Supreme Court
New South Wales
Common Law Division

Case Title:	Munsie v Dowling (No 2)
Medium Neutral Citation:	[2014] NSWSC 1042
Hearing Date(s):	31 July 2014
Decision Date:	31 July 2014
Jurisdiction:	Common Law
Before:	Nicholas AJ
Decision:	(1) The defendant pay a fine of $2,000. (2) The defendant pay the plaintiffs' costs of the contempt proceedings on an indemnity basis, to be assessed and payable forthwith.
Catchwords:	CONTEMPT OF COURT – publication contrary to suppression order – penalty proceedings in absence of contemnor – considerations relevant to punishment
Legislation Cited:	Crimes (Sentencing Procedure) Act 1999
Cases Cited:	Australian Securities and Investments Commission v Michalik (2004) NSWSC 1259 Munsie v Dowling [2014] NSWSC 962 NCR Australia v Credit Connection (2005) NSWSC 1118 Witham v Holloway (1995) 183 CLR 525
Texts Cited:	
Category:	Consequential Orders
Parties:	Justine Munsie (First Plaintiff) Kerry Stokes (Second Plaintiff) Shane Dowling (Defendant)

Representation

- Counsel:	Counsel: ATS Dawson (Plaintiffs) In person (Defendant)
- Solicitors:	Solicitors: Addisions (Plaintiffs) In person (Defendant)
File number(s):	2014/114469
Publication Restriction:	

JUDGMENT

1 Before me today are the issues of punishment and whether any other orders are appropriate to be made following the making of the declaration by me on 22 July 2014 that the defendant was in contempt of court for breaches of the orders of the court made in these proceedings on 14 April 2014. I held that the publications of which complaint was made were published in circumstances where the defendant was well aware of the scope of the suppression order and its significance, being self-evident from the contents of the publications themselves: *Munsie v Dowling* [2014] NSWSC 962.

2 The proceedings before me today were in the absence of the defendant. He was called outside the court at 9.30am but did not appear. He had sent to the court his written submissions of 30 July 2014 and a covering email in which he made it plain that he did not propose to attend these proceedings. These submissions demonstrate that he was well aware that these were proceedings for penalty and costs, and that they might proceed in his absence. They also demonstrate the defendant's familiarity with UCPR Part 40 Rule 40.7 and the possibility that a contemnor may be liable to punishment by way of committal or sequestration. In my opinion, the position he adopted amounted to a voluntary waiver of his right to attend. I

am satisfied in all the circumstances that no injustice would be suffered by the defendant if the proceedings were permitted to continue, and to be determined in his absence.

3 At the outset it may be recorded that I have given careful consideration to the defendant's written submissions. The fact that I do not recite them in any detail should not be taken as any indication to the contrary. In short, the defendant said he believed he should not have been found guilty of contempt, and should not be penalised. As I understood it, the thrust of the submissions was that the plaintiff's case was fatally flawed by reason of the failure to serve a sealed copy of the judgment which bore a penal notice in compliance with UCPR Part 40 Rule 40.7(3). He also submitted that as there was no victim and the suppression order was in force only until 17 April 2014 no punishment was justified. He sought an order that the plaintiff should pay his costs.

4 However, the situation before me is that he has put on no evidence as to matters which may be relevant to the court's determination of the appropriate punishment in the case, including, for example, his background, antecedents, and financial position. It is fair to say that, taken overall, I found the submissions to be of little assistance. I do not accept them as providing a valid ground for resisting punishment in this case.

5 It is to be noted as a relevant consideration that the submissions conveyed neither an apology, nor any expression of contrition or of acceptance that his conduct in breach of the order was wrongful.

6 The plaintiffs referred to the evidence in the affidavit of Richard Michael Keegan sworn 31 July 2014 which was filed this morning. It annexed a copy of the publication made by the defendant on his web site "Kangaroo Court Australia" of an article under the heading "Australian KCA blogger found guilty of the crime of journalism by NSW Supreme Court. Free speech under attack". I do not propose to recite the entire contents of this publication. It is indicative of the defendant's position as a consequence of

the declaration that I made. Its flavour may be taken from the following passages:

> "I have seen many dodgy judgments and plenty of judicial corruption but this one takes the cake for its absolute stupidity …
>
> I took the action I did (referring to sending the email to the Chief Justice and others) because it was clearly dodgy what was happening. Ex parte hearings (only one party is in court with the knowledge of the other party) are only meant to happen in extreme situations and suppression orders are pretty much the same. Stokes or his lawyers or the court has ever [sic] been able to justify what happened. So given I write about judicial corruption I thought it might be a setup of some sort and I wanted people to know what was happening in case something went wrong and I never got another chance. In hindsight I did the right thing as I have no doubt that Justice Harrison would have corruptly extended the suppression order otherwise …
>
> A suppression order stopping me from sending an email complaining about the suppression order to the relevant authorities clearly is political communication and makes the suppression order invalid in that situation. The courts do not like this fact because they love their suppression orders to cover up what they do …
>
> Stokes clearly has serious issues...
>
> 3. He is now a party to what will go down in history as one of the dumbest and most corrupted judgements any court anywhere has ever seen. When there is a Royal Commission into the judiciary one of the first witnesses to be called should be Stokes …
>
> ... How can communication with the Chief Justice of any court on any matter be in contempt of court? It is scandalous for Justice Nicholas and for Chief Justice Bathurst that Nicholas has made such a decision. Worse still is that communication also went to the Attorney-General and the Federal Police. Is reporting a crime to the police now also a crime? What sort of fool is Nicholas? Nicholas leaves as a judge next week which probably helps explain why Chief Justice Bathurst gave him had case in the first place. No other judge wanted to get their hands dirty."

7 In approaching the question of punishment it is necessary to keep in mind the following.

8 Supreme Court Rules Part 55 Rule 13 relevantly provides:

> "(1) Where the contemnor is not a corporation, the Court may punish contempt by committal to a correctional centre or fine or both.
>
> …
>
> (3) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security."

9 In *Witham v Holloway* (1995) 183 CLR 525 the plurality said (at 533):

> "Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests...proceedings for breach of an order or undertaking have the effect of vindicating judicial authority as well as a remedial or coercive effect. Indeed, if the person in breach refuses to remedy the position as is not unknown their only effect will be the vindication of judicial authority."

10 In *NCR Australia v Credit Connection* (2005) NSWSC 1118 Campbell J summarised the relevant considerations to be taken into account on issues of punishment for contempt. He observed (para 68):

> "A sentence for crime is arrived at as a result of an instinctive synthesis of multiple factors. It is, nonetheless, a judicial decision, because principles of law determine the factors that can properly be taken into account, and a judicial judgment can be made by an appellate court of whether the way in which those factors have been taken into account is within the range of legally permissible outcomes. The same applies to sentencing for contempt."

11 The relevant provisions of the *Crimes (Sentencing Procedure) Act* 1999 are:

> "3A Purposes of sentencing
>
> The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,
(b) to prevent crime by deterring the offender and other persons from committing similar offences,
(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

21A Aggravating, mitigating and other factors in sentencing

(1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

…

(3) Mitigating factors

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,

(k) a plea of guilty by the offender (as provided by section 22),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23)."

12 In *Australian Securities and Investments Commission v Michalik* (2004) NSWSC 1259 at [29], Palmer J listed the following factors as appropriate for consideration:

"i) the seriousness of the contempt proved;

ii) whether the contemnor was aware of the consequences to himself of what he proposed to do;

iii) the actual or potential consequences of the contempt on the proceedings in which the contempt was committed;

iv) whether the contempt was committed in the context of a proceeding alleging crime or conduct seriously prejudicial to the public interest: see, for example, *Von Doussa v Owens (No 3)* (1982) 31 SASR 166;

v) the reason or motive for the contempt;

vi) whether the contemnor has received, or sought to receive, a benefit or gain from the contempt;

vii) whether there has been any expression of genuine contrition by the contemnor;

viii) the character and antecedents of the contemnor;

ix) what punishment is required to deter the contemnor and others of like mind from similar disobedience to the orders of the Court;

x) what punishment is required to express the Court's denunciation of the contempt."

13 With regard to the above, I have taken into account the following matters in deciding the question of punishment.

14 The plaintiffs, correctly in my view, make no submission that a sentence of imprisonment is appropriate.

15 I have found that the defendant's conduct was a contumacious contempt, and not merely a technical contempt. These proceedings are essentially concerned with the requirement to sanction the past defiance of the court's order. I am mindful that the order is not one in respect of which the breach may be remedied in any relevant way.

16 In my opinion, the publications which were found to be in contempt demonstrated that the defendant has a high disregard for the operation of the courts and the conduct of the judges before whom he has appeared. That conclusion is reinforced by the evidence of the publication on his web site on 23 July 2014, the day after judgment was delivered, of the matter to which I have referred.

17 I have found that the defendant's conduct rendered nugatory the suppression order. I am entirely satisfied that his defiance of the order was calculated to strip the plaintiffs of the protection from publication to which the court had then found them to be entitled.

18 It is apparent from the material to which I have referred that the defendant firmly takes a view that not only is no apology warranted but that the order itself was an order which he was free to ignore. As I have indicated the defendant's written submissions regrettably were of little assistance, and his waiver of his right to attend has left the court in a position where it is obliged to proceed on such evidence as it has before it, having regard to the overall purpose of the appropriate penalty, if any, to be imposed in the present circumstances. The inevitable conclusion is that, if the defendant's conduct went unpunished, the authority of the court would be likely to be undermined with the obvious consequence that the confidence of the public in the administration of justice would be weakened.

19 As already indicated, the defendant's conduct was a deliberate breach of the order that was made, and the publication of 23 July 2014 may be taken as indicative of his rejection of the court's authority. Nevertheless, I have taken into account the assertion in his submission that he has no previous criminal history. Regrettably, there is no information as to his financial or other personal circumstances. As I have said, the situation which now confronts the court is to determine a penalty sufficient to vindicate the authority of the court. In my opinion, this is not a case where an order for costs is sufficient. Regard for the needs for deterrence and vindication requires something more than an order for costs. The appropriate punishment is to impose a fine and to order the defendant to pay the plaintiff's costs.

20 As to costs, I respectfully adopt the observation of Campbell J in *NCR Australia* at [102]:

> "In imposing a costs order for contempt, the Court aims so far as it can to provide full indemnity to a party who obtained a court order which has been breached in a way which amounts to contempt. Thus, the usual order for costs is that the contemnor pay the costs on an indemnity basis. There is no reason to depart from the usual order in the present case."

21 As these contempt proceedings may properly be regarded as proceedings which are part of, yet discrete in nature from, the main defamation proceedings, it is appropriate to exercise the discretion pursuant to Part 42 Rule 42.7 to order that the plaintiffs' costs be assessed and payable forthwith.

22 In all of the circumstances in my view a fine of $2,000 is an appropriate penalty, and costs should be on an indemnity basis.

23 The orders I make therefore are:

(1) That the defendant pay a fine of $2,000.

(2) That the defendant pay the plaintiffs' costs of the contempt proceedings on an indemnity basis, to be assessed and payable forthwith.

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