# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Turner v Commonwealth Director of Public Prosecutions* [2017] QCA 30 |
| PARTIES: | **ELIZABETH ANNE TURNER**<br>(appellant)<br>**v**<br>**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS**<br>(respondent) |
| FILE NO/S: | Appeal No 5921 of 2016<br>SC No 409 of 2014 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane - [2016] QSC 107 |
| DELIVERED ON: | 10 March 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 October 2016 |
| JUDGES: | Margaret McMurdo P and Fraser JA and McMeekin J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The appeal is dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – PROCEDURE – BAIL – SURETIES – where the appellant signed an undertaking as surety for bail – where the accused absconded on bail – where the respondent brought an application under s 32(1) *Bail Act* 1980 (Qld) for forfeiture of the surety – where the appellant argued that on a correct construction of s 20(3A)(a)(iii) the accused had not failed to appear in accordance with his undertaking as required for forfeiture under s 32(1) – whether the accused had failed to appear in accordance with his undertaking– whether the primary judge erred in ordering the surety be forfeited<br><br>STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – where the appellant signed an undertaking as surety for bail – where the accused absconded on bail – where the lawyers representing the accused were given leave to withdraw – where the trial listing was subsequently vacated – where the respondent brought an application under s 31(1) *Bail Act* 1980 (Qld) seeking a declaration that the accused's bail undertaking be forfeited – where the application was adjourned to allow the respondent |

to serve at the residential bail address of the accused a notice of the judge's direction requiring him to appear on a future date – where the appellant argued that on a correct construction of s 20(3A)(a)(iii) the accused had not been given notice of the direction and therefore had not failed to appear in accordance with his undertaking as required for forfeiture under s 31(1) – whether the term "personally" in s 20(3A)(a)(iii) required that notice of the judge's direction be served on the accused in person – whether such a construction would be consistent with the objects and purposes of the Act – whether the accused had failed to appear in accordance with his undertaking – whether the trial judge had erred in declaring the undertaking forfeited

*Acts Interpretation Act* 1954 (Qld), s 14A, s 14B
*Bail Act* 1980 (Qld), s 20(2), s 20(2A), s 20(3A)(a)(iii), s 27, s 31(1), s 32(1), s 33, s 36A

*Beckwith v The Queen* (1976) 135 CLR 569; [1976] HCA 55, followed
*Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298, approved
*Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107, approved

COUNSEL: P J Davis QC, with J R Jones, for the appellant
L K Crowley for the respondent

SOLICITORS: McKays Solicitors for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P:** In May 2011, the appellant's son, Markis Scott Turner, was arrested, charged with a number of serious drug offences against the *Criminal Code Act* 1995 (Cth) and remanded in custody. He was granted bail under the *Bail Act* 1980 (Qld) on 1 June 2011 on his own undertaking, with a cash deposit and a surety. After his committal on 30 April 2013, he signed a new bail undertaking and the appellant signed an undertaking as surety for $450,000 together with a $70,000 cash deposit.[1] After he was committed for trial, an indictment was presented against him and his co-accused in the Supreme Court. He was arraigned and pleaded not guilty. Subsequently the court listed his trial to commence on 29 September 2015 and Mr Turner was informed of this through his lawyers.[2] It is uncontentious that Mr Turner absconded prior to 11 September 2015 when the court revoked his bail, issued a warrant for his arrest, and gave leave to his lawyers to withdraw.[3] On 25 September his trial listing was vacated, so that on 29 September Mr Turner's matters were not before the court.[4]

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1 Mr Turner's grandmother (now deceased) provided an additional $30,000 cash deposit.
2 Appeal Book (AB), 1 – 12.
3 AB, 13 – 16.
4 AB, 18.

[2] The respondent applied to the primary judge for a declaration under s 31(1) *Bail Act* that Mr Turner's bail undertaking be forfeited, and an order under s 32(1) *Bail Act* that the appellant's surety and cash deposit be forfeited and paid to Her Majesty.[5]

[3] On 28 October 2015, the primary judge adjourned the application to permit the respondent to serve a notice at Mr Turner's residential bail address, requiring him to personally appear before the court at 9.30 am on Monday, 9 November 2015.[6] Unsurprisingly, Mr Turner did not appear. Relying on that evidence, the respondent pursued its application.

[4] On 18 May 2016, the judge declared that Mr Turner's undertaking as to bail be forfeited, and that the appellant's cash deposit of $70,000 and surety, which was reduced to $315,000, be forfeited, and the surety paid to the proper officer of the court within six months. In default, she was to be imprisoned for 12 months.[7]

**Grounds of appeal**

[5] The appellant appeals against the 18 May 2016 orders on two grounds. The first is that the primary judge, having determined that on or before 28 October 2015 Mr Turner did not fail to appear before the court in accordance with his undertaking and surrender into custody, ought to have dismissed rather than adjourned the respondent's application.

[6] The second is that, on 18 May 2016, his Honour ought to have found that Mr Turner had not been given notice requiring his appearance before the court on 9 November 2015; that his undertaking was therefore not liable to be forfeited; and that the appellant's surety was not liable to be forfeited. She contends that, instead, the judge should have dismissed the respondent's application.

[7] Before explaining my reasons for dismissing the appeal I will set out relevant parts of Mr Turner's bail undertaking; provisions of the *Bail Act*; aspects of the primary judges' reasons on 28 October 2015 and 18 May 2016; and the parties' competing contentions.

**Mr Turner's bail undertaking**

[8] It is common ground that the relevant undertaking is that which Mr Turner signed post-committal. It was relevantly in these terms:

> "I, the abovenamed defendant, upon being granted bail ... undertake as follows:
>
> 1. **I shall appear, or be represented by my counsel or solicitor, before the**
>
> **Court:** SUPREME COURT
>
> **Place:** MACKAY
>
> **in accordance with any notice I may receive given by or on behalf of the Director of Public Prosecutions ... advising me of**

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5 AB, 461 – 462.

6 *Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298.

7 *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107.

**the date and the time when and the place where an indictment will be presented against me.**

2. If the notice states that it is intended to ask the Court to proceed with the trial at the time stated in the notice, I shall surrender into custody at the time and the place stated in the notice and I shall not depart from the Court unless my bail is enlarged.

3. 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.

4. I will immediately give written notice to the Director of Public Prosecutions ... of any change of my address for service of notices or my residential address other than the change that arises if I surrender into custody. ...

5. [D]efendant is to reside at 1 Kilgour Street, Mackay or such other address first agreed to in writing by the Director of Public Prosecutions (Commonwealth)."[8]

[9] The undertaking did not contain a separate address for service of notices as required by s 20(2) *Bail Act*. Paragraph 3 of the undertaking, which reflects the terms of s 20(3A)(a)(iii) *Bail Act*, is of particular relevance.

**Relevant provisions of the Bail Act**

[10] Part 1 *Bail Act*, 'Preliminary', contains definitions and allows for delegation of powers. Part 2 is headed 'Grant and enlargement of bail and other release'. Neither Part has any direct relevance to this appeal. Part 3, 'Undertakings and sureties', relevantly includes:

"**20 Undertaking as to bail**

(1) A defendant to whom bail is granted in or in connection with a criminal proceeding ... shall, before being released from custody, enter into an undertaking in the approved form.

(2) A defendant—

(a) who is committed for trial; ...

and to whom bail is granted shall provide and the undertaking shall contain the defendant's residential address and an address for service of notices.

(2A) For subsection (2), the defendant's address for service of notices may be the same as the defendant's residential address.

...

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8 AB, 373 – 375.

(3A) In the case of bail granted to a defendant following the defendant's committal for trial the undertaking shall be subject to—

(a) conditions that the defendant—

(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

(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; ...".

[11] Part 4, 'General provisions', relevantly includes:

"**27 Notice of Trial**

(1) Where a defendant who has been committed for trial is on bail to appear at the trial and it is intended to present an indictment against the defendant the director of public prosecutions ... shall cause notice to be given to the defendant or the defendant's solicitor and to each of the defendant's sureties (if any) advising of the time when and the place where the indictment will be presented. ...

(4) Where the trial is to be adjourned the defendant need not appear personally before the court when an indictment is presented against the defendant provided the defendant is represented by the defendant's lawyer. ...

**29 Offence to breach conditions of bail**

(1) A defendant must not break any condition of the undertaking on which the defendant was granted bail requiring the defendant's appearance before a court.

Maximum penalty—40 penalty units or 2 years imprisonment.

...

**30 Apprehension on variation or revocation of bail**

...

(2) An application under this section may be made ex-parte—

(a) after notice of intention to make the application has been given to the defendant and the defendant's surety or sureties; or

(b) without giving notice pursuant to paragraph (a) if the defendant—

(i) has absconded or if the court is satisfied that the defendant is likely to abscond; or

(ii) has broken, or if the court is satisfied that the defendant is likely to break, a condition of the defendant's undertaking.

...

**31 Forfeiture of undertaking**

(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.

...

**32 Forfeiture of deposit or other security**

(1) 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.

...

**33 Failure to appear in accordance with undertaking**

(1) A defendant who—

(a) fails to surrender into custody in accordance with the defendant's undertaking; and

(b) is apprehended under a warrant issued pursuant to section 28[9] ...

commits an offence against this Act.

...

**36A Service of notices**

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[9] Section 28 deals with matters concerning apprehension of a defendant who has undertaken to appear before a Supreme Court or a District Court.

> 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—
>
> (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
>
> (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; ..."

[12] The final Part of the *Bail Act*, Part 5, 'Transitional provisions', has no relevance to this appeal.

**The decision of 28 October 2015**

[13] The respondent's application first came before his Honour on 14 October 2015. The respondent contended that, although Mr Turner's trial date of 29 September was vacated, he had to appear and surrender himself into custody on that date as his bail had not been enlarged. As he did not appear, he failed to appear in accordance with his undertaking.[10] During argument the respondent indicated that, if the judge considered Mr Turner had not been served with a notice requiring him to appear at court to answer his bail because the trial was delisted, then the application should be adjourned so that the respondent could effect that service.[11] The appellant opposed any adjournment and submitted that the application should be refused.[12] The judge required further considered written submissions as to the effect of the relevant *Bail Act* provisions and whether Mr Turner had failed to appear in accordance with his undertaking. When his Honour enquired whether the respondent would undertake to pay the appellant's costs thrown away by the adjournment, the respondent declined, making clear that it was not requesting an adjournment.[13] His Honour nevertheless adjourned the matter, requiring the parties to file written supplementary submissions by 16 October 2015.[14] On 28 October 2015, his Honour delivered his written reasons for further adjourning the application and permitting the respondent to serve a notice at Mr Turner's residential address requiring him to personally appear before the court at 9.30 am on Monday, 9 November 2015.[15]

[14] His Honour noted that affidavit material showed Mr Turner's wife and children left Australia from the Brisbane International Airport on 22 July 2015 and had not returned. All attempts to locate him at his residential address had failed.[16] His Honour referred to the distinction under the *Bail Act* between a grant of bail and a defendant's undertaking, highlighted in s 20(3A). That provision, his Honour considered, required that the undertaking must contain a condition that Mr Turner obey the directions of the court, whether given to him personally or to his lawyer, with respect to any further appearance and, if directed, to personally appear, surrender into custody and not depart from the court unless bail was enlarged.[17]

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10 AB, 52, 404 – 405.
11 AB, 44 – 45.
12 AB, 41.
13 AB, 45.
14 AB 54 – 55.
15 *Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298.
16 Above, [17].
17 Above, [21] – [28].

The effect of the revocation of Mr Turner's bail, the judge found, was that he was now at large unlawfully, but he remained subject to his undertaking to appear when notified.[18] The only relevant notification to him was through his legal representatives, requiring him to personally appear at his trial on 29 September 2015.[19] The revocation of his trial date was not notified to him.[20] Under s 31 *Bail Act* the court may declare his undertaking to be forfeited if he had been released on bail, and failed to appear before the court in accordance with his undertaking and surrender into custody.[21] Mr Turner, his Honour found, had been released on bail,[22] and absconded and failed to appear and surrender into custody on 29 September 2015.[23] His Honour concluded, however, that the delisting of his trial meant that there was no constituted court before which he could appear and surrender into custody on 29 September 2015, so that there had been no failure on his part to "appear before the court in accordance with his undertaking and surrender into custody" under s 31.[24]

[15] His Honour ordered:

> "The application be adjourned so as to permit [the respondent] to serve a notice at [Mr Turner's] residential address requiring [him] to personally appear before the court at 9.30 am on Monday 9 November 2015".

[16] Neither party has appealed from that order. As noted earlier, Mr Turner failed to appear at court on 9 November and the respondent pursued its application.

**The decision of 18 May 2016**

[17] His Honour considered the sole issue of relevance was whether, on 9 November 2015, Mr Turner failed to appear before the court in accordance with his undertaking. If so, his Honour was entitled to declare Mr Turner's undertaking forfeited under s 31 and order the appellant's security be forfeited under s 32(1).[25] The onus was on the respondent to establish on the balance of probabilities that Mr Turner failed to appear in accordance with his undertaking.[26]

[18] His Honour rejected the appellant's contention that Mr Turner had not failed to appear in accordance with his undertaking because he was not personally given notice requiring his attendance at court on 9 November. Under s 20, his undertaking had to contain his residential address and an address for service of notices, which may be the residential address. Mr Turner's undertaking did not contain an address for services but his Honour found it should be construed so as to comply with that provision so that his residential address was also his address for service.[27]

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18 Above, [29].
19 Above, [30].
20 Above, [32].
21 Above, [33].
22 Above, [34].
23 Above, [38] – [39].
24 Above, [41] – [43].
25 *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107, [8] – [13].
26 Above, [14] citing *R v Mokbel & Mokbel* (2006) 199 FLR 176, 184; [2006] VSC 158, [31].
27 *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107, [15] – [20].

[19] The judge noted the appellant's contention that paragraph 3 of the undertaking, which was in terms of s 20(3A)(a)(iii), meant that any notice requiring his appearance must be given to him personally. His Honour accepted that the notice referred to in paragraphs 1 and 2 of the undertaking was of the kind identified in s 27 to bring the defendant before the court upon presentation of an indictment. Such notice may be given in accordance with s 36A.[28] His Honour considered that s 20(3A)(a)(iii) and paragraph 3 of the undertaking could not be construed as requiring that a direction of the court must be given to the defendant in person; the provision did not deal with the service of such a direction, let alone personal service.[29] The requirements in section 20(2) and (2A) were general provisions requiring the undertaking to contain the defendant's residential address and address for service of notices. They were not limited to service of s 27 notices. Mr Turner's undertaking, his Honour observed, also required him to give written notice to the Director of Public Prosecutions of any change of address for service of notices or his residential address.[30]

[20] His Honour concluded that paragraph 3 of the undertaking did not stipulate a limitation on the means by which the court's direction can be given to a defendant. The phrase "whether given to me personally or to my counsel or solicitor" should be construed as drawing a distinction between the direction being given to Mr Turner directly rather than through his lawyers. The use of "whether" in contrast to "if" or "where" meant that the term "personally" was not intended to operate as a limitation upon the circumstances in which a defendant should appear in accordance with the direction of the court.[31] The judge considered that "personally" should be construed not as requiring personal service but as permitting notification by way of service of a notice to a defendant's bail address.[32] The appellant's construction of s 20(3A)(a)(iii), his Honour stated, would defeat the operation of the *Bail Act*. Mr Turner's whereabouts had been unknown since about 14 August 2015. As his solicitors were unable to obtain instructions, they were given leave to withdraw on 11 September 2015. In those circumstances, personal service could not be effected and he had no solicitors on whom to effect service. The only way the court's direction to him to personally appear in court on 9 November could be given was by service at his bail address. If personal service were required, the court could not declare his undertaking forfeited.[33]

[21] For these reasons his Honour declared Mr Turner's undertaking as to bail be forfeited and that the appellant's cash deposit and surety also be forfeited and paid to the proper officer of the court within six months, in default imprisonment for 12 months.[34]

**The appellant's contentions**

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28 Above, [19].
29 Above, [21].
30 Above, [22].
31 Above, [23].
32 Above, [24].
33 Above, [25].
34 Above, [34] and [99].

[22] The appellant emphasises that a breach of an undertaking results in a criminal offence[35] and contends that any ambiguity in construing s 20(3A)(a)(iii) and paragraph 3 of the undertaking should be determined in favour of Mr Turner.[36]

[23] The appellant first submits that the primary judge, having found on 28 October 2015 that Mr Turner at that time had not failed to appear before the court in accordance with his undertaking, erred in then adjourning the respondent's civil[37] application. She contends that, as the respondent did not establish the condition precedent necessary under s 31, the judge should have dismissed, not adjourned, the application.[38]

[24] As to her second contention, she submits that the terms of s 20(3A) distinguish between "notice" in (a)(i) and (ii) and "directions of the court" in (a)(iii).[39] Under s 27, "notice" must be given to defendants or their lawyers advising when and where the indictment will be presented. She argues that it is a s 27 notice to which s 20(3A)(a)(i) and (ii) refer.[40] But once the indictment was presented, s 20(3A)(a)(iii) applied and Mr Turner was obliged to obey the court's directions given to him, either in person or through his lawyer. As Mr Turner was without lawyers once they withdrew on 11 September 2015, she contends that any court directions under s 20(3A)(a)(iii) had to be given to him in person. The only rational inference from the evidence, she submits, is that he did not personally receive the notice of the judge's direction to him to appear in court on 9 November 2015 which was left at his bail address. She argues that, for those reasons, Mr Turner did not breach paragraph 3 of his undertaking and the judge erred in declaring he had failed to appear before the court in accordance with it.[41]

[25] Whilst s 36A allows for a "written notice required to be given under this Act" to be served by delivery to a defendant's address for service, the appellant submits this should not be construed as extending to service of a "direction of the court" under s 20(3A)(a)(iii). She submits that s 36A has no application.[42] She emphasises that paragraph 3 of the undertaking refers to obeying "the directions of the Court", not to obeying a written notice to appear. In any case, she contends that, if s 36A is applicable and a direction to appear in court can be given by delivering notice of it to an address for service, this does not assist the respondent as Mr Turner's undertaking does not contain an address for service of notices, only a residential address.[43]

[26] The appellant emphasises that the only breach of bail undertaking which can lead to forfeiture of the undertaking is a failure "to appear before the court in accordance with the defendant's undertaking and surrender into custody".[44] Whilst conceding that Mr Turner had absconded so that his bail was rightly revoked, she submits that this case contains a novel combination of circumstances which prevent a finding

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35 See s 29 and s 33 *Bail Act*; *R v Crown Court at Reading, ex parte Bellow* [1992] 3 All ER 353.

36 Outline of Submissions of the Appellant dated 20 September 2016 ('Appellant's Outline'), [26] citing *Beckwith v The Queen* (1976) 135 CLR 569, 576; *R v Adams* (1935) 53 CLR 563, 567; *DPP v Priestley* [2013] NSWSC 407.

37 *R v Southampton Justices, ex parte Green* [1976] QB 11, [15].

38 Appellant's Outline, [41] – [45].

39 Above, [46] – [48], [53].

40 Transcript of Proceedings, 28 October 2016, 15.

41 Above, 13 – 14, 16.

42 Appellant's Outline, [35]; Transcript of Proceedings, 28 October 2016, 15.

43 Appellant's Outline, [37].

44 *Bail Act* s 31(1).

that he failed "to appear before the court in accordance with [his] undertaking".[45] They are that his lawyers withdrew; the trial date of which he had been informed through his lawyers was vacated, but he was not notified of this change; and neither was he informed in person of the court's direction to appear on 9 November 2015.[46] As a result, she submits he has not, as a matter of law, failed to appear under s 31. Until he is located, she contends that no further directions to appear in court of the kind to which paragraph 3 of his undertaking and s 20(3A)(a)(iii) refer can be given to him as they must be given to him in person.[47] This construction, she argues, does not defeat the purposes of the *Bail Act* as, until Mr Turner is located, he remains subject to his undertaking and she cannot be discharged from her obligations as surety under the *Bail Act*.[48]

[27] She contends that for these reasons the appeal should be allowed, the orders made on 18 May 2016 set aside and instead the respondent's application dismissed.

**The respondent's contentions**

[28] As to the appellant's first contention, the respondent points out that the primary judge was concerned about the correctness of its submission on 14 October 2015 that Mr Turner, at that time, had failed to appear in accordance with his undertaking. His Honour required further written submissions. The respondent was content for its application to be adjourned for that purpose and to obtain more evidence to support it but ultimately did not request an adjournment. The respondent submits that the judge was entitled to order on 28 October 2015 that the respondent's application be further adjourned so as to permit it to serve a notice on Mr Turner at his residential address requiring him to personally appear before the court.[49]

[29] The respondent accepts that its application for forfeiture of Mr Turner's bail undertaking was an exercise of criminal jurisdiction. But the requirement that penal statutes should be construed strictly, the respondent submits, is a rule of last resort and must not give way to a court's duty to give effect to the purpose of the legislature as expressed in the language enacted by Parliament.[50]

[30] It contends that Mr Turner failed to appear in accordance with his undertaking as notice of the court's direction to appear on 9 November 2015 was served at the residential address nominated in his undertaking. This, the respondent contends, was a sufficient means of notification of the court's direction. The primary judge, the respondent submits, correctly determined that "personally" where first used in paragraph 3 of his undertaking (reflecting s 20(3A)(a)(iii)) permitted notification of the court's direction by way of service of a notice to his bail address.[51] Section 20(3A), it contends, does not limit the means by which a direction of the court may be given to a defendant; it simply stipulates the conditions of an undertaking which requires a defendant to observe court directions in respect of further appearances. It clarifies that the defendant shall do so, irrespective of whether the direction is given

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45 *Bail Act* s 31(1).
46 Appellant's Outline, [58].
47 Above, [59].
48 See *Bail Act* s 23.
49 Appellant's Outline, [6]; Transcript of Proceedings, 28 October 2016, 23 – 24.
50 Appellant's Outline, [26] citing *Beckwith v The Queen* (1976) 135 CLR 569, 576 Gibbs J; *R v Lavender* (2005) 222 CLR 67, [87] – [95] Kirby J.
51 Appellant's Outline, [23].

to the defendant or the defendant's lawyer. It does not require that service be either of the defendant in person or through the defendant's lawyer, or that the direction be given in court to the defendant in person or the defendant's lawyer in person.[52] The respondent contends that the primary judge correctly concluded as much.[53]

[31] The respondent submits that s 36A has no relevance to the construction of s 20(3A)(a)(iii). The fact that s 20(3A)(a)(i) and (ii), s 27 and s 36A permit certain types of notices to be served on a defendant by delivery to a defendant's address for service of notices which could be the same as that defendant's residential address, does not mean that notice of the court's direction here must be served in person or that it could not be effected in the same manner as a s 27 notice.[54]

[32] His Honour, the respondent argues, rightly concluded that the word "personally" where first appearing in paragraph 3 of Mr Turner's undertaking and in s 20(3A)(a)(iii) should be construed not as requiring personal service but as permitting notification by way of service of a notice of the direction to his bail address.[55]

[33] The respondent emphasises that the relevant provisions of the *Bail Act* should be interpreted in a way which best achieves the purposes of the Act.[56] The primary judge's construction was consistent with the purposes of the *Bail Act* generally, and particularly with Part 3, which relates to undertakings and sureties. Those purposes are principally to ensure that people charged with criminal offences appear in court to answer the charges; that, where appropriate and consistent with the presumption of innocence, they be released from custody on conditional liberty pending the determination of the charges; and that the bail system protect the interests of the community and the administration of justice.[57] The potential adverse consequences flowing from forfeiture of undertakings and sureties are an integral part of the scheme established under the *Bail Act* to achieve those purposes.[58] The primary judge, the respondent submits, rightly identified that the appellant's interpretation would produce absurd results, inconsistent with the purposes of the Act.[59]

[34] The respondent contends that the judge rightly declared Mr Turner's undertaking forfeited and did not err in ordering that the appellant's surety and cash deposit be forfeited. It submits that the appeal should be dismissed.

**Conclusion**

[35] The appellant's first contention is ambitious. After hearing oral argument on 14 October 2015 and receiving further submissions in writing on 20 October 2015, the primary judge ordered on 28 October 2015 that the respondent's application be adjourned so as to permit it to serve a notice at Mr Turner's residential address requiring him to personally appear before the court at 9.30 am on Monday, 9 November 2015.[60] The appellant contends his Honour ought to have instead dismissed the respondent's application.

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52 Appellant's Outline, [21] – [23]; Transcript of Proceedings, 28 October 2016, 29 – 30.
53 *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107, [21] – [23].
54 Appellant's Outline, [21]; Transcript of Proceedings, 28 October 2016, 30 – 31.
55 *Director of Public Prosecutions (Cth) v Turner & Anor* [2016] QSC 107, [24].
56 Section 14A(1) *Acts Interpretation Act* 1954 (Qld).
57 Appellant's Outline, [25] – [27].
58 Above, [28].
59 Above, [24] – [25].
60 *Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298.

[36] For the following reasons that contention is without substance. First, this appeal is not from the order of 28 October 2015 but from the orders of 18 May 2016. Second, the transcript of the hearing on 14 October 2015 makes clear that the primary judge did not then reach any final conclusions. His Honour identified that the respondent may have difficulties in establishing the necessary evidentiary basis to succeed in its application but considered it may be able to remedy this if given an adjournment. In any case, his Honour wished to receive further written submissions as to what seemed to be a novel and significant point of statutory construction. His Honour received those submissions on 20 October. His Honour concluded on 28 October that the delisting of Mr Turner's trial on 29 September meant that no court was constituted before which he could appear and surrender into custody on 29 September; he had not then failed to appear before the court in accordance with his undertaking. It followed, his Honour reasoned, that at that time the respondent had not established under s 31(1) that his undertaking should be forfeited. There was no appeal from that order and neither party now challenges the correctness of that conclusion. His Honour's adjournment on 28 October of the respondent's application to allow it to attempt to remedy the gaps in its evidence was an unremarkable exercise of judicial discretion. The appellant's contention that his Honour ought to have dismissed the application on 28 October 2015 is not made out.

[37] The appellant's second contention concerning the construction of the *Bail Act* is more problematic. To have the appellant's surety forfeited under s 32(1),[61] the respondent must first obtain a declaration under s 31(1)[62] forfeiting Mr Turner's undertaking because of his failure to appear before the court. This requires a consideration of the construction of s 20(3A)(a)(iii)[63] and paragraph 3 of his undertaking.[64] The essential issue is whether the judge erred in finding that on 9 November 2015 Mr Turner failed to appear before the court in accordance with his undertaking. That depends on whether the service at the residential address in his bail undertaking of the notice of the judge's direction on 28 October, that he appear personally before the court at 9.30 am on 9 November, was given to him personally, as required by s 20(3A)(a)(iii) and paragraph 3 of his undertaking. The answer to that question turns on the construction of the term "personally" where it first appears in s 20(3A)(a)(iii) and paragraph 3 of the undertaking. As the term "personally" is not defined in the *Bail Act*, it should be given its ordinary meaning. But "personally" can have a number of meanings, namely:

> **"1.** as regards oneself: **Personally, I think it's too hard to bring up more than two, maybe three [children], on today's standards.* - LYN RICHARDS 1985. **2.** as an individual person: *he hates me personally*. **3**. in person. **4**. as if intended for one's own person: *"*Look Blair, you're having fun and everything but - don't take this personally - I'm not the slightest bit attracted to you physically.*" - JOHN A SCOTT, 1988."[65]

[38] There can be no doubt that "personally" where it appears second in s 20(3A)(iii) must mean "in person". That also seems to be the meaning of the term "personally"

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61 Set out at [11] of these Reasons.
62 Above.
63 Set out at [10] of these Reasons.
64 Set out at [8] of these Reasons.
65 The Macquarie Dictionary, Federation Edition.

where used in s 27(4) and s 36A.[66] It is true that it is unusual for the same term used in the same provision of a statute just two lines apart to have different meanings but that is not necessarily fatal to the respondent's case.

[39] The primary judge construed "personally" where it first appears in s 20(3A(a)(iii) as having the second of the meanings set out above, that is, the court's direction must be given to the defendant as an individual rather than through the defendant's legal representatives. That seems also to be the meaning of "personally" in s 34E(2) *Bail Act*,[67] so that there is no consistency within the Act as to the meaning of "personally". The appellant contends that it should be construed as having the third meaning set out above, that is, as requiring the directions to be given to the defendant in person.

[40] The construction of s 20(3A)(a)(iii) which this Court adopts should be that which best achieves the purpose of the *Bail Act*.[68] The long title of the *Bail Act*[69] makes clear that it was both consolidating and amending the law relating to bail. Its objects and purposes are not directly contained in its terms. In discerning them and the construction of s 20(3A) it is appropriate to consider statements made by members of the legislature when it was enacted and relevantly amended.[70]

[41] The Hon W D Lickiss, Minister for Justice and Attorney-General, in introducing the Bill to Parliament referred to the historical background of bail at common law and under English statute law:

> "The concept of bail is of considerable antiquity, with roots in the legal system of Anglo-Saxon times. A person granted bail was considered not to be at liberty, but to be entrusted to the custody of his sureties. If he absconded, the sureties were liable to the penalties appropriate to the offence with which the defendant was charged.
>
> ...
>
> The present recognizance system, which has proved to be ineffective, is replaced in the Bill by the undertaking to be entered into by the defendant and his sureties, if any, requiring the defendant to appear at the appointed time and place and surrender himself into custody. Failure to appear will be a criminal offence on the part of the defendant, although not of the sureties, punishable by imprisonment for two years, which term will be cumulative on prior-existing State and Federal sentences."[71]

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66 Both set out in [11] of these Reasons.

67 "**34E Protection from liability**

(1) This section applies to a person who—
  (a) is a member of the community justice group in a defendant's community; and
  (b) is responsible for the making of a submission about the defendant to—
    (i) a court under section 15(1)(f); or
    (ii) a court or a police officer under section 16(2)(e).

(2) For subsection (1)(b), it does not matter that the person did not personally make the submissions to the court or the police officer ...".

68 *Acts Interpretation Act* s 14A.

69 "An Act to consolidate and amend the law relating to the release of defendants charged with offences and for incidental and other purposes".

70 *Acts Interpretation Act* s 14B.

71 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 1979, 1573 – 1574.

[42] Opposition Member, Mr K J Hooper, welcomed the Bill, noting without dissent: "if the bailee absconds or fails to appear at his trial, his bail is estreated and the persons who have provided sureties have them forfeited to the Crown."[72]

[43] In the second reading speech, the Minister for Justice and Attorney-General stated that, after consultation, clause 20 had been amended:

> "… so that the defendant, on entering his undertakings, must make himself available to the sittings to which the trial has been set down or adjourned. On the trial being set down for a particular date, this is then notified either to the defendant in writing or to his solicitor and the surety or sureties either orally or in writing."[73]

[44] Whilst proposing amendments to clause 27 the Minister noted:

> "These amendments are in conjunction with clauses 17 and 20 which have been discussed previously. As the defendant must hold himself ready to attend at any time during the sittings to which his trial is adjourned the Crown Solicitor can, by amendment, give notice of the date, time and place of the trial in writing to the defendant or to his solicitor and sureties or surety, either orally or in writing. This is in accordance with the present practice."[74]

[45] Sections 20(3A) and s 36A, and a new s 27 and s 33[75] of the *Bail Act* were inserted by the *Bail Act & Other Acts Amendment Act* 1988 (Qld).[76] During the second reading speech the Hon P J Clauson, Minister for Justice and Attorney-General, relevantly noted:

> "The Bill also contains provisions which are concerned mainly with undertakings entered into where the defendant has been committed for trial, sentence or on appeal.
>
> The new procedures are intended to facilitate the management of the court lists in these jurisdictions by simplifying the procedure for giving notices.
>
> ...
>
> Under the new section 33, a defendant who fails to surrender into custody in accordance with his undertaking and who is apprehended under a warrant issued in respect of that failure, commits an offence against the Act."[77]

[46] The objects and purposes of the *Bail Act* are not directly contained in its terms. But, as the respondent contends, its purpose may be inferred from its provisions; the long-established operation of bail and sureties to which the Minister referred when introducing the Bill to Parliament in 1980; and the relevant legislative discussion at that time and when s 20(3A), s 36A and the new s 27 and s 33 were introduced.

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72 Above, 1576.
73 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1980, 2931.
74 Above, 2936 – 2937.
75 These provisions have not been relevantly amended since.
76 Section 14 and s 19.
77 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 1988, 2377 – 2378.

The principal purposes of the Act are to ensure that those charged with criminal offences, consistent with the presumption of innocence and the interests of the community and the efficient administration of justice, are released from custody on bail pending trial, with any conditions and sureties necessary to ensure they appear in court when called on to answer the charges. It is equally clear that Parliament intended that, where a surety was provided and the bailee absconded and did not appear in court in accordance with the bail undertaking, the amount of the surety or cash deposit would be forfeited to the State. It is also discernible that, with the court's increasingly busy criminal jurisdiction, Parliament wished to simplify the procedures for giving defendants notices about court appearances.

[47] As the appellant points out, a forfeiture of Mr Turner's undertaking to appear before the court and surrender into custody under s 31 will incur criminal liability.[78] Whilst the forfeiture of the appellant's substantial security is not a criminal matter, it has serious consequences. Not only will she have to pay $385,000 to the State, she will also serve 12 months imprisonment if she defaults in paying that amount within six months. As a result, if there is ambiguity in construing s 20(3A)(a)(iii) in a way that best achieves the purposes of the *Bail Act*, that doubt should be resolved in favour of Mr Turner and the appellant.[79]

[48] Taking into account the purposes of the *Bail Act* and the legislative intent discerned from Parliament when it was first enacted in 1980, and when s 20(3A) and s 36A with s 27 and s 33 in their present form were introduced in 1988, I do not consider there is any ambiguity in construing the meaning of "personally" where it first occurs in s 20(3A)(a)(iii). I agree with the primary judge that it has the second meaning set out above, namely "as an individual person", distinguishing directions given to a defendant in their own right from those given to them through their lawyer as agent. This construction is consistent with an ordinary meaning of "personally" and with the legislative intention to establish a functional bail scheme, with sureties and cash deposits when necessary, which provides for the efficient management of busy criminal court lists. If the appellant's construction were correct, the provision of court directions as to future court appearances to self-represented defendants only in person would be apt to be costly and unwieldy. The construction the primary judge and I prefer also sits comfortably with the other relevant provisions of the *Bail Act* with which s 20(3A)(a)(iii) interacts. Section 36A, 'Service of notices', is contained in the general provisions of the *Bail Act* and applies to all written notices required to be given under the *Bail Act*. The term "notice" or "written notice" is not defined in the *Bail Act*[80]. "Notice" in s 36A should have its ordinary meaning, namely:

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78 *Bail Act* s 33.

79 *Beckwith v The Queen* (1976) 135 CLR 569, 576, Gibbs J.

80 The term "notice to appear" is referenced in s 7(9) *Bail Act* as: "***notice to appear*** see the *Police Powers and Responsibilities Act 2000*, schedule 6". This in turn references s 382(2) of that Act which provides:

> "(2) A police officer may issue and serve a notice (***notice to appear***) on a person if the police officer—
> (a) reasonably suspects the person has committed or is committing an offence; or
> (b) is asked by another police officer who has the suspicion mentioned in paragraph (a) to issue and serve the notice to appear."

It is not helpful in determining the meaning of "notice" in s 36A.

> "**1.** information or intelligence: *to give notice of a thing*. **2.** an intimation or warning. **3.** a note, placard, or the like conveying information or warning. ..."[81]

[49] Despite the appellant's contentions, I consider s 36A has application to the notice referred to in his Honour's order of 28 October 2015. It is not limited to notices specifically referred to in terms within the *Bail Act* and includes directions of the court under s 20(3A)(a)(iii). The serving of a notice at Mr Turner's residential address of the judge's order requiring him to personally appear before the court at 9.30 am on Monday, 9 November 2015 is, under s 36A, a "written notice required to be given under this Act" which is given "if it is delivered to the defendant's address for service of notices".[82]

[50] I agree with the primary judge that s 20(2) and s 20(2A) are general provisions relating to bail undertakings after committal for trial and have application to Mr Turner's bail undertaking. As s 20(2A) provides that a defendant's address for service of notices may be the same as the defendant's' residential address,[83] where, as here, only the residential address is included in the undertaking, that address must be taken to be the address for service of notices on him. It follows that he was given notice of the primary judge's direction to appear before the court on 9 November 2015 when this was served at his bail address. His failure to appear in accordance with that notice was in breach of paragraph 3 of his undertaking and s 20A(3)(a)(iii). His Honour was entitled to declare his undertaking forfeited under s 31. His Honour was also entitled to order the appellant's cash deposit and surety be forfeited under s 32.

[51] This construction is consistent with the purposes of the *Bail Act*; an ordinary meaning of "personally"; and the scheme under the *Bail Act* for the provision of bail with sureties which provides for forfeiture of sureties and cash deposits when a bailee absconds.

[52] The appeal should be dismissed.

[53] **FRASER JA:** I agree with the reasons for judgment of Margaret McMurdo P and the order proposed by her Honour.

[54] **McMEEKIN J:** I have read the reasons of the President I agree with them and the order her Honour proposes. I wish to add a few words of my own.

[55] I do not say that the construction of the *Bail Act* 1980 (Qld) ("the Act") urged by the appellant is not open. It plainly is. But the effect of the appellant's arguments is that by absconding the defendant can put himself beyond the court's reach for all purposes. That is a very unattractive argument. Further, the effect of the appellant's submission is that the provision for what is effectively substituted service (i.e. service at the notice of address for service provided by the defendant) provided by s 20 is not available, and not available when it is most needed. Again the proposition is unattractive, to say the least.

[56] I would not subscribe to that approach unless compelled to do so by clear words of the statute.

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81 The Macquarie Dictionary, Federation Edition.

82 *Bail Act* s 36A(a).

83 *Bail Act* s 20(2A).

[57] The approach to the construction of the statute urged by the appellant suffers from two major deficiencies. The first is that the primary argument for a strict construction, namely to avoid the imposition of criminal penalty in the absence of knowledge of the offence, is illusory. The second is that such a construction would cause a deal of mischief.

[58] Before turning to those deficiencies it is worth noting that the whole argument proceeds from a contradictory stance taken by the appellant. The premise underlying the appeal is that the obligations under the bail undertaking cannot be altered by the Court unless by a direction given to the lawyers on the record or to the defendant in person. Yet the appellant proceeds on the assumption that a direction that the defendant *not* appear at court - the order made vacating the date of trial made in the absence of both lawyers and defendant and about which the defendant knew nothing – is effective to alter those obligations. So the argument must be that the notice requirements under the Act turn on whether the direction made by the Court imposes a positive obligation or a negative one. That may be so, although there is nothing in the Act which makes that distinction that I can see, but it is at least peculiar that a direction relieving a defendant of an obligation (about which he is ignorant because he has absconded) cannot be accompanied by a direction imposing a substituted obligation (about which he is ignorant because he has absconded).

[59] The point was not argued before us and no appeal has been taken from the primary judge's ruling to the opposite effect, so the question is not open for re-consideration. For present purposes I observe that if the commencing premise be that the defendant's obligations imposed on him by his own undertaking can be altered without notice to him then much of the force of the appellant's arguments fall away.

[60] The primary argument advanced by the appellant is that if the respondent's construction, and that preferred by the learned primary judge, is adopted then the defendant has received no notice at all of the requirement to appear on 9 November 2015. The argument is that this is an untenable construction because the defendant is then exposed to prosecution for a criminal offence by failing to appear despite having no knowledge of the need to appear. While ordinarily that argument would have considerable force it has none here. That is so because it pays no regard to the fact that we are dealing with an absconding defendant.

[61] It is true that notice by way of service at an address for service (here the residential address) is artificial in the case of an absconding defendant. Someone endeavouring to avoid being brought to trial will not presumably continue to be available at a previously notified address, particularly perhaps at their usual residence. But that the notice is artificial is irrelevant. It is artificial whatever means be adopted to notify the absconder. The Act provides two means by which notices can be given to the defendant – through his lawyers, if lawyers are indeed acting for him, or by way of service on him. In the case of an absconding defendant who had lawyers on the record acting for him notice to them does not have the effect of informing the defendant that he is required to appear – the notice is completely artificial, or at least will usually be so. But on the appellant's construction that will be satisfactory. The letter of the law would have been satisfied even though the defendant would still have no notice of the requirement to appear and he would still have committed a criminal offence by failing to appear. So the alleged unfairness of the construction adopted by the primary judge is entirely illusory.

[62] The second point is the mischief that such an approach would cause to the ordinary workings of the court and the justice system. When a defendant absconds, the lawyers, assuming that there are lawyers on the record, have no instructions and no means of communicating with the absconder. It is an everyday order, when those circumstances pertain, for lawyers to seek to be given leave to withdraw. It is a waste of the time and energy of those lawyers to be retained in a case, and so obliged to appear whenever the Court directs, in a case where they have no instructions and where they are no longer in any position to assist the court or the system of justice. The effect of the appellant's argument is that the Court should as an everyday response to such an application for leave reject it merely to keep open an artificial line of communication to the defendant, one that will not be effective in bringing to his notice the Court's requirements.

[63] Further, as the facts in this case show, where the Court is confronted with an absconding defendant it cannot vacate dates for hearing, save and unless it keeps that artificial line of communication open through solicitors who lack instructions, and so maintain the orderly conduct of its business. Whatever the last date for hearing that had been communicated to the absconding defendant's lawyers that is the date that must be maintained as the next hearing date even though all concerned have no expectation that the defendant will appear. It does not matter whether the lawyers have in fact been able to so inform the defendant. Judicial time must be set aside and the prosecution must have its staff attend court on that date last advised. Wasted costs and wasted time. For what purpose? In a criminal justice system already burdened with delays and costs no sensible legislature could have intended to bring about that result. That this has consequent effects on a surety, as was pointed out, is of very little moment. That is precisely where the Act intends it will have an effect. The primary judge was quite right to say that the approach of the appellant would defeat, not serve, the operation of the Act.

[64] Finally, I accept that an argument against the construction I favour is that it requires that the word "personally" be used in two different senses in the one section. Such an approach would not normally be adopted. The rule however is not universal or inflexible. There are many examples of where the courts have declined to follow a presumption of consistent use. It is a presumption that must yield to context: *Murphy v Farmer* (1988) 165 CLR 19 at 27 where the majority (Deane, Dawson and Gaudron JJ) said:

> "…the presumption is that "the same meaning should be given to the same word wherever it occurs in a statute" (per Gibbs J, *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643; 24 ALR 175). Plainly, there is some force in that argument. On the other hand, as Gibbs J commented in *Clyne v DCT (NSW)* (1981) 150 CLR 1 at 10; 35 ALR 567, the presumption that a word is used with a uniform meaning in a statute is not one "of very much weight … it all depends on the context". In the same case, Mason J pointed out (CLR at 15) that the "presumption readily yields to the context"."

[65] Here two different things are under discussion – an appearance before a court and the giving of directions to a defendant, already subject to the court's directions and who has provided an address for service. The context is quite different. In my view the different approaches are justified.

[66] The distinction between serving a notice on an individual in person and serving a notice on an individual in that person's personal capacity is one that is well recognised. Once it is accepted that there are different senses in which the word "personally" can be used, the issue becomes – which sense should be adopted.

[67] The reasons of the President demonstrate why the latter is to be preferred here. As the President points out, when construing the conditions to which the undertaking as to bail is subjected those conditions ought to be construed with the evident objects and purposes of the legislation in mind. The construction adopted by the President (and the primary judge) in my respectful opinion better achieves those objects and purposes and is plainly the preferred one. The appeal should be dismissed.