

2018//274662

In the Supreme Court of New South Wales

Paul Robert Burton

v

The Local Court of NSW

The Crown Solicitor

██████████

Submissions on behalf of the second and third defendants

The Summons

The plaintiff seeks relief by way of a Summons filed 27 August 2018. The orders sought in the Summons are:

1. An order that the matter be remitted back to the first defendant to give reasons for the decision according to law;
2. Costs;
3. Any other orders the Court deems fit to make.

The decision complained of is a decision of Magistrate Bugden made in the Newcastle Local Court on 27 July 2018. In essence, the plaintiff asserts that his Honour made an error of law in failing to give adequate reasons.

Accordingly, it appears the plaintiff seeks an order under s. 69 of the *Supreme Court Act 1970* in the nature of certiorari quashing the decision and remitting the matter to the Local Court at Newcastle for determination.

Background

The plaintiff, Paul Robert Burton, commenced a private prosecution in the Newcastle Local Court in July 2018 by the issue of a Court Attendance Notice. The Court Attendance Notice named ██████████ as the defendant.¹

As ██████████ is an employee of the Department of Family and Community Services ("FACS") and the allegation arose in the course of her employment, the Crown Solicitor was engaged on her behalf to provide representation pursuant to a grant of Crown Representation.

On 19 June 2018 the plaintiff filed a Notice of Motion in the Local Court proceedings seeking the following orders;

- 1* An order that the Crown Solicitor does not have the right of appearance in the matter of Burton v ██████████;
2. Any other order the Court sees fit to make².

¹ See Annexure A to the affidavit of Brett Thomson 30 October 2018 pages 4 ~1.

The Notice of Motion was supported by an affidavit of Paul Robert Burton, which included a document headed "Reasons in Support of Notice of Motion".

In reply the Crown Solicitor relied upon written submissions.⁴ Those submissions distilled the issues raised in the plaintiff's Notice of Motion under a number of subheadings, and then dealt with the arguments against each of them.

The Motion came before Magistrate for hearing on 27 July 2018. (The transcript of the hearing is annexed to the affidavit of Brett Thomson and appears as "Annexure E" at page 57). The matter was briefly mentioned, then stood in the list. His Honour then came onto the bench and commenced to summarise the arguments of each of the parties; see transcript at page 3 and following.

At page 10 of the transcript, having summarized the position of the parties, his Honour states I have carefully considered all of Mr Burton's submissions. I have carefully considered Mr Thomson's submissions" (transcript at p. 10).

His Honour then expresses his reasons as follows (transcript at p. 10);

"They are the matters before the Court. I have carefully outlined those matters for the court record, for the people in the court, and for the purpose of my being able to now give a decision in the proceedings. It is clear from the documents and I indicated from the outset that I thought that Mr Burton's submissions, a lot of the factual matters are not in dispute with what Mr Thomson says, are rather eloquently prepared, and they stray a little from the issue that I have to decide today. There is reference to the way the systems works in itself; the collusion, for example, between different judicial bodies.

When I consider everything that Mr Burton has set out, when I consider all of the material and Mr Thomson's submissions, I am against you Mr Burton. I do not believe that there is any collusion between the bodies. I do not believe that there is any reason that the State Crown solicitor should be denied the opportunity to act in these proceedings. ACCORDINGLY I DISMISS THE MOTION."

The obligation to give adequate reasons

The High Court recently discussed the obligation to give reasons in the decision of *DL v The Queen* [2018] HCA 26. In the majority judgment of Kiefel CJ, Keane and Edelman JJ (dismissing the appeal) it was stated that the content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular subject matter of the decision".⁵

Whilst accepting that reasons will not be inadequate merely because they fail to undertake a minute explanation of every step in the reasoning process that leads to the judge's conclusion, their Honours set out what those reasons would require.

"Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution

¹ Thomson affidavit at p. 8

² Thomson affidavit at p. 43

⁴ See Annexure D to the Thomson affidavit pp. 49- 56

⁵ [2018] HCA at [32] citing *Wainohu v New South Wales* (2011) 243 CLR 181 at 215

arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed."⁶

Later in the decision Nettle J stated at [130] (omitting footnotes):

"As early as 1947, the Supreme Court of New South Wales, in a judgment delivered by Jordan CJ, stated in *Carlson v King* that a court of first instance from which an appeal lies to a higher court had a duty "to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision." A plethora of cases since then has established that, although the extent of reasons may depend on the circumstances of the case, reasons must identify the relevant principles of law, refer to relevant evidence, state the judge's findings upon material questions of fact and provide an explanation for those findings and the ultimate conclusions reached by the judge."

Later his Honour went on to state at [131] (omitting footnotes):

"Similarly, while a judge is not required to deal with every argument and issue that might arise in the course of a trial, if a party raises a substantial argument which the judge rejects, the judge should refer to it and assign reasons for its rejection. And in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that conclusion. Failure sufficiently to expose the path of reasoning is therefore an error of law."

Application to the present case

Applying the above principles to the current case, regrettably, the defendants concede that the reasons provided by his Honour were inadequate. It is perhaps understandable given the somewhat untenable propositions put forward by the plaintiff that his Honour may have felt they were self-evidently unmeritorious not to require elaborate explanation.

Many of the arguments advanced by the plaintiff were not supported by evidence, and probably could be disposed of fairly shortly as nothing more than assertions.

However, given that a number of the issues raised by the plaintiff involved the operation of legislation and legal principles, it is conceded that the reasons given did not adequately engage with those issues.

Relief

The second and third defendants accept that it would be open to the court to grant the relief sought, and remit the matter to the Local Court for determination.

Brett Thomson

Special Counsel

Crown Solicitor's Office

⁶ (2018] HCA 26 at 33 citing *AK v Western Australia* [2008] HCA 8; (2008) 232 CLR 438 at 468