

NEW SOUTH WALES SUPREME COURT

CITATION:

Constable Redman v Willcocks [2010] NSWSC 1268

JURISDICTION:
COMMON LAW

FILE NUMBER(S):
2010/047730

HEARING DATE(S):
2 November 2010

JUDGMENT DATE:
29 November 2010

PARTIES:
Constable Shane Redman (Plaintiff)
Andrew Willcocks (First Defendant)
The Honourable Elizabeth Ellis LCM (Second Defendant)

JUDGMENT OF:
Davies J

LOWER COURT JURISDICTION:
Local Court

LOWER COURT FILE NUMBER(S):
2009/00029389

LOWER COURT JUDICIAL OFFICER:
Ellis LCM

LOWER COURT DATE OF DECISION:
27 January 2010

COUNSEL:
R Ranken (Plaintiff)
C Steirn SC & B Rosic (First Defendant)
Submitting appearance (Second Defendant)

SOLICITORS:
Crown Solicitor's Office (Plaintiff)
Craddock Murray Neumann (First Defendants)
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CATCHWORDS:

ADMINISTRATIVE LAW - prerogative writs and orders - certiorari - proceedings before the Local Court for Apprehended Violence Order - application withdrawn by police officer making application - whether Magistrate had the power to order costs - procedural misconduct by police officer.

LEGISLATION CITED:

Crimes Act 1900
Crimes Amendment (Apprehended Violence) Act 1999
Crimes Amendment (Apprehended Violence) Act 2006
Crimes (Domestic and Personal Violence) Act 2007
Criminal Procedure Act 1986
Justices Act 1902
Supreme Court Act 1970

CATEGORY:

Principal judgment

CASES CITED:

John Fairfax Publications Pty Ltd v Ryde Local Court [2005] NSWCA 101; (2005) 62 NSWLR 512

TEXTS CITED:

DECISION:

(1) The summons is dismissed. (2) The Plaintiff is to pay the Defendant's costs of the proceedings.

JUDGMENT:

- 1 -

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION**

DAVIES J

29 NOVEMBER 2010

2010/047730

CONSTABLE REDMAN V WILLCOCKS

JUDGMENT

1 On 11 September 2009 Constable Shane Redman filed an application for an Apprehended Domestic Violence Order in relation to Andrew Willcocks pursuant to the *Crimes (Domestic and Personal Violence) Act 2007*.

- 2 The hearing of the matter commenced before her Honour Magistrate Ellis in the Local Court at Parramatta on 16 September 2009. It was adjourned part heard after the person in need of protection (PINOP) gave some evidence.
- 3 The PINOP was due to continue her evidence on 27 January 2010. On that day the police officer in charge advised the Magistrate that the PINOP would not be attending and it was sought to withdraw the matter. The Defendant sought costs on the basis that he had made enquiries of the Prosecutor from early December to ascertain if the matter was continuing. This was because the Defendant had been told by the PINOP (his wife or former wife) that she did not intend to proceed. The Defendant was told he would be contacted with information about whether the matter was proceeding. The first time the Defendant ascertained that it was not proceeding was when the Police Prosecutor sought to withdraw the complaint on 27 January 2010.
- 4 The learned Magistrate, having heard argument about her power to make a costs order in the circumstances, determined that the Defendant ought to have his costs of the adjourned date which she assessed at \$2,310.
- 5 Constable Redman now seeks prerogative relief from this Court as well as declarations that the Magistrate had no jurisdiction to award costs in the proceedings before her.
- 6 The matter turns entirely on the proper construction of s 99 *Crimes (Domestic and Personal Violence) Act 2007* and its interplay with Division 4 Part 2 Chapter 4 *Criminal Procedure Act 1986* (“Division 4”) which is referred to in s 99.
- 7 Although the amount involved is derisively small (as amounts in issue go in this Court) there is said to be an important point of principle concerning the awarding of costs in applications for personal violence orders.

The legislative framework

- 8 Section 99 *Crimes (Domestic and Personal Violence) Act 2007* provides:

99 Costs

- (1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.
- (2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
- (3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.

- (4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.
- (5) Subsections (3) and (4) have effect despite any other Act or law.
- (6) (Repealed)

9 Division 4 concerns costs in criminal proceedings. Although proceedings for personal violence orders are not criminal proceedings, s 99(2) makes Division 4 relevant to those types of proceedings. The relevant sections in the Division provide:

212 When costs may be awarded

- (1) A court may award costs in criminal proceedings only in accordance with this Act.
- (2) This Act does not affect the payment of costs under the *Costs in Criminal Cases Act 1967*.

213 When professional costs may be awarded to accused persons

- (1) A court may at the end of summary proceedings order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.
- (2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.
- (3) Without limiting the operation of subsection (1), a court may order that the prosecutor in summary proceedings pay professional costs if the matter is dismissed because:
 - (a) the prosecutor fails to appear or both the prosecutor and the accused person fail to appear, or
 - (b) the matter is withdrawn or the proceedings are for any reason invalid.
- (4) (Repealed)
- (5) The order must specify the amount of professional costs payable.

214 Limit on award of professional costs to accused person against prosecutor acting in public capacity

- (1) Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following:
 - (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,
 - (b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,
 - (c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

- (d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.
- (2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.

...

215 When costs may be awarded to prosecutor

- (1) A court may at the end of summary proceedings order that the accused person pay the following costs to the registrar of the court, for payment to the prosecutor, if the accused person is convicted or an order is made against the accused person:
 - (a) such professional costs as the court considers just and reasonable,
 - (b) court costs, to be paid to the registrar for payment to the prosecutor if the costs have been paid by the prosecutor or, if they have not been so paid, to be paid to the registrar of the court.

...

- (2) The amount that may be awarded under subsection (1) (b) for court costs is:
 - (a) the filing fee for a court attendance notice, or
 - (b) such other amount as the court considers to be just and reasonable in the circumstances of the case.
- (3) The order must specify the amount of costs payable.
- (4) For the purposes of this section, an accused person is taken to have been convicted if an order is made under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. The order for costs may be in the order under that section.
- (5) This section applies to all summary proceedings, including orders made in proceedings conducted in the absence of the accused person.

216 Costs on adjournment

- (1) A court may in any summary proceedings, at its discretion or on the application of a party, order that one party pay costs if the matter is adjourned.
- (2) An order may be made only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.
- (3) The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.
- (4) An order may be made whatever the result of the proceedings.

The Magistrate's judgment

- 10 The Magistrate gave reasons for her order immediately after hearing addresses from the legal representatives of the Prosecutor and the Defendant. She said this:

The application for a domestic violence order in favour of Donna Willcocks has been unsuccessful with me dismissing the application. It follows upon the proceedings commencing on 16 September where I marked myself part heard as I had formed the view as to interim orders which could well affect the final orders that were being sought. The application for costs comes under the banner of two Acts, firstly as to the *Crimes (Domestic and Personal Violence) Act 2007*, specifically s 99. I have formed the opinion that the section is badly worded. It precludes the court from making a costs order against the applicant unless it is seen as frivolous or vexatious. It is also precluded for the court to order costs against a police officer unless satisfied that the application was made knowing it contained false or misleading material. Neither of those, in my opinion, would allow the court to make costs.

Curiously, however, this section deviates the application for costs back to the *Criminal Procedure Act* as a guidance as to how costs are to be made. It isn't clear as to whether subs (2) only applies unless subs (3) or (4) takes place or if they are stand alone provisions. Given that I am of the opinion I can deal with it as stand alone provisions as it can only make sense that the authors of the section intended that the *Criminal Procedure Act* was to be followed if subs (3) and (4) did not flow. That takes me back to s 212 which says that it is criminal proceedings only where costs can be ordered. That also in my opinion does not make sense to s 99 unless I rule that it does include provisions for domestic applications for violence orders.

I am therefore of the opinion that, even though s 212 says it is only criminal and s 214 refers to the accused, by the action of s 99 it does allow me to consider costs in civil proceedings such as domestic violence orders. I am informed that the person in need of protection informed the officer-in-charge that she no longer had fears. That is an important aspect and would have meant that even if all parties would have given evidence it is unlikely the court would have made orders in favour of Mrs Willcocks. The officer-in-charge confirmed to the defendant that this was the case and that appropriate paperwork had to be done to confirm that the matters were not proceedings.

However that was not done and to protect his legal position Mr Willcocks was obliged to have counsel present today on the basis that it was highly probably the matters would still proceed. Therefore it appears as though the officer-in-charge did not undertake the necessary paperwork and in my opinion that is sufficient to ground s 214(1)(d) that it is just and reasonable to award professional costs in favour of Mr Willcocks.

The Plaintiff's contentions

- 11 The Plaintiff seeks prerogative relief as well as declarations. Certiorari is sought on the basis that there is an error of law on the face of the record and also a jurisdictional error. The jurisdictional error is said to be that the Magistrate had no power to award costs under s 99 when she had found that she was not satisfied that the Plaintiff had made the application knowing it contained matter that was false or misleading (s 99(4)).
- 12 The Plaintiff further submits that the record includes the reasons for the decision by reason of s 69(4) *Supreme Court Act 1970*. The errors in the reasons include a failure to have proper regard to s 99(5) and in construing s 99(2) and (4) as stand alone provisions.

- 13 The Plaintiff submits that an examination of the provisions in the *Criminal Procedure Act* relating to costs shows that some of the provisions are what the Plaintiff describes as prescriptive and some are mechanical or machinery provisions. So, for example, ss 213(1), 214 and 215(1) are said to be prescriptive provisions because they concern circumstances in which a costs order may be made. On the other hand, provisions such as ss 213(2), 213(5), 215(1)(a) and (b), 215(2) and 215(3) are mechanical provisions relating to how a court is determine the quantum of costs payable and the information that must be included in any costs order. The Plaintiff then submits that s 99(2) only picks up the mechanical or machinery provisions in Division 4 but not the prescriptive provisions.
- 14 The Plaintiff further submits that the Magistrate failed to have regard to s 99(5) and the words “despite any other Act or law”. The words are said to make it clear that the only circumstances in which a court has jurisdiction to make an order for costs against a police officer who makes application under the Act is that provided in s 99(4).
- 15 The Plaintiff points to the purposive approach to the construction of s 99 based particularly on the fact that police ought not to be dissuaded from applying for Apprehended Domestic Violence Orders in good faith in appropriate circumstances because of concerns that they may be subject to a costs order if the matter is subsequently withdrawn. That purposive approach is said to be strengthened by the fact that there are some circumstances where a police officer must make an application, one such example being if the person for whose protection the Order would be made is a child at the time of the application.
- 16 The Plaintiff also points to the Second Reading Speech in respect of a predecessor provision to s 99(4), s 562N(3) *Crimes Act*, where the then Attorney General said:

This is designed to protect police from costs orders when they initiate AVO complaints in good faith. Police should not be dissuaded from applying for AVOs in appropriate circumstances.

The Defendant’s contentions

- 17 The Defendant submits that s 99(4) is designed to protect the police officer in relation to the making of the application only. It is not concerned with how the matter is dealt with along the way in terms of procedure and case management.
- 18 The Defendant also points to s 9(2)(b) *Crimes (Domestic and Personal Violence) Act* which states that one of the objects of the Act is ensuring access to the courts in a way that is as safe, speedy, inexpensive and simple as is consistent with justice. The Defendant says the court must as a matter of implication and necessity have the power to award costs in relation to the conduct of the parties during the course of the proceedings. In that regard reference is made to what Spigelman CJ said in *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at [38]:

[38] The Local Court is a statutory court and, as such, has powers that are conferred expressly or are necessarily to be implied from the express conferral of powers. The test of implication was stated by the High Court in *Grassby v The Queen* (1989) 168 CLR 1 as a test of necessity. Dawson J, with whom the other members of the Court relevantly agreed, said at 16:

“... [N]otwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise ...”

His Honour added at 17:

“It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be ‘derived by implication from statutory provision conferring particular jurisdiction’.”

Was the order within jurisdiction?

- 19 The incorporation of parts of the *Criminal Procedure Act* into s 99 results in the provisions of s 99 and the provisions of Division 4 sitting very uneasily together. It can reasonably be inferred that Parliament intended that all of the provisions of s 99 and the incorporated parts of Division 4 would have work to do, so that a construction which would result in a provision having no work to do should be avoided.
- 20 Moreover, if it was only intended that some but not all of the provisions of Division 4 would be incorporated it could reasonably be expected that the Legislature would have said so. That being so, the contention of the Plaintiff that only the machinery provisions were imported is unlikely to be correct, unless no other construction was reasonably open. Alternatively, if s 99(2) had contained words to the effect of “so far as” or “to the extent that” the provisions of Division 4 were relevant, the submission based on the dichotomy between the mechanical provisions and the prescriptive provisions would have had greater force.
- 21 In my opinion, the proper operation of s 99 in harmony with Division 4 is as follows:
- (a) The Court may not award costs against a police officer making an application in relation to the application generally and its determination unless the Court is satisfied that the police officer made the application knowing that it contained matter that was false and misleading in a material particular.
 - (b) That restriction does not prevent the Court being able to make a costs order against a police officer in relation to procedural misconduct such as occurred in the present case, such power being found in s 214(3)(b) and s 214(1)(d).

22 It is to be noted that in the present case the costs order was not made in respect of the proceedings themselves but only in respect of the procedural failures by the Plaintiff which caused the Defendant to incur the costs of the appearance on the second occasion before the Magistrate.

23 My reasons are as follows.

24 First, if s 99(3) and (4) were overriding provisions, s 213(3) and the whole of s 214 could never be relevant or applicable under the *Crimes (Domestic and Personal Violence) Act*. Further, s 216 could never be relevant to a claim by an accused person.

25 Secondly, the legislative history of s 99 and its predecessors appears to me to be of some relevance. The first time that the predecessor to Division 4 was made referable to the predecessor of s 99 was by reason of the *Crimes Amendment (Apprehended Violence) Act 1999*. The predecessor to s 99 was then s 562N *Crimes Act 1900*. By virtue of the *1999 Amendment Act* s 562N came relevantly to read:

562N Costs

- (1) Subject to this section:
 - (a) a court may, in proceedings under this Part, award costs to the complainant or the defendant, and
 - (b) such costs are to be determined in accordance with section 81 of the *Justices Act 1902*.
- (2) A court is not to award costs against a complainant who is the person for whose benefit an apprehended domestic violence order is sought unless satisfied that the complaint was frivolous or vexatious. This subsection has effect despite any other Act or law.
- (3) A court is not to award costs against a police officer who makes a complaint unless satisfied that the police officer made the complaint knowing it contained matter that was false or misleading in a material particular. This subsection has effect despite any other Act or law.

26 When the *Justices Act* was repealed and costs in criminal proceedings was dealt with in Division 4 from 2001, s 562N *Crimes Act* relevantly provided:

562N Costs

- (1) Subject to this section:
 - (a) a court may, in proceedings under this Part, award costs to the complainant or the defendant, and
 - (b) such costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
- (2) Subs (2) & (3) remained unaltered.

27 In 2006 a further amendment was made by the *Crimes Amendment (Apprehended Violence) Act 2006*. The relevant provision came then to be found in s 562ZZM *Crimes Act 1900*. It relevantly provided:

- (1) Subject to this section:
 - (a) a court may, in proceedings under this Part, award costs to the applicant for the order or decision concerned or the defendant, and
 - (b) such costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.
- (2) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.
- (3) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.
- (4) Subsections (2) and (3) have effect despite any other Act or law.

28 This was the immediate predecessor to s 99. Two things should be noted about this and the preceding amendments. First, prior to s 562ZZM being enacted what then became sub-s (4) was an added sentence at the end of sub-ss (2) and (3). I do not attach any significance to the fact that when s 562ZZM was enacted those sentences were combined in a new sub-section (4). That was followed through into s 99.

29 Secondly, but far more significantly, until s 99 itself was enacted the provision for the determination of costs in accordance with either the *Justices Act* or the *Criminal Procedure Act* was contained in a sub-s that commenced “subject to this section”. On one view, and despite some of the difficulties I mentioned earlier in endeavouring to harmonise the provisions in Division 4 with s 99 and its predecessors, those words “subject to this section” might be thought to have meant that the dominant provisions in the section were sub-ss (2) and (3). The incorporation of Division 4 was “subject to” subs (2) and (3) (as they then were).

30 It seems to me significant that what is now s 99(2) is not said to be subject to the other provisions in s 99. Whatever the difficulties might have been in harmonizing the provisions of s 99 and Division 4 when s 99(1) commenced with “subject to this section”, the Legislature has removed those words with the result that subs (3) and (4) cannot be construed as overriding or dominant provisions.

31 The matter is given more significance by the fact that neither s 99(3) or (4) of the present Act commences with the words “notwithstanding sub-section (2)” or similar words.

32 Thirdly, it is then necessary to deal with s 99(5). The words of that subs were previously attached separately to the end of sub-ss (3) and (4). The Plaintiff submits that the meaning of sub-s (5) is that s

99(4) provides the only circumstance that costs may be made against a police officer who makes a domestic violence application. I do not accept that submission.

33 Sub-section (5) must be read in its context. Its principal context is a sub-section that deals with the awarding of costs in apprehended violence order proceedings and expressly says that costs are to be determined in accordance with a part of the *Criminal Procedure Act*. For that reason, I do not construe the words “any other Act” as including the *Criminal Procedure Act* 1996. Further, the words “or law” are likely to be a reference to the common law or, possibly, a rule or regulation or some other form of delegated legislation.

34 Fourthly, because some of the provisions of s 99 sit uneasily with the provisions of Division 4 it is legitimate to have regard to the Second Reading Speech when the amendments that ultimately comprise s 99(4) were introduced. What the Attorney-General said was that the provision was:

Designed to protect police from costs orders when they initiate AVO complaints in good faith. Police should not be dissuaded from applying for AVOs in appropriate circumstances.

35 That statement is consistent with the construction that I believe s 99 bears. In that regard, it would have been inappropriate and, probably without power, for the Magistrate to have made a costs order against the police officer in respect of the proceedings generally. For the reasons offered by the Attorney-General in the Second Reading Speech, and for the additional matters put forward by the Crown concerning occasions where the Police are bound to apply for such orders, the Police should not be at risk for the costs of bringing the proceedings except in the closely defined circumstances contained in s 99(4).

36 The sub-section was never intended to provide an immunity, and does not provide an immunity, to a police officer except for the bringing of the proceedings. It was not intended to protect, nor does it protect, the police officer from his conduct of the proceedings. If that was so, for example, inexcusable breaches of case management orders would not be able to be visited with costs orders despite the clear words of s 214(1)(b) or (d).

37 Fifthly, s 99(4) twice refers to the making of the application by the police officer in the context of trying to harmonise somewhat inconsistent legislative provisions. This is a further small indication that the restriction in that sub-section is directed to the bringing of the application and not the way it is subsequently conducted.

38 All of this seems to me to fit well with the purposive approach that the Plaintiff suggests ought to be applied to the legislation. It also sits with what the Attorney-General said in his Speech. There should be no discouragement to police officers applying for orders in good faith because of a costs risk if they do so. Nor should they be dissuaded from withdrawing such proceedings or asking for them to be

dismissed where it is appropriate to do so. They are, however, entirely different considerations from where a police officer does not conduct the proceedings properly.

39 If the Legislature had intended to achieve what the Plaintiff submits is the proper construction of s 99 there would have been a number of obvious ways it could have done that. First, it could have identified those parts of Division 4 which were relevant to the apprehended violence order proceedings. Secondly, it could have made the incorporation of Division 4 expressly subject to sub-sections (3) and (4). Thirdly, it could have commenced sub-sections (3) and (4) with the words “notwithstanding sub-section (2)”. Fourthly, it could have enacted as part of the *Crimes (Domestic and Personal Violence) Act 2007* only the machinery provisions of Division 4. Fifthly, sub-section (4) could have made clear that the words “any other Act” included Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.

40 I acknowledge that the construction I have preferred nevertheless contains some difficulties. The test for the awarding of costs in s 99(4) is certainly not the same test as s 214(1)(b) implies in relation to the initiation of the proceedings. Other difficulties remain.

41 In my opinion, it would be useful if the Parliament were to give some consideration to s 99 as it relates to Division 4 so that its intention with regard to costs in these sorts of applications is made clear.

Conclusion

42 In my opinion, the Magistrate's order was not made in excess of jurisdiction, nor is there any error of law disclosed in the order she made.

43 I make the following orders:

(1) The summons is dismissed.

(2) The Plaintiff is to pay the Defendant's costs of the proceedings.

LAST UPDATED:
29 November 2010