Common Law Division
Supreme Court
New South Wales

Case Name:	Prothonotary of the Supreme Court of New South Wales v Shane Dowling (No 4)
Medium Neutral Citation:	[2018] NSWSC 785
Hearing Date(s):	28 May 2018
Date of Orders:	28 May 2018
Date of Decision:	28 May 2018
Jurisdiction:	Common Law
Before:	Lonergan J
Decision:	I decline to lift the suppression orders made by Justice Beech-Jones on 3 and 8 February 2017 and Justice Adamson on 6 April 2017.
Catchwords:	CONTEMPT – where allegations constituted contempt – where suppression order exists over allegations – application to lift suppression order – whether subject material in public domain – public interest
Legislation Cited:	*Court Suppression and Non-publication Orders Act* ss 6, 7, 8
Cases Cited:	*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 *Prothonotary of the Supreme Court of New South Wales v Shane Dowling (No 3)* [2018] NSWSC 784 *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403
Category:	Procedural and other rulings
Parties:	Prothonotary of the Supreme Court of New South Wales (Plaintiff) Shane Francis Dowling (Defendant)
Representation:	Counsel: A Mitchelmore (Plaintiff) Defendant, self-represented

	Solicitors: Crown Solicitors Office (Plaintiff)
File Number(s):	2017/94322
Publication Restriction:	Pursuant to an order of this Court, the content of such parts of the Affidavit of Brett Frederick Thomson filed in Court that are the subject of existing suppression orders made by Beech-Jones J on 3 February 2017 and 8 February 2017 and Justice Adamson on 6 April 2017 are suppressed.

EX TEMPORE JUDGMENT

1 Listed before me today as Duty Judge is an application by the defendant for lifting of suppression orders made previously in these proceedings on 3 and 8 February 2017 by Beech-Jones J and 7 April 2017 by Adamson J.

2 The application was referred to me by order of Wilson J on 26 March 2018 and is part of a Notice of Motion filed by the defendant in November 2017.

3 The Notice of Motion filed in November 2017 was accompanied by an affidavit of the defendant sworn 21 November 2017. The defendant applicant relies on the contents of that affidavit by way of evidence and submissions in support of his application to have all the suppression orders made in the proceedings lifted.

4 He also relies upon a further affidavit filed in court today pursuant to leave sworn 25 May 2018. That affidavit annexes various documents that Mr Dowling took me to during oral argument.

5 The defendant also relied upon a bundle of documents called "Extra Documents For Submissions", which related to police charges against him, which were withdrawn formally in late March 2018. The defendant made particular submissions about these documents as well, to which I will return.

6 The respondent plaintiff relied on an affidavit of Brett Thomson sworn 25 May 2018, to which suppression orders now apply pursuant to the order I made under the *Court Suppression and Non-publication Orders Act*. I made that order upon the application of the plaintiff respondent, in order to ensure that the non-publication orders already in place have a consistent corresponding non-publication order relating to some of the material in Mr Thomson's affidavit, over which the previous non-publication orders apply and continue to apply pending further order of this court. (There is a separate judgment setting out my reasons for making this order: *Prothonotary of the Supreme Court of New South Wales v Shane Dowling (No 3)* [2018] NSWSC 784).

7 The defendant, who appeared for himself, articulated a number of grounds for the orders that he seeks. He made clear oral submissions that were able to be distilled into a number of key issues and I will address those in turn.

Applicant defendant's submissions

8 First, the defendant argued that the judgment of Beech-Jones J of 8 February has been published, both in Caselaw and AustLII and is thus able to be reviewed by members of the public. He argued that by virtue of that publication, the content of the material over which the suppression orders apply is available to the public. In particular, the name of a Registrar referred to in the suppressed material is published in Beech-Jones J's judgment. He also argued, ancillary to this point, that if a person wishes to look at the defendant's website and then look at Beech-Jones J's judgment it will be obvious who and what is being referred to. He argued that as a result, the non-publication and suppression orders in place are futile because this material is already in the public domain.

9 Second, the New South Wales Police were initially requested to investigate the allegations relating to the contempt charges and this was then passed on to the Commonwealth DPP and charges were laid against the defendant for "use carriage service to menace, harass and offend". Those charges were formally withdrawn on 28 March 2018.

10 The defendant argued that in addition to those organisations being made aware of the content of the suppressed material, he had not been requested to take the material down from his website. No action had been taken directly against him in relation to that. He said that police withdrawing the charge was, in effect, providing a type of "consent" to the publication of the information naming all the persons concerned, which included 18 judicial officers, comprising 15 judges, one magistrate and two registrars.

11 The third key point was based on an argument around the statements of the New South Wales Court of Appeal in *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403, in which the Court of Appeal made it clear in [27]

that the legislative intention of the *Court Suppression and Non-publication Orders Act* was that orders should only be made in exceptional circumstances. The defendant argued that what this means is that consideration needs to be given as to whether there are exceptional circumstances here, and he submitted that they were not exceptional circumstances. There were simply allegations about judges that ought to "dealt with" in open court.

12 The next matter raised was one of public interest. The *Court Suppression and Non-publication Orders Act* in s 6 stresses that any court, in deciding whether to make a suppression order or non-publication order, must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The defendant's submission in respect of that was that there is clearly a strong public interest in respect of safety of children and the *Royal Commission into the Institutional Responses to Child Sexual Abuse* made many statements in that regard. He argued that there is a basis upon which observers may take the view that this court has "covered up" such allegations.

13 There was an observation made independently of this that if any higher court "looked at" the suppression orders that had been made, that it is likely that such a court would take the view that those orders should be lifted.

14 Finally, the defendant submitted that it is embarrassing for this court to have suppression orders over what is, in effect, "its own case" in respect of allegations against judicial officers.

Respondent plaintiff's submissions

15 In response, Ms Mitchelmore, who appears on behalf of the plaintiff, raised arguments contesting each of these points.

16 In relation to the first point regarding publication of the 8 February judgment on Caselaw and AustLII, Ms Mitchelmore argued that this does not disclose the content of the allegations and does not make reference to any named

judges of this court. She submitted that the information on the website conducted by the defendant is separate material to that which is subject to the suppression orders.

17 Ms Mitchelmore provided context for the orders made by Beech-Jones J. Events in a Registrar's List on 3 February 2017 involved the Defendant making groundless, vexatious and scurrilous allegations which were quickly conveyed to the Duty Judge and orders made to suppress those matters on that day. Subsequently, the matter was formally dealt with on 8 February 2017. Formal orders made on 8 February were also in response to publications by the defendant on his website that were in contravention of the orders made on 3 February 2017.

18 Ms Mitchelmore argued that a combination of the judgment of 8 February of Beech-Jones J and material on the website being read together may allow a person to "guess" what allegations are in the suppressed material is not sufficient to argue that it is futile to maintain the suppression orders.

19 It was emphasised that matters still present on the website remained there, despite a number of requests to take that material down.

20 The orders made by Beech-Jones J and Adamson J were made in order to protect the interests of justice and, in particular in this regard, to ameliorate against the contempt that had been committed by the defendant on 3 February 2017 and following.

21 In respect of the allegations that the police did not pursue their proposed prosecution against the defendant, Ms Mitchelmore submitted that the charges were of a different nature and a different issue to that before this court to which the suppression orders apply. There is no available inference that the allegations that were the subject of the email were true, or are in any way protected by the type of protections provided by *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25, that is freedom of communication issues.

Decision

22 I accept the submissions made by Ms Mitchelmore in response to the futility argument. I am of the view that the bases of the orders made by Beech-Jones J and Adamson J and the rationale behind them, namely to ameliorate the contempt, are entirely proper bases for the orders made and the considerations and reasoning behind those orders remain as valid today as they did then. The published judgment does not disclose the content of the protected material.

23 I accept the submissions made by Ms Mitchelmore regarding the withdrawal of charges by the Federal Police. This makes no difference to my determination of the question of whether suppression orders ought to be lifted. I reject all the arguments made by the defendant in regard to this issue.

24 In terms of the legal principles set out in *Rinehart* and the objects and powers under the *Court Suppression and Non-publication Orders Act*, I accept the submissions made by Ms Mitchelmore which emphasised the contents of [40] of *Rinehart* and, in particular, the need for orders to be made which are necessary for the proper function of a court.

25 I accept Ms Mitchelmore's argument that in this particular case, based on the decisions of Beech-Jones J, both on 3 February and 8 February, the test he applied was in reference to the administration of justice and the circumstances which arose on 3 February, where court processes were used to make baseless allegations against judicial officers.

26 I am satisfied that both sections 7 and 8 provide bases for the orders having been made, and that they were properly made at the time, and that the same considerations and protection of the interests of justice and the administration of justice being safeguarded, continue to apply today.

27 In response to the allegations about the public interest issue, the same considerations apply, as found by Beech-Jones J on 3 February. The allegations made were "scandalous and groundless". Public interest in the

significant work of the Royal Commission has no bearing on this application and the suppression orders made to address the prejudice to administration of justice in the management of matters before this court.

28 The observation regarding a Court of Appeal taking the view that the suppression orders should be withdrawn is a matter for such court or courts at a later time and I make no comment in that regard.

29 In respect of the submission regarding the assertion that this court is placed in an embarrassing position for placing suppression orders over what is, in effect, an allegation against this court, Ms Mitchelmore argued that is a misconceived submission. I agree. The suppression orders relate to the contempt proceedings brought by the Prothonotary on behalf of the court against the defendant. The administration of justice being protected by the suppression orders made is in the nature of an amelioration of the contempt by the defendant and its effect.

30 That is clearly a proper basis for those orders. I see no basis for those suppression orders to be lifted.

31 It was submitted by Ms Mitchelmore that the strength of the bases of those orders has been increased by the finding of Wilson J that the charge of contempt has been proven. The defendant stated that really the position had become weaker over time because there was a longer period during which, what he described as being, "all the necessary material" or "relevant material", was "out there in the public domain".

32 I do not accept the defendant's submission in that regard. I accept Ms Mitchelmore's submission regarding the basis for the necessity of the suppression orders made having been strengthened by the finding of contempt against the defendant. I accept and agree that amelioration of the contempt is an appropriate basis upon which the suppression orders were made and an appropriate basis upon which they should continue and that is and continues to be, to protect the administration of justice.

33 I have carefully considered the submissions made by the defendant and those made in reply on behalf of the plaintiff. I have formed the view that the suppression orders currently in place should not be lifted.

Orders

34 I decline to lift the suppression orders made by Justice Beech-Jones on 3 and 8 February 2017 and Justice Adamson on 6 April 2017.

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I certify that this and the 8 preceding pages are a true copy of the reasons for judgment herein of Justice Lonergan.

Dated: 30.5.18

Associate: G Villam