HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C3 OF 2024**

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

NO C4 OF 2024

BETWEEN: **HIS HONOUR JUDGE SALVATORE PAUL VASTA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S24 OF 2024**

BETWEEN: **STATE OF QUEENSLAND**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE COMMONWEALTH

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Issue 1: The contempt orders were valid until set aside (CS [12]-[32], CR [2]-[9])

2. Orders of an inferior court that are affected by jurisdictional error are, generally, void *ab initio*. However, Parliament may provide that the orders of an inferior court are, in some circumstances, to have the same characteristics as those of a superior court: see, eg, *Day* (1984) 153 CLR 475 at 479 (**Vol 3, Tab 26**).

3. Section 17(1) of the *Federal Circuit Court of Australia Act 1999* (Cth) (**Vol 1, Tab 4**) conferred upon the Circuit Court the "same power" to punish contempts as is possessed by this Court. As a provision conferring power on a Court, s 17(1) should be read as broadly as the text and context permit, and without unexpressed limitations. So read, s 17(1) had the consequence not just that the Circuit Court could punish the same categories of contempt as can be punished by this Court, but also that, if it did so, its orders had the same characteristics as orders punishing contempt made by this Court.

4. Parts XIIIA and XIIIB are not a "complete code" for dealing with contempt in family law proceedings (cf CAB 279 [93], 281 [97], 345 [356]): *Family Law Act 1975* (Cth), ss 35, 112AD, 112AE, 112AP (**Vol 1, Tab 3**). Those Parts limited the Circuit Court's contempt powers, and if contravened provided grounds on which its orders might be set aside on appeal. However, they say nothing about whether contempt orders are binding until set aside. If they did, then contempt orders made by the Family Court (a superior court) would not have been binding until set aside: cf CAB 279 [93]-[94]; RS [41].

Issue 2: Judge Vasta was protected by judicial immunity (CS [49]-[74], CR [10]-[22])

5. The primary judge held that an inferior court judge has no immunity from civil liability, even when the judge has subject-matter jurisdiction, if there are "exceptional circumstances": CAB 342-343 [342]-[346]. That involved error for two reasons.

6. *First*, at least since *Sirros v Moore* [1975] QB 118 at 132-136, 146-149 (**Vol 7, Tab 94**), the common law of Australia has not recognised a distinction between the civil immunity of superior and inferior court judges. The Australian authorities hold that judges enjoy immunity from civil suit with respect to acts done in the exercise of their judicial function or capacity, without drawing any distinction between superior and inferior court judges.

Such a distinction is particularly inapposite in Australia, where no courts are courts of unlimited jurisdiction: *Kable* (2013) 252 CLR 118 (**Vol 4, Tab 33**).

- *Durack* (unreported, High Court of Australia, 13 April 1981) (**Vol 6, Tab 53**)
- *Gallo* (1988) 63 ALJR 121 (**Vol 6, Tab 55**)
- *Gallo* (1992) 66 ALJR 859 (**Vol 6, Tab 57**)
- *Re East* (1998) 196 CLR 354 at [28]-[30] (**Vol 5, Tab 39**)
- *Fingleton* (2005) 227 CLR 166 at [34]-[40], [124], [137] (**Vol 3, Tab 29**)
- *Rajski* (1987) 11 NSWLR 522 at 538-539 (**Vol 7, Tab 89**).

7. *Second*, and alternatively, even if the common law of Australia does continue to draw a distinction between the civil immunity of superior and inferior court judges, inferior court judges enjoy absolute immunity with respect to matters within their jurisdiction. An inferior court has jurisdiction for this purpose if it has authority to make decisions regarding a particular subject-matter, person or place: *Nakhla* [1978] 1 NZLR 291 at 300-301 (**Vol 7, Tab 74**). "Jurisdiction" in the sense relevant to judicial immunity is not lost if a court makes a "jurisdictional error" in purporting to exercise its jurisdiction: *In re McC* [1985] 1 AC 528 at 542. The Australian cases provide no support for denying immunity to an inferior court judge for acts within jurisdiction if there are "exceptional circumstances".

8. The primary judge's reliance on *In re McC* [1985] 1 AC 528 at 535-537, 541-547 (**Vol 6, Tab 64**) was misplaced: cf CAB 321 [254], 343 [345]-[346]. That case turned on a statutory immunity provision which prevented reliance on the common law as stated in *Sirros*. It has no bearing on the common law of Australia.

Issue 3: The common law defence applied to MSS Guards (CS [33]-[48], CR [23]-[30])

9. The primary judge held that an enforcing official would be liable for false imprisonment when acting in the ordinary course of their duties to enforce apparently valid orders of an inferior court: any defence to such a claim excluded police and gaolers and was limited only to so-called "ministerial officers" of the court itself: CAB 384-385 [515]-[517].

10. This conclusion was wrong and arose from errors as to the operation and discernment of the common law. *First*, it was not necessary to find "unequivocal" authority for the defence: the common law is not tidy, but messiness does not deny its existence: *Mann* (2019) 267 CLR 560 at [84], [199]. *Second*, it was wrong to take centuries-old statements about the conservators of the King's peace and to apply them directly to the contemporary Australian legal context: *Scott* (1956) 102 CLR 392 at 447-448, 454-455. *Third*, it was an error to see the common law as having been proven, or stifled, by the *Constables*

Protection Act 1750 (Imp); this ignored the symbiotic relationship between common law and statute: *Esso* (1999) 201 CLR 49 at [19]. The primary judge should have held that it is a defence to the tort of false imprisonment if a person was acting to enforce or execute a judicial order in accordance with their duties, unless the person knew the order was invalid.

11. The older English authorities show that the defence could cover police, gaolers and others who were not within the primary judge's category of "ministerial officers": eg *Olliet v Bessey* (1682) 84 ER 1223 (**Vol 7, Tab 76**). While some cases did apply the defence to "ministerial officers", those cases did not exclude its broader operation: eg *Moravia v* 10 *Sloper* (1737) 125 ER 1039 at 1044 (**Vol 6, Tab 71**); *Andrews v Marris* (1841) 113 ER 1030. The common law operated alongside the *Constables Protection Act 1750* (Imp) (**Vol 2, Tab 11**). The same common law protection was sufficiently broad to cover garnishees: *London v Cox* (1867) LR 2 HL 239 (**Vol 6, Tab 70**).

12. The Australian authorities follow these English authorities, and to similarly broad effect. The Australian decisions confirm that the common law defence extends to persons like police and gaolers whose duties involve giving effect to the orders of a court. Those decisions nowhere suggest that the defence is limited to "ministerial officers".

- *Mooney* (1905) 3 CLR 221 at 241 (**Vol 4, Tab 32**)
- *Smith v Collis* (1910) 10 SR (NSW) 800 at 813, 815, 817 (**Vol 7, Tab 96**)
- 20 *Cavanough* (1935) 53 CLR 220 at 225, 227 (**Vol 3, Tab 22**)
- *Ward v Murphy* (1937) 38 SR (NSW) 85 at 94-99 (**Vol 7, Tab 101**)
- *Posner* (1946) 74 CLR 461 at 476, 481-482 (**Vol 4, Tab 37**)
- *Robertson* (1997) 92 A Crim R 115 at 124-125 (**Vol 7, Tab 90**)
- *Kable* (2012) 268 FLR 1 at [22], [35], [40], [48] (**Vol 6, Tab 65**).

13. This common law defence is recognised as being important to the integrity of the judicial process. It also avoids the absurdity and incoherence which would arise from requiring officials to disregard the apparently valid orders of an inferior court.

14. The MSS Guards were in relevantly the same position as police and gaolers, and so were entitled to rely on the defence: CS [46]-[47].

30 Dated: 14 August 2024

Stephen Donaghue | Tim Begbie | David Hume | Olivia Ronan