

RSB:SND

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 WILSON J

THURSDAY 4 MAY 2017

10 **2017/00094322 - PROTHONOTARY OF THE SUPREME COURT OF NSW
v SHANE DOWLING**

NON PUBLICATION ORDER

15 Mr D Kell SC for the Crown
Accused appeared in person

20 PROCEEDINGS TAKEN OVER BY SOUND REPORTERS AT 1.52PM

RESPONDENT: Your Honour, I'd ask for another two or three minutes.

25 RESPONDENT: Just a few things, five points. I just want to address while I
was mad with Registrar Bradford last year, which is in the video.

HER HONOUR: So this is in September?

30 RESPONDENT: September last year. Every decision that he made have
been in Kerry Stokes' favour, the applicant's favour. In September last year - if
we wind the clock back to December 2015 Davies J handed down a judgment
in Munsie v Dowling which is basically Kerry Stokes versus me, Munsie's his
lawyer, ordering the parties to approach the listing judge to have the matter set
down for final hearing, and it's really up to the applicants to push that, so I was
waiting for him to do it and they never did nothing.

35 So in about August last year, some eight, nine months later, I approached the
Court to have it set down to have the matter dismissed for want of prosecution
and we went before a Registrar and they refused it. I wanted to go before the
Duty Judge. They refused it, they didn't allowed it. Stokes's lawyers had been
40 going before the duty judge all the time having ex parte hearings. I didn't want
necessarily an ex parte hearing, I just wanted a hearing. They refused it and
they set it down for Registrar Bradford and it went before Registrar Bradford,
every decision he'd made being in their favour, and I'd had a gutful. So I
asked him to transfer it to the duty judge and we had it out in on the videos as
45 you've seen. I shut my mouth. He set it down for hearing and that was it, that
being 9 o'clock forwarded to this year and he shouldn't have been anywhere
near the case as far as I'm concerned. So I just wanted to address that.

50 They spoke about damage to the reputation of the Court, what happened in
February. Let's be realistic, I'm the self-represented litigant, I did not make the

allegation they said in relation to Hoeben CJ at CL. I put an opinion on the table and I should ..(not transcribable).. all lawyers and barristers they wouldn't have gone home and said, a self-represented litigant said this and it must be true. No, they wouldn't have done that. They would have seen it for what it is,
5 a self-represented litigant in a - I don't know if they know the advice - within the Court or don't. They would have seen a self-represented litigant getting pissed off.

10 And there's a number of judges within this Court I don't like but for whatever reason even if I'm in front of them I don't like Ian Harrison but when I'm in front of him we don't get in an intending brawl or argument, for example. But I do not like Registrar Bradford and I've asked him to move it politely, as you've seen last year and he just ignored me and he goes on to give the applicants whatever they want. So I don't believe any damage would have been done to
15 the reputation but even if it was, once again, a plea for communication as per Lange v ABC(?).

I just wanted to raise this issue and it's part of my article in relation to, a recent article in relation to police - complaint to the Federal Police. I don't know
20 whether it's something that you can deal with or whether it's relevant but I thought I'd just waive it. If it's not, so be it and I raised it as part of a complaint back in I think it was February and I got all the details within that article.

I received a phone call late at night after 8 o'clock from someone who was
25 purporting to be from the Solicitor-General, he was the Crown Solicitor, threatening me with incarceration if I didn't take down the videos in relation to Registrar Bradford.

Now, without getting into the details, I haven't gone them in front of me - I took
30 those notes that night, remember, and they're fairly accurate, well, very accurate but the gist of the conversation was Registrar Bradford wasn't happy and if I don't take down those videos he's - will have me incarcerated. I'm not accusing anyone of doing that. Someone did it, that's a fact but in my mind it'd be pretty stupid of it for - to have actually been just under Registrar Bradford, it
35 could quite possibly be someone else.

I just thought I'd raise it. I'd raised it in another point too. Your Honour - said to me before in relation to the allegation do I make complaints to the relevant
40 authorities, well I do. I made a complaint to the Federal Police on a number of issues in that recent article and I'm also fully aware making false complaints is a criminal offence. So when I make the complaints I don't make them lightly and I believe in them. I've never had any authority accuse me of making a false complaint.

45 That's pretty well it now. The other two are just administrative issues. I maybe deal with them now?

Some of the stuff I've only been handed today so I was hoping or maybe an
50 extension to maybe file written submissions, maybe a few days or a week or something and they'll in - Rothman J gave me permission last week. He had

contempt - not contempt, a defamation matter last week, Monday, and he gave me some time to ..(not transcribable).. a number of affidavit and that on that day and so I was given extra time to write(?) - through the submissions if I wanted.

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And last thing, I generally don't show up to judgments so I probably won't be at your judgment because I actually have to work another job. Everyone else gets paid, I don't, and that this cost me a fair bit of money to come to court and I know judgments are normally over in five minutes anyhow. And so in relation to that could I be emailed the judgment?

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HER HONOUR: Yes, of course. Mr Crown.

KELL: If I could be relatively brief. Subject to one matter that may impact on your Honour's procedures which I'll deal with in a minute, the substantive matters are set out in the submissions document which is in the folder that's been provided. And I'll just speak very generally about a couple of matters just by way of response. These contempt proceedings are not about Mr Dowling's, they're not in any substantive or direct way about Mr Dowling's website, his Kangaroo Court website and his views that he professes there. These proceedings arose from allegations and comments that Mr Dowling made in open court on 3 February before numerous people and it's a charge of scandalising the Court from those statements that were made.

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And they're not statements by people - they're not people that have gone to a website and taken a view or know that Mr Dowling might have written something six months ago and the question of contempt is viewed by reference to the objective tendency of conduct and what happened on 3 February was that a person, Mr Dowling, went into a courtroom and made allegations which are completely indefensible and baseless about a Registrar and a judge of this Court.

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He did so in a tone that your Honour has heard on the audio recording which was loud, hostile and aggressive. He said a couple of times in his submissions today of his response that, well, he said, "I wasn't calling Hoeben CJ at CL a paedophile, I was calling him a grub."

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Well if your Honour does to the business of the recording goes to the transcript that p 3 of Mr Keagan's annexure, he says, after referring to Hoeben CJ at CL having given a paedophile priest three months gaol, this is at p 3 at line 11 to 12, "Who gives the paedophile priest three months gaol, only another paedophile, that's Clifton Hoeben for you." I mean that can only be taken by the observer and the person there as being an allegation, as it was, baseless, groundless allegation that Hoeben CJ at CL was paedophile. Notwithstanding what Mr Dowling said, it can't sensibly be taken any other way.

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And similarly, he said of Registrar Bradford, "It's taken out of context, I didn't call him a paedophile, I called him a suspected paedophile". It's a degree of difference which is meaningless in the context. Either allegation is in my submission clearly scurrilous abuse, contemptuous. It's a groundless,

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baseless statement made in open court. And similarly, the reference to the Registrar being a known bride taker and the like, that the statements which are indefensible.

5 Mr Dowling's history of previous communications in his website might conceivable be a matter that, if your Honour gets to it, has some relevance to penalty as part of his objective circumstances arguably. In my submission they don't in any way go to the question of whether the contempt is made out.

10 And similarly, the courts 2 and 3 involve breaches of suppression orders made by this Court but they are orders which are orders of a superior court which are assumed to be valid unless and until such time as some person moves to set them aside. They were valid in forceful orders of this Court at the time when the alleged contempt took place.

15 In the submissions documents that I've provided your Honour I do want to draw your attention to and I mentioned it earlier, there is one issue of construction of order 1 of Beech-Jones J's order and I've referred to that or we've referred to it in page 1 at footnote 2.

20 HER HONOUR: I'm assuming it's more than a one page document because that's all that's in the working folder.

KELL: A one page document? Yes.

25 HER HONOUR: We've just got page 1.

KELL: All right, I'll just hand up, so it was provided to Mr Dowling. It's a ten page document and I'll just hand up a further working copy which is unmarked.

30 Paragraph 1 of the orders is in footnote 2 makes reference to, it uses language a double negative - well it's effectively a double negative - except without leave of the Court until further order and we say that in context the order, including its reference to, except without leave of the Court, is clearly intended to be and is a reference to a prohibition against disclosure unless permitted by the Court and the order cannot sensibly be construed otherwise and hasn't been suggested by Mr Dowling or taken to be any other way.

40 And then we say also that it would be a nonsensical construction to suggest that the order prohibited disclosure of the contents with leave of the Court and, indeed, permitted such disclosure only on the proviso that leave was not given.

45 So as your Honour would be aware and some context comes up in Land and Environment cases where an order could arguably be viewed as two possible constructions and a defendant may have adopted a course in respect of one. That raises an issue in a contempt prosecution. In my submission this is an order that can only sensibly be construed in one way and we've given reference to the authorities and the footnotes there. So I just want to draw that to your Honour's attention.

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Mr Dowling made reference a couple of times to a judgment of Harrison J, a recent judgment dealing with contempt and his Honour in that judgment did refer to some principles. I haven't got a copy on me but I will just give your Honour the reference to it if I may?

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HER HONOUR: Yes.

KELL: Doe v Dowling [2017] NSWSC 202 and it's a judgment of 15 March 2017, a recent judgment.

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HER HONOUR: All right, it's easy enough for me to get.

KELL: Then I think that early on I mentioned that we could hand up a document that just indicated the alterations or the slight amendments in the transcript?

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HER HONOUR: Yes.

KELL: If I could just do that, and perhaps if your Honour could receive just as an MFI, it's in the nature of an aide memoire.

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HER HONOUR: Yes certainly, thank you.

KELL: There's no significant issues arising?

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HER HONOUR: No.

MFI #1 TRANSCRIPT OF DOE v DOWLING JUDGMENT OF HARRISON J,
DATED 15/3/17

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KELL: Your Honour at one point Mr Dowling made a statement that my junior I think had engaged in some misleading conduct at a directions hearing. That's totally rejected, it's baseless and there's no merit in it and it shouldn't have been made in my submission.

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The matter that I wanted to end on, which may affect matters procedurally is that we've received Mr Dowling's submissions at the same time as your Honour did. It occurred to us over lunch and we haven't had time to think as deeply about it as we'd want, but whether it raises a section 78B issue. I just hand up a copy of 78B, it's capital B of the Judiciary Act. I just give my friend a copy as well.

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And setting out at B1 which is on the second page. Of course where a matter arising under the constitution or involving its interpretation there's a duty on the Court not to proceed unless and until notices are arranged to be served on the Attorney's General and a reasonable time has elapsed since the giving of the notice.

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Mr Dowling has in his written document and to some extent in his oral submissions but I think I would like to look at the transcript has made some

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submissions based I think in part on references to Lange and the like. On our sort of quickened analysis and review of them they don't seem to be arguments that have merit but that's a separate question from whether the Court needs to pause.

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And your Honour will be planning to reserve in any event. I just wonder if we could have the opportunity to consider that with the transcript in the next week and just perhaps communicate with your Honour's Associate and copy Mr Dowling as to whether we having reviewed that and considered it whether we are of the view that your Honour would make a direction about section 78B notices being issued?

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HER HONOUR: Well Mr Dowling was asking for some additional time in case he wished to respond to anything in the material by today. So I could set a timetable for Mr Dowling to provide anything within the next week or fortnight and then for the Crown to take the same period of time and it could then be, deal with that issue.

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KELL: Yes and I should indicate that, other than the sound recording and when he - Ms Moore's affidavit my understanding--

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HER HONOUR: There's nothing substantial I think.

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KELL: No, my understanding was that the material had previously been served on Mr Dowling and certainly the bulk of it was served but on or before 6 April. But I accept what your Honour says. Those are the matters I wanted to raise your Honour.

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HER HONOUR: All right, thanks Mr Crown. Mr Dowling did you want to be further heard?

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RESPONDENT: There are just three things, your Honour, quickly. Once again my learned friend referred to Mrs Keegan's affidavit. That should all be struck out because it cuts off the transcript at a favourable time to the prosecutors and he did that when he read it out, he didn't read out the full transcript. He said word to the effect, I said the only people I know who give the paedophile priest pretty much know - as another paedophile. "That's Justice Hoeben for you" - the next part it - "That's Justice Hoeben for you, he's an absolute grub."

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HER HONOUR: But I've got the full transcript though.

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RESPONDENT: Yeah, he was trying to make out that people would only hear that and jump to the conclusion I said he was a paedophile. If you hear the lot you hear me saying, that's what their - would hear me say that he's a grub not a paedophile.

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He said the suppression orders and how they're not valid - I mean how they're valid. If you look at something like Colman v Power that was in relation to the Vagrancy Act and went to the High Court and they said, no it wasn't valid, the

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5 police shouldn't have charged him, they had no authority to charge him because all was ..(not transcribable).. the same as suppression orders. That's why I'm asking you to determine, you know, you can't be in contempt of court for breaching those suppression orders because they shouldn't never have been issued anyhow.

10 But even if they weren't politic of communication I've asked a number of times and I just keep on getting knocked back for an opportunity to argue that they are invalid based on that Act and one way I see, you mentioned Justice Harrison.

15 That's where it becomes problematic. Justice Harrison found me guilty but there has been no sentencing hearing. The reason there's no sentencing hearing ..(not transcribable).. he had to wait for Justice McCallum to tell him whether the suppression orders - he found me guilty on breaching suppression orders. Now we have to wait for Justice McCallum to determine if the suppression orders should have been issued in the first place and if they shouldn't have been issued Justice Harrison said, quite rightly, that would have an impact on whether I need a penalty and as far as I can see that should
20 have had an impact on whether I was found guilty or not but he didn't see it that way. But he certainly said in his judgment that'll have an impact on any penalty. So at some stage - no, I just wanted to make that point.

25 Just one last thing on the constitutional issues that my learned friend raised. I assume you're going to notify the Attorney General's or, you know--

HER HONOUR: Not necessarily but I'll give the Crown an opportunity to consider that.

30 KELL: Your Honour sorry, I just want to briefly raise a procedural matter that if Mr Dowling's given an opportunity we don't oppose to provide written submissions or some submission. Could we have the opportunity for--

35 HER HONOUR: Of course.

KELL: We may not need to take it but I'm just not sure what he's going to say. Thank you.

40 HIS HONOUR: No, no, I understand that of course. I'd always make it for both parties, never just one.

45 RESPONDENT: I don't know if I'll say anything but I know Justice Rothman, Rothman is it, Justice Rothman. He gave me an opportunity I thought I wouldn't say anything and abstain - ten pages of it.

50 HER HONOUR: All right, I'm forewarned then. Let's me, today's the fourth. What if we said any further submission from Mr Dowling by close of business on 15 May. So filed and served on 15 May and anything further from the Crown by close of business on 26 May and the Crown would also obviously take that time to consider the 78B issue.

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RESPONDENT: Can I file and serve to your associate, just email and email the other?

5 HER HONOUR: Yes. All right, if Crown's content with that? Well, I'll obviously reserve judgment until the time after 26 May but I give liberty to the parties to file and serve any additional submissions.

10 Mr Dowling is to file and serve any further written submissions by close of business on 15 May 2017 and provision of the pending material by email will be satisfactory. The Crown is to file and serve any material further submissions it wishes to provide by close of business on 26 May 2017 including any submission as to the application of section 78B of the Judiciary Act 1903.

15 I think that's all the orders I need to make. Mr Crown is there anything you can think of I need to make?

20 KELL: No, your Honour, we'll be interested for the 78B notice to obtain a transcript but I don't understand that your Honour needs to make any direction for that.

25 HER HONOUR: No, they're generally ready very quickly so I think they should be available within the next couple of days at the latest. All right, I thank the parties for their assistance. Court will adjourn.

JUDGMENT RESERVED