(1)

Form 3.45 Originating Application – Judicial Review

Court Procedures Rules 2006

(see r 3556 (Judicial Review - Application etc))

SUPREME COURT OF THE A.C.T.
25 AUG 2023
LODGED

In the Supreme Court of the Australian Capital Territory

No SC 347 **of 2023**

Pursuant to sections 20 and 34B of the *Supreme Court Act 1933* (ACT)

SUPREME COURT OF THE A.C.T.
25 AUG 2023
FILED

Neville Shane Drumgold
Plaintiff

Board of Inquiry – Criminal Justice System
First Defendant

Attorney-General for the Australian Capital Territory
Second Defendant

Australian Capital Territory
Third Defendant

To: **Board of Inquiry – Criminal Justice System**
First Defendant

Of: Plaza Level
13 Constitution Avenue
CANBERRA CITY 2601

And to: **Attorney-General for the Australian Capital Territory**
Second Defendant

Of: Plaza Level
13 Constitution Avenue
CANBERRA CITY 2601

And to: **Australian Capital Territory**
Third Defendant

Of: Plaza Level
13 Constitution Avenue
CANBERRA CITY 2601

THE SEAL OF THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Take notice that the Court will hear an application by the Plaintiff on a date to be set:

Filed for the Plaintiff by:

Bradley Allen Love Lawyers
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40 Marcus Clarke Street
Canberra City ACT 2601
GPO Box 240 Canberra ACT 2601

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1. To review the report by the First Defendant titled "Report of the Board of Inquiry into the Criminal Justice System" and dated 31 July 2023, issued in respect of Notifiable Instrument NI2023-232 under the *Inquiries (Board of Inquiry – Criminal Justice System) Amendment Appointment 2023* (**Report**).

2. To grant prerogative and other relief.

The Plaintiff claims:

1. Prerogative relief in the nature of a writ of certiorari quashing:

    a. the Report;

    b. alternatively, the decisions made in respect of the Plaintiff in the Report (**Decisions**).

2. A declaration that the Report is, alternatively the Decisions are, invalid and of no effect.

3. Prerogative relief in the nature of a writ of prohibition restraining the Second Defendant from taking any action against the Plaintiff under the *Director of Public Prosecutions Act 1990* (ACT) **(DPP Act)** on the basis of the Report, alternatively the Decisions.

4. In the alternative to 3, an injunction restraining the Second Defendant from taking any action against the Plaintiff under the DPP Act on the basis of the Report, alternatively the Decisions.

5. Costs.

6. Any other orders that the Court considers appropriate.

Grounds of Application

The prerogative and declaratory relief in paragraphs 1, 2 and 3 are sought on the following grounds:

1. The member of the First Defendant and/or a lawyer or lawyers assisting the First Defendant and/or members of the staff of the First Defendant failed to comply with section 17 of the *Inquiries Act 1991* (ACT).

2. The First Defendant failed to accord the Plaintiff natural justice in that the member for the First Defendant gave rise to a reasonable apprehension of bias.

3. The findings in the Report set out in Schedule A to this originating application are legally unreasonable.

4. The First Defendant failed to accord the Plaintiff natural justice by failing to give the Plaintiff a fair hearing in respect of the findings set out in Schedule B to this originating application.

5. The findings in the Report set out in Schedule C to this originating application were made in excess of jurisdiction in that they were outside of the First Defendant's Terms of Reference as set out in Schedule 1 to Notifiable Instrument NI2023-232 under the *Inquiries (Board of Inquiry – Criminal Justice System) Amendment Appointment 2023*.

The prerogative and injunctive relief in paragraphs 3 and 4 is sought on the following grounds:

6. The Second Defendant has legal authority to terminate the appointment of the Plaintiff under section 28 of the DPP Act.

7. The termination of the Plaintiff's appointment is a matter that affects the Plaintiff's rights.

8. In a letter dated 4 August 2023 from the Second Defendant to the Plaintiff, the Second Defendant evinced an intention to consider whether to make a decision under section 28 of the DPP Act on the basis of the Report.

9. The Report is, alternatively the Decisions are, invalid and therefore a nullity.

10. In the premises, prohibition, alternatively an injunction, is sought to restrain the Second Defendant from an apprehended decision under section 28 of the DPP Act on the basis of a nullity.

Affidavits

This application is supported by the following affidavit:

1. Affidavit of Neville Shane Drumgold affirmed on 25 August 2023.

Schedule A

Findings impugned on the ground of legal unreasonableness

References to paragraphs are to the paragraphs of the Report.

1. The finding at [270], when read in conjunction with [264]-[265], in respect of the Plaintiff having read counselling notes pertaining to Ms Brittany Higgins:

   that Mr Drumgold's prosecutorial duty of disclosure "had been engaged" and that "Mr Drumgold's failure to do anything was a breach of his duty as a prosecutor".

2. The finding at [320] that certain documents generated by the ACT Police were not disclosable:

   "This view was wrong and untenable".

3. The findings at [413], [415] and [416] in respect of an affidavit sworn by a lawyer within the Office of the Director of Public Prosecutions (**ODPP**) regarding the position that certain documents were protected by legal professional privilege:

   Mr Drumgold "knew exactly what he was doing when he asked Ms Pitney to swear a misleading affidavit and, when foiled, he asked someone in his office who could not be expected to imagine that he was being asked, by the DPP himself, to do something improper";

   Mr Drumgold directed "a junior lawyer in his office to make a misleading affidavit" and "preyed on the junior lawyer's inexperience";

   Mr Drumgold "egregiously abused his authority and betrayed the trust of his young staff member".

4. The finding at [415] in respect of a position advanced at a stage of the proceedings that certain documents were protected by legal professional privilege:

   "Mr Drumgold deliberately advanced a false claim of legal professional privilege".

5. The findings at [415] and [417] in respect of presentations to the Court regarding the position advanced that certain documents were protected by legal professional privilege:

   Mr Drumgold "misled the Court about this claim through submissions and by …a misleading affidavit";

   "…the ACT DPP tried to use dishonest means to prevent a person he was prosecuting from lawfully obtaining material".

6. The findings at [471] and [477] in respect of a proofing note made in respect of a meeting between the Plaintiff, other officers of the ODPP and Ms Lisa Wilkinson:

   "Mr Drumgold's statements to the Chief Justice [to the effect that the note was contemporaneous and made by Mr Greig] were false";

"I find that Mr Drumgold knowingly lied to the Chief Justice".

7. The findings at [482], [489], [494] and [496], in respect of Ms Wilkinson having read some content of a speech she was contemplating in the event that she was awarded a Logie:

   Mr Drumgold was "under a duty to warn her not to give the speech in the form read to him";

   "…he came under an obligation to do what he could to prevent that outcome. He became obliged to tell Ms Wilkinson that if she gave her speech it would prejudice the fairness of the trial and an application for a temporary stay of proceedings would likely succeed—at great cost, trouble and anxiety to those involved. He should have told her emphatically not to make the speech in the form in which she had prepared it. If she did not agree to change her speech, it would then have been his obligation to tell the judge promptly and, if necessary, to seek an injunction to prevent Ms Wilkinson from making it so as to protect the integrity of the trial and prevent a threatened contempt of court";

   "Mr Drumgold … fail[ed] to do his duty to advise Ms Wilkinson not to make the speech";

   "I reject that submission [that the warning was over and above Mr Drumgold's duty as DPP and as a prosecuting barrister]".

8. The finding at [600], in respect of the cross examination of Senator Linda Reynolds:

   "The suggestions made by Mr Drumgold [that Senator Reynolds arranged for her partner to attend court, that she and her partner had been discussing Ms Higgins' evidence, that she, not her lawyer, wanted the transcripts of the trial, and that she was politically invested in the outcome] had no basis at all and should not have been made. … the conduct was… grossly unethical."

9. The findings at [657] and [660] in respect of statements the Plaintiff had made when announcing the discontinuance of the prosecution of Mr Bruce Lehrmann to the effect that he still held the view that there had been a reasonable prospect of conviction, and that Ms Higgins had faced a significant level of attack with bravery, grace and dignity:

   "The comments were improper and should not have been made … the decision was bad";

   "Mr Drumgold's comments were improper. They undermined the public's confidence in the administration of justice and was [sic] a failure in his duty as DPP."

Schedule B

Findings impugned on the ground of breach of the hearing rule

References to paragraphs are to the paragraphs of the Report.

1. The finding at [270], when read in conjunction with [264]-[265], in respect of the Plaintiff having read counselling notes pertaining to Ms Brittany Higgins:

   that Mr Drumgold's prosecutorial duty of disclosure "had been engaged" and that "Mr Drumgold's failure to do anything was a breach of his duty as a prosecutor".

2. The finding at [688] regarding statements the Plaintiff had allegedly made to the Chief Police Officer about the circumstances of the release of a letter from the Plaintiff pursuant to a Freedom of Information application:

   "Mr Drumgold's statements to him were false".

3. The findings at [693]-[694] and [699], in respect of explanations provided by the Plaintiff about the circumstances of the release of a letter from the Plaintiff pursuant to a Freedom of Information application:

   "I reject Mr Drumgold's explanation as false";

   "...the explanations proffered by Mr Drumgold to the Ombudsman, the ACTP and to me were untrue. It is also clear to me that he has shamefully tried falsely to attribute blame to [an employee]..."

Schedule C

Findings impugned on the ground that they were outside the Terms of Reference

1. The finding at [688] regarding statements the Plaintiff had allegedly made to the Chief Police Officer about the circumstances of the release of a letter from the Plaintiff pursuant to a Freedom of Information application:

   "Mr Drumgold's statements to him were false".

2. The findings at [693]-[694] and [699], in respect of explanations provided by the Plaintiff about the circumstances of the release of a letter from the Plaintiff pursuant to a Freedom of Information application:

   "I reject Mr Drumgold's explanation as false";

   "...the explanations proffered by Mr Drumgold to the Ombudsman, the ACTP and to me were untrue. It is also clear to me that he has shamefully tried falsely to attribute blame to [an employee]..."

Plaintiff

Full Name:	Neville Shane Drumgold
Address:	c/- Office of the Director of Public Prosecutions Reserve Bank Building 20-22 London Circuit CANBERRA CITY ACT 2601
Solicitor's full name:	Ian Alexander Meagher
Solicitor's firm:	Bradley Allen Love Lawyers
Solicitor's full business address:	Level 9, 40 Marcus Clarke Street, Canberra ACT 2601
Solicitor's telephone no:	(02) 6274 0999

Address for Service of Documents

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First Defendant

Full Name:	Board of Inquiry – Criminal Justice System
Address:	Plaza Level 13 Constitution Avenue CANBERRA CITY 2601

Second Defendant

Full Name:	Attorney-General for the Australian Capital Territory
Address:	Plaza Level 13 Constitution Avenue CANBERRA CITY 2601

Third Defendant

Full Name:	Australian Capital Territory
Address:	Plaza Level 13 Constitution Avenue CANBERRA CITY 2601

Date: 25 August 2023

Signed: .....

Ian Alexander Meagher

Bradley Allen Love Lawyers

Solicitor for the Plaintiff

Notice to Defendants

Before taking any further steps in this proceeding, you must file a Notice of Intention to Respond in the Court.

If you do not attend the Court at the time this Originating Application is listed for hearing, either in person or by a lawyer—

- this application may be heard in your absence; or
- default judgment may be entered, or an order made, against you.

Take notice that a directions hearing will be held as follows:

Time: 10:00am on 14/9/2023

Place: Supreme Court, Knowles Place, Canberra ACT 2601