" in contrast to the words "if" or "where" means the qualification "personally" is not intended to operate as a limitation upon the circumstances in which a defendant should appear in accordance with the direction of the court.[17]

[24] The use of the word "personally" should be construed as not requiring personal service but rather as permitting notification by way of service of a notice to the defendant's bail address. The first respondent's construction of the Act would require personal service on the defendant of a "direction of the Court" but not for a notice of a trial under s27 of the Act.

[25] If the first respondent's construction of paragraph 3 of the undertaking was accepted and there was a requirement for personal service such a construction, in the circumstances of the present case, would defeat the operation of the Act. The whereabouts of the defendant has been unknown since about 14 August 2015. As the defendant's solicitors were unable to obtain instructions leave to withdraw as the defendant's legal representatives on the record was granted on 11 September 2015. In these circumstances personal service cannot be effected nor does the defendant have any solicitors on the record for the purposes of effecting service. It follows that the only way the court's direction for the defendant to personally appear on 9 November 2015 could be given was by service at the defendant's bail address. If personal service was required of the court's direction for the defendant to appear it would mean that, in circumstances where the defendant's whereabouts have been unknown since on or about 14 August 2015, the court could not declare his undertaking forfeited.

Issue 2

[26] The Director concedes that if the Court was satisfied that the defendant was deceased prior to 9 November 2015, the Director would not be able to satisfy the Court that there had been a relevant failure to appear.[18]

[27] The Director's primary submission however, is that on the evidence the Court could not be satisfied, on the balance of probabilities, that the defendant was deceased prior to 9 November 2015. Accepting that the onus of proof is on the Director to establish that the

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[15] Compare s 20(3A)(a)(i) of the Act which makes a specific reference to the notice given to s 27.
[16] Applicant's Outline of Submissions, 2 March 2016, [19].
[17] Applicant's Outline of Submissions, 2 March 2016, [21].
[18] Applicant's Outline of Submissions, 2 March 2016, [37].

defendant failed to appear, the first respondent submits that, in light of the evidence she led as to the possibility of the defendant being deceased prior to 9 November 2015, the Director has failed to discharge this onus. Reference was made to a shifting onus but ultimately Senior Counsel for the first respondent put the submission on the basis that the Court, in assessing the whole of the evidence, could not be satisfied that there was a failure to appear.[19]

[28] Both the Director's concession and the first respondent's submission are based on an acceptance of there being an element of fault in s 31(1). In this respect both parties referred to the obiter dicta of Gillard J in *R v Mokbel & Mokbel.*

[29] In that case his Honour considered s 6(1) of the *Crown Proceedings Act* 1958 (Vic) which provided:

> "(1) Where a Court is satisfied that a person has failed to observe a condition of bail the Court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid to Her Majesty in the event of such a breach be paid to the proper officer of the Court forthwith or within such time as the Court allows and that in default of payment of that amount in accordance with the order that the amount be obtained by seizing and selling the property of the surety or sureties and in default, in whole or in part, that the surety or sureties be imprisoned for the term (not exceeding two years) fixed by the order."

[30] This section in effect incorporated most of the provisions of ss 31, 32 and 32A of the Act. The Victorian Act also contained a provision, s 6(4) which was not in dissimilar terms to s 32B of the Act which permits the variation or revocation of orders made under sections 32 or 32A of the Act. Gillard J at [28] to [39] considered without deciding the point, whether there was an element of fault in s 6(1) or whether all the Crown had to prove was that the defendant had failed to attend. His Honour accepted that the Court must be satisfied of the proof of a fact, namely that the defendant has failed to observe a condition of bail and like any other fact, it must to proven to the satisfaction of the Court. His Honour observed:

> "The word 'failure', depending on the context, may mean that a person does not fail to observe a condition unless that person has a capacity to comply with the condition. As a matter of common sense, it could hardly be said that a person failed to attend at a particular place on a particular date if that person was dead."[20]

[31] His Honour identified countervailing arguments of substance concerning the meaning and application of the words "has failed to observe a condition of bail". His Honour summarised those countervailing arguments as follows:

> "• A literal construction not involving proof of fault may lead to an absurd result;

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[19] T 1-114, lines 32 to 40.

[20] *R v Mokbel & Mokbel* (2006) 199 FLR 176 at 184; [2006] VSC 158 at [32].

- However any absurd result may be overcome by a further application under s 6(4);
- What the words mean must depend upon the context and the purpose of the statutory provision. The meaning will vary according to the context;
- The law is usually concerned with fault and does not compel the impossible;
- The difficulties involved in the Crown adducing evidence of fault militates against an interpretation based on fault. On the other hand, the Crown would only be expected to adduce such evidence as it could in all the circumstances and the mere absence of suspicious circumstances may be sufficient to prove fault on the part of the accused;
- A literal application without proof of fault would mean that a surety would be the subject of a penalty even though it was impossible for the surety to comply with his or her obligations;
- The purpose of the undertaking given by a surety and the consequences which flow from that undertaking are to ensure that the surety takes steps to ensure that the accused attend at trial. The undertaking of the surety and the consequences of a failure are intended to act as a deterrent to the accused absconding. These purposes are not defeated if the failure of the accused to attend results from something beyond the control of the accused, such as death or kidnapping."

[32] His Honour concluded that if proof of fault was necessary, the quantum of proof will depend upon the circumstances of each case. In most cases he observed the mere failure to attend may be sufficient.[21]

[33] Whilst it is not necessary for me to decide the point in light of the Director's concession, when one has regard to the operation of s 32B of the Act and given that such an application is contingent on the making of an order under s 32 or 32A, the better view is that s 31(1) simply requires the Director to establish to the satisfaction of the Court that the defendant has failed to appear. Except in the clearest of cases where there is uncontroverted evidence as to the circumstances of such non-appearance, for example uncontroverted evidence that the defendant is dead, then explanations and excuses for non-appearance are best dealt with in the context of an application pursuant to s 32B of the Act. This would give s 31(1) and 32(1) the automatic operation referred to in such cases as *Baytieh v State of Queensland*, *Thomakakis v Sheriff of New South Wales* and *Frawley v Layton*.[22] In any event as discussed below, I am not satisfied on the evidence that the reason for the defendant's failure to appear was that he was deceased prior to 9 November 2015.

[34] I therefore declare that the defendant's undertaking as to bail, executed by the defendant on 30 April 2013, be forfeited. For the purposes of s 31(2)(a)(i) of the Act I note that the respects in which the defendant's undertaking has not been complied with is that the

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[21] *R v Mokbel & Mokbel* (2006) 199 FLR 176 at 186; [2006] VSC 158 at [39].
[22] See paragraphs [8] to [13] above.

defendant failed to appear before the Supreme Court at Brisbane at 9.30am on 9 November 2015.

Issue 3

[35] Section 32(1) of the Act provides:

> "Where an undertaking that has been declared forfeited because of the failure of the person released on bail to appear in accordance with the undertaking contains as a condition of bail the making of a deposit of money or other security, the court that declares the forfeiture may order that the deposit or other security so made be forfeited and paid to Her Majesty."

[36] As discussed above, even though the word "may" is used the forfeiture of deposit or other security should follow automatically upon the declaration of forfeiture of the undertaking. The first respondent is named as first surety on the undertaking in the amount of $450,000 plus $70,000 cash deposit.

[37] I declare that the surety of $450,000 and the cash deposit of $70,000 be forfeited and paid to Her Majesty.

Issue 4

[38] Section 32A of the Act provides:

> "(1) A court that orders the payment of a deposit of money or other security (the ***amount***) under section 32 for which there is a surety must also order—
>
> (a) that the surety pay the amount to the proper officer of the court immediately or within the time or by the instalments stated in the order; or
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> (b) that the proper officer of the court is to give the prescribed particulars of the amount to SPER for registration under the *State Penalties Enforcement Act 1999*, section 34.
>
> (2) If the court makes an order under subsection (1)(a), the court may also order that the surety be imprisoned for the term, of not more than 2 years, stated in the order if the surety defaults in paying the amount."

[39] Having forfeited the surety and deposit of money pursuant to s 32, s32A(1) makes it mandatory that the Court make an order either in terms of s 32A (1)(a) or (b). The Court does however have a discretion as to the time to pay and as to whether or not a default term of imprisonment should be imposed. The $70,000 cash deposit is already forfeited by force of the order which I have made. The issue of time to pay and default imprisonment is only relevant to the $450,000 surety. The Director seeks an order that the surety of $450,000 be paid either forthwith or within a specified time to the proper officer of the Court rather than having the matter referred to the State Penalties Enforcement Registry. The first respondent has not identified any cogent reason why an

order should be made under s32A(1)(b) as opposed to an order under s32A(1)(a). The Director also seeks an order that the first respondent be imprisoned for a term not exceeding two years if she defaults in paying that amount.[23] The first respondent submits that an order under s 32A(1)(a) of the Act should allow her 12 months to pay the surety sum of $450,000 and no order should be made under s 32A(2) for any default term of imprisonment.[24]

[40] The reason the first respondent seeks a period of 12 months to pay is that the majority of assets controlled by her through Turner Holdings Qld Pty Ltd is real property. At the time of providing the surety the first respondent recorded an excess of assets over liabilities of $3,151,000. She identified Turner Holdings as being the registered owner of approximately 13 properties.[25] A number of these properties have subsequently been sold. An unencumbered property at 121 Peak Downs Highway, Walkerston had a valuation from Herron Todd White dated 11 August 2010 for $450,000. That property is now valued at $310,000 but remains unencumbered. I consider the evidence as to the first respondent's change in financial circumstances in more detail below but I accept for present purposes that she will need to sell real property for the purposes of paying the amount of the surety. She has been aware of these proceedings since the filing of the application by the Director on 8 October 2015. She also has been aware from about 14 August 2015 of her son's disappearance. In those circumstances she has had considerable time to arrange her affairs in order to meet her obligations as a surety. I therefore consider that a period of 12 months to pay is excessive. I order that the first respondent, pursuant to s 32A(1)(a) of the Act, pay the amount of $450,000 to the proper officer of the Court within six months of the date of this order.

[41] As to s 32A(2) of the Act, the first respondent submits that as she played no role in the defendant's failure to appear no default imprisonment should be imposed. In *R v Mokbel & Mokbel* Gillard J imposed a period of two years imprisonment in default of payment of a surety of $1 million. His Honour noted that there was no criteria specified in the relevant section to guide a court in determining the appropriate period. [26] In the present case when the defendant disappeared the first respondent was on a three to four week road trip to Western Australia with her husband. Her evidence is that she did not take her mobile phone on this trip.[27] I do not accept the first respondent's submission that she did all that was necessary to ensure that the defendant appeared in accordance with his undertaking.[28] I consider the evidence in relation to the efforts made by the first respondent to ensure the defendant's appearance in the context of s32B of the Act below.

[42] Gillard J accepted that the greater the sum of the surety the longer the period of imprisonment:

> "The period of imprisonment in default of payment must be commensurate with the amount of the undertaking."

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[23] Applicant's Outline of Submissions, 2 March 2016, [39].
[24] First respondent's Submissions, 14 October 2015, [1] (iii).
[25] Affidavit of Elizabeth Anne Turner sworn 31 May 2011, para. 6.
[26] *R v Mokbel & Mokbel* (2006) 199 FLR 176 at 191-192; [2006] VSC 158 at [57] to [59].
[27] T 1-67, lines 10 to 15.
[28] Submissions on behalf of the first respondent, 17 March 2016, [39].

[43] It may be accepted that the amount of surety of $450,000 together with the cash deposit of $70,000 was fixed to ensure that the defendant appeared at his trial to face what are serious drug offences. There is no evidence before the Court that the first respondent took any steps to notify authorities as to her concerns that the defendant had taken his own life. From the financial evidence which I discuss below I am satisfied that the first respondent has the capacity to pay the $450,000 within the required six months. Whether such payment would cause financial hardship, because of a change in the first respondent's financial circumstances since providing the surety, is a separate consideration. A default period of imprisonment should in the circumstances of this case be made to ensure such payment. I therefore order that the first respondent be imprisoned for the term of 12 months if she defaults in paying the amount of $450,000 within six months of this order.

Disposition of the Director's application

[44] I make the following orders:

1. I declare that the defendant's undertaking as to bail executed by the defendant on 30 April 2013, be forfeited;

2. I order that the cash deposit of $70,000 be forfeited and paid to Her Majesty;

3. I order that the surety of $450,000 be forfeited and paid to Her Majesty;

4. I order that the first respondent pay the amount of $450,000 to the proper officer of the Court within six months of the date of the order;

5. I order that the first respondent be imprisoned for the term of 12 months if she defaults in paying the amount of $450,000 within six months of this order to the proper officer of the Court.

The first respondent's application

[45] Section 32B provides:

> "(1) If a court orders a defendant or a surety to pay an amount under section 32 or 32A, the defendant or the surety may apply in the approved form to the court that made the order or, for a Magistrates Court, any magistrate, for an order revoking or varying the order.
>
> (2) The application—
>
> (a) may only be made on the ground that, having regard to all the circumstances, it would be against the interests of justice to require the person to pay the amount ordered to be paid; and
>
> (b) must be made within 28 days after the relevant undertaking is forfeited or the longer time the court allows for payment of the amount; and

(c) must briefly state the circumstances relied on; and

(d) must be filed with the proper officer of the court and served, at least 14 days before the date set for the hearing of the application, on the complainant or, for an undertaking entered into after an indictment is presented, whoever of the following is relevant—

(i) the State crown solicitor;

(ii) for an offence against a law of the Commonwealth, the Australian Government Solicitor in Queensland.

(3) Despite subsection (2)(b), if the undertaking was forfeited in the absence of the defendant, an application may be made within 28 days after the order comes to the notice of the applicant.

(4) At any time after the application is filed, the applicant may apply to the court for a stay of proceedings to which the application relates.

(5) The court may grant the stay and do any of the following—

(a) direct the return of any unenforced warrant;

(b) postpone the issue of a warrant;

(c) stay the enforcement of any warrant until the application is decided.

(6) Also, the court may hear the application earlier than 14 days after service of the application if the parties consent to the earlier hearing.

(7) The court must decide the application and may—

(a) vary the order; or

(b) revoke the order; or

(c) refuse the application."

[46] The first respondent may only apply for relief under s 32B of the Act where the Court has made orders under s 32 or 32A. Having made the orders identified above in [44] it is appropriate that I grant the first respondent leave to read and file her application pursuant to s 32B of the Act.

[47] On 21 March 2016 I directed that pursuant to s 32B(2)(d)(iii) of the Act the first respondent's draft application be served on the Australian Government Solicitor.

[48] Pursuant to s 32B(2)(b) of the Act, an application under s 32B must be made within 28 days after the relevant undertaking is forfeited. The application must be filed at least 14 days before the date set for the hearing of the application. The Director, through the Australian Government Solicitor, has had notice of the s 32B application in excess of 14 days. Pursuant to s 32B(6) of the Act the Court may also hear an application earlier than 14 days after service of the application if the parties consent to the earlier hearing. The parties were content for the Court to proceed to hear the s 32B application if orders were made under s 32 or 32A of the Act.

[49] Section 32B(2)(c) of the Act requires the application to briefly state the circumstances relied on by the first respondent. The application identifies the following circumstances:

(i) the defendant is deceased and was deceased before 9 November 2015 so securing his attendance at Court was impossible;

(ii) the surety's financial position has deteriorated so hardship will be suffered if relief is not given;

(iii) during the time the defendant was on bail the surety did her best to supervise him and ensure his adherence to the bail conditions;

(iv) the departure of the defendant was sudden and not foreseen by the surety;

(v) through the actions of the Director of Public Prosecutions the application for forfeiture of the bail undertaking and the surety has been adjourned on occasions incurring unnecessary costs to the surety.

Circumstance (i): Does the evidence support a finding that the defendant was deceased prior to 9 November 2015?

[50] The first respondent carries the onus of establishing that the interests of justice require an order for relief under s 32B.[29] As observed by McMurdo P and Davies JA in *Baytieh v State of Queensland*:

> "It may be accepted that the circumstances will be rare in which it would be against the interests of justice to require the person indebted to pay any part of the amount ordered to be paid, given the importance of ensuring the integrity of the surety system."[30]

[51] If the court were to be satisfied that the defendant was deceased then it would have been impossible for the first respondent to secure the defendant's attendance at Court. What is necessary however, is evidence to satisfy the court on the balance of probabilities, of the fact of death. The evidence must be enough to enable the court to feel an actual persuasion that a particular fact is so.[31]

[52] The evidence that the defendant is deceased is entirely circumstantial.

[53] The first respondent has not seen the defendant since 13 August 2015.[32] She held significant concerns about the state of the defendant's mental health as the trial approached.[33] On the last occasion that she spoke to her son, she believed that his mental condition had deteriorated significantly. The defendant had made comments about committing suicide and had obtained a shot fire licence.[34] Two weeks prior to 13 August

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[29] Applicant's Outline of Submissions, 21 April 2016, [7] citing *CUCU v The District Court (NSW)* (1994) 73 A Crim R 240 at 242.

[30] [2001] 1 Qd R 1 at [12]; [1999] QCA 499 at [12].

[31] *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 per Campbell JA [2012] NSWCA 431 at [51] per Campbell JA; *Austin v Parmalat Australia Limited* [2013] QSC 227 at [33] per Dalton J.

[32] Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 22.

[33] Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 17.

[34] Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 22.

2015 the defendant had placed a life insurance form on the first respondent's desk and asked her to deal with it.

[54] Whilst the first respondent encouraged the defendant to seek professional help, there is no evidence that he in fact did so.

[55] The basis of the first respondent's belief that the defendant has committed suicide is as follows:

> "I am of the view that (the defendant) has committed suicide, simply because of the manner in which he carried himself over the last couple of weeks. Also we cannot find any of his things missing from his house (with the exception of his mobile phone). He has left behind all his clothing, identification and also his insulin and he is an insulin-dependent diabetic."[35]

[56] The first respondent accepts that she did not report any of her concerns to the authorities nor did she make any application regarding her surety.[36] One week after 13 August 2015 she left with her husband on a three to four week road trip through South Australia to Western Australia.[37] The first respondent did not take her mobile phone with her on this road trip.[38] She explained in cross-examination that she did not need a phone.[39] She used a public phone for the purposes of contacting Kaylene Bray, who was the bookkeeper in the employ of Mt Coolon Hotel Pty Ltd. The first respondent owns a hotel at Mt Coolon.

[57] Within approximately three days of commencing the road trip, Ms Bray informed the first respondent that she could not contact the defendant.[40] According to the first respondent she did not become aware that the defendant had failed to report to police until after she returned from the road trip.[41] She did not report her son as a missing person to police until February 2016. This was more than six months after she had last seen him.[42] When she left on the road trip to Western Australia she knew that the defendant's trial had been set down to commence on 29 September 2015.[43] Her son had expressed to her on more than one occasion that he did not wish to go to gaol and he was trying to have his charges reduced to less serious charges.[44]

[58] In spite of her concerns as to the defendant's mental state and the fact that Ms Bray could not locate him the first respondent did not cut short her road trip:

> "… well, you may not have had any specific plans for how long you were going to be away, but it ended up being three weeks? … We were going to

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35 Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 27.
36 Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 25.
37 T 1-66, lines 32 to 36; T 1-67, lines 5 to 9.
38 T 1-67, lines 10 to 15.
39 T 1-67, lines 30 to 31.
40 T 1-68, lines 5 to 15.
41 T 1-68, lines 18 to 19.
42 T 1-73, lines 43 to 46; T 1-74, lines 1 to 10.
43 T 1-78, lines 34 to 35.
44 T 1-78, lines 40 to 46.

> locate to Western Australia, and we decided to go and check out where we wanted to locate to, and that's why it just extended a bit longer."[45]

[59] Prior to going on the road trip, the first respondent travelled with her son's wife and two children to Poland on or about 22 July 2015.[46] The first respondent was in Poland for approximately 10 days.[47] The first respondent paid for the airline tickets for her daughter-in-law and two grandchildren.[48]

[60] The daughter-in-law, Ms Wiacek married the defendant on 12 April 2014.[49] She states that she returned to Poland, her home country, on 22 July 2015. This was a decision she made with the defendant on the basis that it would be best, both for herself and for her children whilst the defendant's trial was on. Neither Ms Wiacek nor her children have returned to Australia. She gave evidence by telephone from Poland. She noticed that the defendant was regularly depressed and sad.[50] She suggested to the defendant that he seek medical assistance but she does not believe that he did.[51] She has not heard from the defendant since 17 August 2015, which was her birthday.[52] Ms Wiacek states:

> "It is really hard for me to consider that he killed himself, but the more I think about it, and analyse his behaviour prior to me leaving for Poland, the more I consider it may be a possibility."[53]

[61] The defendant had expressed to Ms Wiacek on a number of occasions that if he was convicted he would be going to gaol for a long time.[54] He once told her that he would rather die than go to gaol.[55]

[62] When she had not heard from the defendant for approximately two weeks after 17 August 2015 she contacted Ms Bray.[56] Ms Wiacek was aware that the first respondent was travelling for a few weeks. Ms Wiacek could not contact her.[57] Ms Wiacek accepted in cross-examination that she simply does not know what has happened to the defendant.[58] She also accepted that if she thought for one moment that the defendant was at risk of committing suicide she would have taken steps to deal with that.[59]

[63] Ms Bray has not seen the defendant since 13 August 2015 when she had lunch with him.[60] At this lunch Ms Bray recalls discussing the defendant's trial. She said words to the effect that she was not looking forward to travelling to Brisbane to give evidence as she does

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45 T 1-79, lines 6 to 10.
46 T 1-65, lines 40 to 42.
47 T 1-65, lines 44 to 45.
48 T 1-78, lines 14 to 15.
49 Affidavit of Magdalena Wiacek sworn 22 February 2016, para. 2.
50 Affidavit of Magdalena Wiacek sworn 22 February 2016, para. 7.
51 Affidavit of Magdalena Wiacek sworn 22 February 2016, para. 12.
52 Affidavit of Magdalena Wiacek sworn 22 February 2016, para. 23.
53 Affidavit of Magdalena Wiacek sworn 22 February 2016, para. 27.
54 T 1-21, lines 20 to 24.
55 T 1-21, line 27.
56 T 1-22, lines 30 to 34.
57 T 1-22, lines 35 to 38.
58 T 1-25, lines 35 to 37.
59 T 1-26, lines 35 to 36.
60 Affidavit of Kayleen Anne Bray sworn 17 February 2016, para. 19.

not like flying. The defendant said words to the effect that she probably would not have to go.[61] Approximately one week after having lunch with the defendant she made a number of attempts to contact him by telephone but did not receive a response. She attended his residential address but did not find him there. She knew that the first respondent was away at the time travelling interstate. When she checked the defendant's house she noticed that all his clothes and bags were still at the house including his wallet.[62] She also noticed that the defendant's insulin was still located at the house.[63] She expresses the concern that the defendant is no longer alive.[64]

[64] The basis of Ms Bray's concern that the defendant is no longer alive is based on the fact that he has not made contact with family members.[65] In spite of her concerns, Ms Bray did not report the matter to police.[66] Her explanation for not reporting the matter to police was that she did not view it as part of her role and she did not wish to cause any problems.[67] Ms Bray never suggested to the defendant that he should seek medical assistance.[68]

[65] The first respondent's husband recalls that the road trip to Western Australia was for about four weeks.[69] Mr Turner did not realise that the defendant was absent until after his return from the road trip.[70] He confirmed that the first respondent did not have a mobile phone with her on the road trip.[71] Mr Turner did not have a mobile phone on the trip either.[72] He stated that he had no knowledge whatsoever as to what might have happened to the defendant.[73]

[66] Leslie Eckart has known the defendant for 22 years. He previously employed the defendant in his business.[74] Mr Eckart saw the defendant on a number of occasions leading up to the defendant's disappearance. He saw the defendant on 9 June 2015 when the defendant was in Brisbane for a review of his Court matter. He subsequently met with the defendant on 20 July 2015 again in Brisbane. They had dinner together. The defendant expressed a number of suicidal thoughts to Mr Eckart:

> "He stated words to the effect that Magda and the kids were going to Poland and indicated that he thought he would never see them again. He indicated that his marriage was suffering with everything that was going on and as he said this he was very teary-eyed."[75]

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61 Affidavit of Kayleen Anne Bray sworn 17 February 2016, para. 20.
62 Affidavit of Kayleen Anne Bray sworn 17 February 2016, paras. 22 to 25.
63 Affidavit of Kayleen Anne Bray sworn 17 February 2016, para. 26.
64 Affidavit of Kayleen Anne Bray sworn 17 February 2016, para. 35.
65 Affidavit of Kayleen Anne Bray sworn 17 February 2016, para. 35.
66 T 1-37, line 19.
67 T 1-37, lines 25 to 30.
68 T 1-39, lines 39 to 40.
69 T 1-46, line 19.
70 T 1-49, lines 10 to 16.
71 T 1-51, lines 25 to 30.
72 T 1-51, line 31.
73 T 1-51, lines 44 to 45.
74 Affidavit of Leslie John Eckart sworn 16 February 2016, paras. 2 and 3.
75 Affidavit of Leslie John Eckart sworn 16 February 2016, para. 13.

[67] Mr Eckart told the defendant that he needed to get help. The defendant gave Mr Eckart further details of how he would commit suicide:

> "Markis indicated that if he were to kill himself, he said words to the effect that he wouldn't do it in his house and put his family through grief and pain. He said words to the effect that there were plenty of mangrove swamps around his place where he could do himself in. When he was saying these words he was shaking quite a bit."[76]

[68] Mr Eckart has not seen the defendant since 20 July 2015. In spite of the concerns Mr Eckart took away from his dinner with the defendant, he did not contact anyone in relation to these concerns.[77] Mr Eckart accepted that he simply does not know what has happened to the defendant.[78]

[69] The first respondent submits that the evidence is sufficient to satisfy the Court that the defendant is deceased. Neither Mr and Mrs Turner, Mr Eckart, Ms Bray nor Ms Wiacek have had contact with the defendant since his disappearance. These are all people who would be expected to have contact with the defendant. The first respondent further submits that there is no evidence that the deceased has accessed his bank accounts. The first respondent submits that the fact the first respondent has not made a missing person report to police is unsurprising given her belief that the defendant is dead.

[70] The Director submits that the evidence that the defendant is deceased is purely speculative. It must be accepted that neither the first respondent nor any of the witnesses called by her have the medical expertise to assess the mental health of the defendant prior to his disappearance. The body of the defendant has not been found nor are there any unidentified remains located in Queensland since 2008 that have not been identified.[79]

[71] There are two competing hypotheses posited by the Director and the first respondent: either the defendant absconded or he took his own life. The evidence does not in my view permit the Court to draw the inference that the defendant took his own life. In particular, it is difficult to accept that if the first respondent had such concerns for her son, she would embark on a three to four week road trip with her husband without her mobile phone. It is also very difficult to understand why, once the first respondent was informed by Ms Bray of her difficulties in contacting or locating the defendant, the first respondent did not immediately cut short the road trip and return home. Nor is there any satisfactory explanation by the first respondent as to why she did not make any report to the police as to her concerns relating to the defendant's disappearance. The mere fact that the first respondent believed that the defendant was deceased is not a satisfactory explanation for her failure to lodge a missing person report with authorities until February 2016. The evidence falls well short of enabling the Court to feel actual persuasion that the defendant is deceased and was so prior to 9 November 2015.

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[76] Affidavit of Leslie John Eckart sworn 16 February 2016, paras. 18 and 19.
[77] T 1-55, lines 41 to 42.
[78] T 1-56, lines 39 to 40.
[79] Affidavit of Damien Paul Powell sworn 11 February 2016, para. 4.

Circumstances (iii) and (iv): Was the first respondent, as surety, at fault?

[72] These two circumstances may be considered together. It is well established that in considering an application for relief under s 32B of the Act an important consideration is whether the surety has taken all reasonable steps to ensure the attendance of the defendant at his trial.[80] As observed by Crockett J in *Re Condon*[81]:

> "The surety's obligation was to take all reasonable steps to ensure the attendance of the principal at his trial. The primary question on the present application must therefore remain – did the applicant take such steps? If she has, then no doubt she will have gone a long way, if not the whole way, to earn the total or partial relief sought. If she has not then before any relief can be granted facts must emerge that establish that notwithstanding such failure it would be unjust in all the circumstances not to vary or rescind the order."

[73] The first respondent asserts that since the defendant was released from custody in 2011 she has continued to have a very close relationship with him. Up until 14 August 2015 she spoke with the defendant on a daily basis or every second day in relation to issues of both a personal and business nature.[82] She has babysitted the defendant's two young children to enable the defendant and his wife to attend Court. She states that she has taken every step to ensure that the defendant complied with his bail conditions and was available to appear at Court when necessary.[83] When he was first charged the first respondent would on occasions attend with him to sign in at the police station in Mackay. She was aware that until she lost contact with the defendant on or about 13 August 2015 that he complied with the reporting conditions of his bail and she would text him or telephone him for the purposes of ensuring that he was reporting.[84]

[74] The first respondent did not reside with the defendant. For extended periods she was not in proximity to the defendant. As already noted, on or about 21 August 2015 she went on a three to four week road trip to Western Australia with her husband without her mobile phone. Apart from an unstated hope that Ms Bray would keep an eye on the defendant in her absence the first respondent took no steps to ensure that the defendant did not abscond whilst she was on her road trip. This was in circumstances where the first respondent knew that the defendant's trial was to commence on 29 September 2015. According to her husband the first respondent "almost worked full time" at the Mt Coolon Hotel. This hotel is located 350 kms from Mackay.[85] According to Mr Turner the first respondent would only come to Mackay "sometimes once a week".[86] The first respondent's recollection was that she would come to Mackay three days a week.[87] She accepted that in the period leading to August 2015 she was very short staffed at the Mt

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80 See *Baytieh v State of Queensland* [2001] 1 Qd R 1 at [13] per McMurdo P and Davies JA and at [39] per Jones J; [1999] QCA 466 at [13] per McMurdo P and Davies JA and at [39] per Jones J; *ex parte Doueihi* [1986] 2 Qd R 352 at 358 per Williams J; *Director of Public Prosecutions v Lipp & Anor* [2008] VSC 203 at [4] per Curtain J.

81 [1973] VR 427 at 431.

82 Affidavit of Elizabeth Anne Turner sworn 14 October 2015, paras. 8 and 9.

83 Affidavit of Elizabeth Anne Turner sworn 14 October 2015, para. 12.

84 T 1-61, lines 40 to 47.

85 T 1-47, lines 35 to 45.

86 T 1-48, line 5.

87 T 1-64, lines 20 to 25.

Coolon Hotel and could not leave untrained staff by themselves to run the hotel.[88] Whilst she was on the road trip to Western Australia she only recalls attempting to telephone the defendant once.[89]

[75] Even though the defendant had been on bail since 2011 and had complied with his bail conditions to that point, the first respondent on or about 14 August 2015 had noticed a deterioration in the defendant's mental state. In circumstances where she knew that the trial was imminent it was not reasonable for her to assume that the defendant would continue to comply with his bail conditions.

[76] The first respondent's conduct is to be contrasted with the conduct of the surety considered by the Court of Appeal in *Baytieh v State of Queensland*. In that case the surety was a businessman and a minister of religion in the Islamic faith. The Court found that he was assiduous in maintaining his contact with the defendant and ensuring his attendance at the Court. The surety contacted the defendant by telephone every second or third day and attended meetings with his legal advisers and with a psychologist. On 6 May, being the day before the appearance was required, the surety again contacted the defendant and members of his family by telephoning every few hours in order to be assured of the defendant's whereabouts and his intention to attend at the Court the following morning. On the actual morning of attendance the surety rang the defendant's home early in order to confirm his whereabouts. The surety attended the Court on the relevant day and saw the defendant and his parents with his legal adviser. In spite of all these steps the defendant absconded. This is to be contrasted with the present case where, at the time the defendant disappeared, the first respondent was on a three to four week interstate road trip without a mobile phone. She only made one attempt to contact the defendant after being informed by Ms Bray that she was having trouble contacting him. Even in those circumstances the first respondent did not report the matter to police nor cut short the road trip.

[77] The first respondent gave considerable financial assistance to the defendant in the payment of his legal fees in defending the charges. There is no dispute that the amount of this financial assistance was in excess of $800,000. The extent of this financial assistance and the history of the defendant complying with his bail conditions constitutes some basis for the first respondent's belief that the defendant would not abscond. As I have already observed however, the closeness of the trial and the observable deterioration in the defendant's mental state rendered it inappropriate for the first respondent to undertake a three to four week road trip where she would be effectively out of contact with the defendant.

[78] The financial assistance given by the first respondent to the defendant is however a relevant consideration concerning the deterioration in the first respondent's financial position since entering into the undertaking of surety.

Circumstances (ii) and (v)

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[88] T 1-64, lines 44 to 46.
[89] T 1-71, lines 10 to 13.

[79] These two circumstances may be considered together as they are both relevant to the issue of hardship. Whilst McMurdo P and Davies JA in *Baytieth v State of Queensland*[90] considered it unwise to attempt a definitive statement of the considerations which may be relevant to an application pursuant to s 32B, their Honours accepted that considerations of financial hardship of the applicant arising since giving the undertaking would be relevant. As identified by Kaye J in *Vladimir Melincianu*[91] even if a surety has not taken reasonable steps to ensure the attendance of the defendant nevertheless the court may, in an appropriate case, permit a reduction in the amount to be paid pursuant to the undertaking of suretyship on the grounds of hardship.

[80] In her affidavit of 14 June 2011, the first respondent deposed that the assets of Turner Holdings exceeded its liabilities by $3,151,000. The first respondent states that at the time of entering into the surety, the defendant ran a successful business and the first respondent was satisfied that her surety was protected.[92] Since providing the surety however her son's financial circumstances have changed significantly. One of the defendant's companies was deregistered in March 2014 and another of the defendant's companies was placed into liquidation in early 2013. Turner Holdings which is the company controlled by the first respondent had to provide security for some of the debtor funders for both companies.[93] At the time of entering into the surety the defendant paid rent and mortgages to Turner Holdings in the amount of $11,250 each month. These payments stopped in approximately 2012 when the defendant's companies went into liquidation.[94] Turner Holdings now only owns seven properties[95] as opposed to the original 13 at the time of entering into the surety.[96]

[81] The first respondent states that these remaining properties have decreased significantly in value and are heavily mortgaged with the exception of 121 Peak Downs Highway which remains unencumbered.

[82] As I have already noted, the first respondent has paid approximately $800,000 in legal fees to the defendant's solicitors since he was charged and currently owes an additional sum of $74,000 to her son's solicitors. This debt of $74,000 is personally guaranteed by the first respondent and is secured against 1 Kilgor Street, Mackay which is one of the properties owned by Turner Holdings.[97]

[83] The first respondent also refers to the medical condition of one of her grandchildren who is undergoing further testing to determine if she suffers from residue autism or epilepsy or both. The first respondent is concerned that if her grandchild does have either autism or epilepsy, then her daughter-in-law now living in Poland will be unable to work full-time and the first respondent will be required to financially support her.[98]

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90 [2001] 1 Qd R 1 at [15] per McMurdo P and Davies JA; [1999] QCA 466 at [15] per McMurdo P and Davies JA.
91 (2005) 155 A Crim R 76; [2005] VSC 89.
92 Affidavit of Elizabeth Ann Turner filed 14 October 2015, para. 44.
93 Affidavit of Elizabeth Ann Turner filed 14 October 2015, paras. 29 and 30.
94 Affidavit of Elizabeth Ann Turner filed 14 October 2015, para. 32.
95 Affidavit of Elizabeth Ann Turner filed 14 October 2015, para. 31.
96 Affidavit of Elizabeth Ann Turner filed 14 June 2011, Annexure "A".
97 Affidavit of Elizabeth Ann Turner filed 14 October 2015, para. 34.
98 Affidavit of Elizabeth Ann Turner sworn 17 February 2016, paras. 3-5.

[84] The first respondent's assets in June 2011 included cash at bank of $103,000 which has reduced to approximately $2,000.[99] Her assets in June 2011 also included cars and machinery. Apart from a crossroad cruiser that was valued at $55,000 in June 2011 and an F250, the first respondent's evidence is that the other motor vehicles and machinery have been sold.[100]

[85] The first respondent states that her financial position has rapidly deteriorated over the last few years due to the decline in the property market in Mackay and surrounding areas. One of the properties identified in her affidavit of 14 October 2015 located at 38 Loudon Street, Mackay has been sold with the bank taking the majority of all funds.[101] She is also concerned that her financial situation will further deteriorate because her husband has needed to draw on his superannuation savings for the purposes of undergoing a number of eye operations. He now has no superannuation remaining and has recently been approved to receive a pension from Centerlink.[102]

[86] In her affidavit sworn 14 June 2011 the first respondent made specific reference to the property at 121 Peak Downs Highway. By reference to the Herron Todd White valuation and the amount of surety of $450,000 the first respondent stated that "the forfeiture of this sum would not be ruinous or injurious to myself or my family".[103] As I have already noted a subsequent Herron Todd White valuation dated 6 April 2016 now values this property at $310,000. The property remains unencumbered. The drop in the value of this property is approximately 30%. The most recent Herron Todd White valuation explains this drop in value:

> "The Mackay residential market appeared to peak in mid-2012. Volatility in the mining sector, coupled with job losses has seen a slowing of the residential market (in terms of volume), with local agents reporting weakening buyer inquiry, increasing supply and reduced rental demand. Vacancy rates through 2014 rose significantly and sit in excess of 9% with rental values falling around 40% and higher again in the northern beaches. On the back of this weakening demand, a large influx of investor house and land packages have been completed toward the end of 2013 and throughout 2014 putting greater pressure on vacancy rates and values. This trend continued throughout 2015.
>
> The market began to fall late 2013. Recent sales activity has seen values across Mackay since the peak fall, of around 30%. Local agents are reporting values are still softening, although the number of sale transactions appear to be increasing. It is considered that any prolonged downturn in the mining industry will continue to have a negative impact on the Mackay residential market with no recovery expected until the mining sector improves."[104]

[87] This valuation evidence is generally consistent with the evidence of the first respondent who referred to the end of the mining boom occurring approximately two years ago. She stated:

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[99] T 1-86, lines 42 to 46; T 1-87, line 1.
[100] T 1-87, lines 6 to 26; T 1-87, lines 31 to 34.
[101] Affidavit of Elizabeth Ann Turner sworn 17 February 2016, paras. 6-7.
[102] Affidavit of Darryl John Turner sworn 17 February 2016, paras. 3-5.
[103] Affidavit of Elizabeth Ann Turner sworn 14 June 2011, para. 8.
[104] Affidavit of Elizabeth Ann Turner sworn 18 April 2016, Exhibit EAT1, p.5.

"Mackay is full of repossessions at the moment. "[105]

[88] The effect of her evidence is that because of existing first and second mortgages on the remaining properties and because of difficulties she has with her present financial facilities she would be unable to raise any shortfall by the sale of other properties.[106] Her only alternative according to the first respondent would be to sell the Mt Coolon Hotel. This hotel constitutes her primary source of income.[107] There is presently a $400,000 mortgage over the hotel which is an interest only loan.[108] This loan constitutes the full amount of the purchase price of the hotel. The first respondent has used the proceeds from some of the properties she has sold, including 1 Jackpine Drive, Capella for the purposes of making approximately $500,000 of improvements to the hotel. She estimates that the hotel could now sell for something in the order of $850,000.[109]

[89] It may also be accepted that the proceeds (after the payment of first and second mortgages) in respect of other properties sold by the first respondent were used to give financial support to the defendant's family and to substantially assist in the payment of his legal fees. This was in circumstances where the defendant was made bankrupt on or about 19 November 2014.[110] The first respondent identified a number of properties that were sold for the purposes of assisting with the payment of the defendant's legal fees. These included 40 Cessnock Court, Caboolture[111] and 38 Loudon Street, Mackay.[112] The initial valuation for 38 Loudon Street, Mackay provided by the first respondent was $450,000. The mortgage as at 1 June 2011 was $275,000.[113] The first respondent has recently sold this property which was her principal place of residence for $320,000. This sale price is also consistent with there being a 30% fall in property prices. The first respondent used all of the proceeds from this sale to pay solicitors' bills.

[90] As to the property at 1 Kilgour Street, Mackay, this showed an initial value as at 1 June 2011 of $490,000. As at 1 June 2011 this property was subject to a mortgage of $285,000. According to the first respondent she has attempted to sell this property and the best offer she has received was in the order $370,000. This offer is also consistent with a general 30% decline in property prices in the Mackay area.[114] The property is presently subject to two mortgages, one of approximately $260,000 and a second mortgage of approximately $74,000. This second mortgage is held by her solicitors in relation to the defendant's outstanding legal fees.[115]

[91] Whilst the evidence of the deterioration in the first respondent's financial position is not entirely satisfactory it is sufficient to establish that there has been an approximate 30% reduction in the value of the properties which the first respondent relied on for the purposes of assessing her assets over liabilities as at 1 June 2011. It may also be accepted

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[105] T 1-90, lines 3 to 7.
[106] T 1-92, lines 5 to 10; T 1-90, lines 35 to 41.
[107] T 1-92, lines 13 to 19.
[108] T 1-82, lines 25 to 30.
[109] T 1-82, lines 15 to 30.
[110] Affidavit of Elizabeth Ann Turner sworn 14 October 2015, para. 26.
[111] T 1-82, lines 40 to 45.
[112] T 1-84, lines 25 to 31.
[113] Affidavit of Elizabeth Ann Turner sworn 14 June 2011, Annexure A.
[114] T 1-84, lines 36 to 40.
[115] T 1-85, lines 1 to 7; Affidavit of Elizabeth Ann Turner sworn 14 October 2015, para. 34.

that her financial situation has deteriorated because of the assistance she has given the defendant in the payment of legal fees and other financial assistance she has given to the defendant and his family because of his own financial difficulties.

[92] The Director submits that the cause of any diminution in the financial position of the first respondent is relevant. In relation to the $800,000 legal fees, the Director submits that whilst the first respondent's desire to provide that assistance to her son is understandable the fact that she did, and to such an extent, must weigh heavily against the Court exercising a discretion to grant her relief.[116] The basis of this submission is that the first respondent was aware of the amount that was at risk by her as a surety in the event that the defendant failed to appear. Whilst this submission has force, there are a number of reasons why it should not prevent an exercise of discretion to reduce the amount of the surety. First, as identified by the Director, the first respondent is the mother of the defendant and it is understandable, in light of the defendant's own financial difficulties, that the first respondent gave him significant financial assistance. Secondly, the sheer amount of this assistance being in excess of $800,000 would support the first respondent's belief that the defendant would not abscond. The financial assistance was given in the context of the defendant (since his release from custody in 2011) complying with his bail conditions. That is, the first respondent would not pay $800,000 towards the defendant's legal fees if she thought that he was likely to abscond. Thirdly, the deterioration of the first respondent's financial position is explicable, not merely by reference to the payment of the defendant's legal fees, but also to the significant decline in property prices in the Mackay region.

[93] The deterioration in the first respondent's financial position is not however such that she is unable to sell the unencumbered property at 121 Peak Downs Highway for the purposes of paying at least part of the surety. It would however cause financial hardship if the first respondent was forced to sell the Mt Coolon Hotel which is her primary source of income. On the first respondent's evidence there is equity in the hotel in the order of $450,000.

[94] The first respondent is 62 years of age. She hires backpackers as staff at the hotel but finds them unreliable. She runs the hotel. Whilst the sale of the hotel may cause financial hardship the evidence does not satisfactorily establish that the first respondent could not borrow on the existing equity of the hotel. I note however, that the first respondent is experiencing difficulties with her existing financial facilities. She was cross-examined as to her ability to pay the $450,000 surety:

> "But nevertheless, you have sufficient assets in the form of real estate, savings or motor vehicles or whatever to readily meet a $450,000 surety? … I don't because the land in Moranbah, the banks have just pulled it on me. I have to refinance it or I'm going to lose it and I'm going to lose 62 Belyando and 8 Bold Street as well as the land with all the rentals on it because I do, no longer – and Kristy has a letter from the bank that – to say that I no longer have a facility with them. And most of it from negativity out of the newspapers that's causing this – that's made the bank nervous, and because we're in a mining town, because we – all the negativity has gone against us, there has been nothing good out of it all."[117]

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[116] Applicant's Outline of Submissions, 21 April 2016, para. 36.
[117] T 1-88, lines 19 to 27.

[95] Another matter relevant to the deterioration in the first respondent's financial situation is the legal fees she has incurred in relation to the present application. These fees are in the order of $133,000 to $140,000.[118] Pursuant to s 10B(1) of the Act a Court may not make any order concerning costs in a bail proceeding. Ordinarily the first respondent would be required to meet her own legal costs, both in relation to resisting orders sought by the Director pursuant to ss 31, 32 and 32A of the Act and also in relation to the first respondent's own application pursuant to s 32B. What is submitted by the first respondent however, is that a substantial portion of these legal fees has been incurred through the actions of the Director. In particular, when this matter came on for hearing on 21 March 2016, the Director sought to read and file a confidential affidavit from a member of the Australian Federal Police. Leave was sought in circumstances where the Director refused to disclose the affidavit to the legal representatives of the first respondent citing a claim of public interest immunity. That claim for public interest immunity was not that of the Director but rather of the Australian Federal Police. The claim was the subject of extensive submissions on 7 April 2016 with the Australian Federal Police being separately represented by Senior Counsel. After the matter was fully argued the Director, by written submissions dated 14 April 2016, withdrew the application for leave to read and file the confidential affidavit. The first respondent has therefore incurred unnecessary legal costs which have added to her financial burden. This matter is only relevant to a consideration of the deterioration in the first respondent's financial situation since entering into the surety.

Disposition of the s 32B application

[96] On a consideration of the evidence this is not an appropriate case such as *Baytieh* to revoke my orders made under ss 31(1), 32A(1)(a) and 32A(2) of the Act. The real question is whether, having regard to all the circumstances, it would be against the interests of justice to require the first respondent to pay the full amount of the surety. The surety is for $450,000. The first respondent has also paid a $70,000 cash deposit. Applying the test in s 32B(2)(a) there should in my view, be some reduction in the amount of the surety of $450,000. One of the considerations in providing this surety was the valuation of 121 Peak Downs Highway of $450,000. The present valuation is now $310,000. Even though the evidence of financial deterioration is unsatisfactory, I accept that in order to meet the full amount of $450,000 the first respondent would not only need to sell 121 Peak Downs Highway in what is a difficult market but will also need to seek to borrow funds utilising the equity in the hotel. This is in circumstances where the first respondent is already experiencing difficulties with her financial facilities.

[97] I note the observation of Curtain J in *DPP v Lipp & Anor*[119]:

> "However, in fixing the reduced amount to be paid, it is important that the integrity of the bail system be maintained so that persons undertaking suretyship understand the seriousness of their obligations and the consequences if they fail to act in accordance with those obligations, and that those persons who are granted bail with a surety will know that they are exposing the surety to dire consequences should they abscond."

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[118] Affidavit of Kristy Emma Dobson sworn 1 April 2016, para. 13.
[119] [2008] VSC 203 at [27].

[98] I will therefore vary the amount of the surety by 30% from $450,000 to $315,000 appreciating that the $70,000 cash deposit is forfeited. This reduction recognises the not insignificant deterioration in the first respondent's financial position since first offering the surety of $450,000 and the cash deposit of $70,000 in 2011.

[99] I therefore order pursuant to s 32B(1) that the order made by me pursuant to 32(1) and 32A(a) be varied by reducing the amount of the surety from $450,000 to $315,000. The default term of imprisonment of 12 months remains unchanged.

Final orders

1. I declare that the defendant's undertaking as to bail executed by the defendant on 30 April 2013, be forfeited.

2. I order that the cash deposit of $70,000 be forfeited and paid to Her Majesty;

3. I order that the amount of the surety be reduced from $450,000 to $315,000;

4. I order that the surety in the amount of $315,000 be forfeited and paid to Her Majesty;

4. I order that the first respondent pay the amount of $315,000 to the proper officer of the Court within six months of the date of these orders;

5. I order that the first respondent be imprisoned for the term of 12 months if she defaults in paying the amount of $315,000 within six months of this order to the proper officer of the Court.