



New South Wales
Supreme Court

CITATION: Markisic v Commonwealth of Australia
[2009] NSWSC 284

HEARING DATE(S): 11/08/08, 14/08/08, 18/09/08, 06/11/08, 21/11/08

JUDGMENT DATE: 24 April 2009

JURISDICTION: Common Law

JUDGMENT OF: Hislop J at 1

DECISION: (1) Application dismissed.
(2) The plaintiffs to pay the defendant's costs of the application.

CATCHWORDS: PRACTICE AND PROCEDURE – subpoenas – unrepresented plaintiffs – leave to issue.

CATEGORY: Procedural and other rulings

FILE NUMBER(S): SC 20369/01

PARTIES: Oliver Markisic (First Plaintiff)
Marika Markisic (Second Plaintiff)
Commonwealth of Australia (Defendant)

**LEGISLATION
CITED:** Australian Federal Police Act 1979
Family Law (Child Abduction Convention) Regulations
Supreme Court Rules
Uniform Civil Procedure Rules 2005 (UCPR)

CASES CITED: Dragan Markisic v Department of Community Services of NSW No.2 [2006]
NSWCA 321
Samootin v Shea [2004 NSWCA 115

COUNSEL: In Person (Plaintiffs)
D Robinson SC (Defendant)

SOLICITORS: In Person (Plaintiffs)
Australian Government Solicitor

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

HISLOP J

24 April 2009

**20369/01 OLIVER MARKISIC & ANOR v COMMONWEALTH
OF AUSTRALIA**

JUDGMENT

Introduction

- 1 **HIS HONOUR:** This is an application by the plaintiffs, who are self represented, for leave pursuant to r 7.3 of the *Uniform Civil Procedure Rules 2005 (UCPR)* to issue 23 subpoenas to witnesses to attend to give evidence at the hearing of an application to set aside an interlocutory judgment of Patten AJ on the ground that the judgment was given irregularly, illegally or against good faith. The application is made pursuant to r 36.15 UCPR or alternatively r 36.16. The judgment of Patten AJ, dated 9 March 2007, related to the striking out of various parts of a further amended statement of claim filed by the plaintiffs. The application for leave to issue the subpoenas is opposed by the defendant.

Background

- 2 The relevant history of the matter is, briefly, as follows.

- 3 The original statement of claim was filed on 9 May 2001. The sole defendant was the Commonwealth of Australia. The statement of claim was verified by each plaintiff. It alleged
- a. The first plaintiff and Dragan Markisic are brothers. The second plaintiff is their mother. Elena Markisic, born May 1997, is the daughter of Dragan Markisic. In July 1998 officers of the defendant initiated proceedings in the Family Court of Australia under the Hague Convention for the return of Elena to her mother in Macedonia. Rowlands J made an order for Elena's return to Macedonia. Dragan Markisic appealed to the Full Court of the Family Court against that decision.
 - b. The plaintiffs resided together in a rented house. On the 29 September 1998 the first plaintiff and Dragan Markisic attended the Full Court of the Family Court for the hearing of the appeal. Elena was left in the care of the second plaintiff at the house.
 - c. The Full Court comprised Nicholson CJ (as he then was) and Justices Ray and O'Ryan. In the course of the hearing the Court made an order for the care of Elena and issued a warrant to take possession of her and to deliver her to the manager of the St George Department of Community Services Centre Hurstville, Mr Tim McDonald, the child to be in care of the Director General of DOCS NSW pending any appeal to the High Court of Australia or pending her return to Macedonia. The appeal was dismissed and the order of Rowlands J was stayed for seven days to enable an application for special leave to appeal to the High Court to be lodged.
 - d. Whilst the appeal was being heard in the Family Court the warrant to take possession of Elena was forwarded to the Australian Federal Police (AFP). It was then executed by three officers of the AFP who took Elena from her grandmother and delivered her to Mr Tim McDonald and Mrs Lily Anthony at the St George Community Services Centre Hurstville. Mrs Lily Anthony took the child and

placed the child in the care of "Centrecare", with foster parents who were named in the statement of claim.

- 4 The plaintiffs asserted, in short,
 - a. That certain named officers of the defendant knowingly acted in misfeasance of public office and in excess of statutory powers arising from the *Family Law (Child Abduction Convention) Regulations* requesting from the Court the warrant to take possession of the child causing the Court to issue the warrant to take possession of the child and furthermore causing the AFP officers unjustifiably and out of authority to execute the warrant.
 - b. The judicial officers of the first defendant, who comprised the Full Court, intentionally and maliciously erred in excess of jurisdiction causing the AFP officers unjustifiably and out of authority to execute the warrant to take possession of the child and issuing invalid warrant.
 - c. The three AFP officers, (Mr Christopher Noble and two others,) executed the warrant to take possession of the child unjustifiably and out of authority.

- 5 The plaintiffs asserted the defendant was liable for the action of its officers. The plaintiffs claimed damages, aggravated damages, exemplary damages, interest and costs.

- 6 The original statement of claim was superseded by an amended statement of claim filed on 5 June 2001. The amended statement of claim made no substantial changes to the original statement of claim.

- 7 The defendant moved to strike out the amended statement of claim. It relied upon the affidavit of Roshana Wikramanayake sworn on 14 June 2001. Master Harrison (as she then was) held that the plaintiffs' claim was hopeless and an abuse of the process of the Court. She dismissed the amended statement of claim and the proceedings.

8 The plaintiff appealed to Bell J from the decision of Master Harrison. Bell J upheld the Master's decision save for the claim arising in respect of the AFP. As to that claim her Honour concluded the claims against the Commonwealth arising out of actions of members of the AFP said to constitute

- i Trespass
- ii False imprisonment (with respect to the second plaintiff) and
- iii Assault (with respect to the second plaintiff) and
- iv Negligence ((with respect to the second plaintiff's claim for psychiatric injury)

were not so obviously untenable that they may not possibly succeed.

Accordingly her Honour granted the plaintiffs leave to file a further amended statement of claim within 28 days "limited to their claims arising out of the actions of members of the AFP in trespass and, with respect to the second plaintiff, in false imprisonment, assault and negligence."

9 Her Honour noted that the matter had proceeded before the Master upon the basis that at the time of entering the family home and taking possession of the child there was a warrant in existence. In oral submissions to Bell J the plaintiffs asserted there was in fact no warrant, that the officers of the AFP acted upon the order for a warrant to issue directed by the Full Court and that those officers were not acting pursuant to judicial process valid upon its face. Senior Counsel for the defendant informed the Court that the defendant's inquiries had not led to the production (or confirmation of the existence) of a warrant though it was submitted that this had no bearing on the proper determination of the appeal as the statement of claim pleaded the existence of a warrant.

10 The plaintiffs, pursuant to the leave granted by Bell J, filed a further amended statement of claim. The defendant successfully moved Patten

AJ to strike out parts of that document. The plaintiffs sought leave to appeal to the Court of Appeal from the decision of Patten AJ. Leave was refused. They then sought special leave to appeal to the High Court of Australia. They were unsuccessful.

- 11 The plaintiffs filed a further further amended statement of claim on 18 June 2008 which they propose to seek leave to rely upon. The further further amended statement of claim asserts inter alia:

[8] In or about July 1998 certain Commonwealth's public officers (herein after referred to as "organisers") with the assistance of certain Commonwealth's public officers and its agents (unlawfully) instituted proceedings in the Family Court of Australia with the father as respondent. The above proceedings were instituted with an improper purpose to (unlawfully) gain possession and control of the child from the possession, custody and care of the child by the Plaintiffs. The organisers were paedophiles and/or child predators.

[9] [The father appealed to the Full Court of the Family Court.]

[10] The above appeal was an appeal from a fabricated decision, fabricated by the organisers and some other certain Commonwealth's public officers and its agents and after that sent to the father as if issued by the court. They fabricated the said decision to enable them to (unlawfully) gain possession and control of the child from the possession and custody of the child by the Plaintiffs.

[11] During the hearing of the above appeal the organisers with the assistance of certain Commonwealth's public officers and agents fabricated another two documents: orders in relation to the arrest and possession of the child ("possession orders") and orders for care of the child ("care orders"). The organisers fabricated the said orders as if issued by the Full Court with a purpose to enable them to (unlawfully) enter the Plaintiffs' land and house and gain possession and control of the child from the possession and custody by the Plaintiffs.

[12] The organisers gave the “possession orders” to a group of men (herein after referred to as “executors”). They advised the executors that the said documents are false. They ordered them to raid the Plaintiffs’ home, to present themselves as the Australian Federal Police, to present the “possession orders” as a warrant of the Full Court, to enter the Plaintiffs’ land and house and to abduct the child from the Plaintiffs by deceit and by use of force.

[16] The executors behaved at the front of the house aggressively and violently. They rang on the door and told to the occupants that they are the Australian Federal Police. They presented a paper claiming that it was a warrant, presented photos of the father and the child and demanded the child to be handed over to them. They were slamming on the door demanding the door be unlocked and the child be given to them threatening to break the door and take the child by force.

[29] [The executors took the child by force]

[38] The executors delivered the child to the organisers at an unknown destination and handed out the child into their possession, custody and control. The organisers by unlawfully obtaining possession, custody and control of the child from the executors continued with the abduction of the child from the Plaintiffs custody and home.

A claim for exemplary damages and damages for nervous shock is made by each plaintiff.

12 The plaintiffs contend that the judgment of Patten AJ was based upon three facts, namely there were relevant orders of the Family Court, the AFP had taken Elena from her grandmother and Elena was taken to DOCs. The plaintiffs now contend that each of those facts was false and that this falsity affected the judgment of Patten AJ as well as the decision of the Court of Appeal in *Dragan Markisic v Department of Community Services of NSW No.2* [2006] NSWCA 321. The false facts were recorded in the defendant’s solicitor’s affidavit and those facts resulted in the judgment being given irregularly, illegally or against good faith.

- 13 The persons sought to be subpoenaed include the former Chief Justice of the Family Court and other judges, the former Director General of DOCs and DOCs officers, Federal Police officers, various barristers and solicitors including the Crown Solicitor, the Secretary of the Attorney General's Department, the senior counsel for the defendant and his instructing solicitor and a number of Commonwealth employees.
- 14 The plaintiffs seek to set aside the judgment of Patten AJ as, in the words of the first defendant "I have an action for damages in this court, firstly, and the judgment of his Honour Justice Patten is in the way of me obtaining justly damages which I believe belong to me, that I am entitled to." The first plaintiff estimated the difference between the claim allowed by Patten J and that asserted in the further further amended statement of claim to be in excess of maybe \$50 to \$60million.

Principles

- 15 Rule 7.3(1)(2) UCPR provides:
- (1) A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is to be issued is represented by a solicitor in the proceedings.
 - (2) Leave under subrule (1) may be given either generally or in relation to a particular subpoena or subpoenas.
 - (3) ...
- 16 This rule was introduced by amendment of the *Supreme Court Rules* in March 2004 by the addition of part 66 rule 1A which was in similar terms to the current rule.

- 17 As to *Supreme Court Rule* part 66 rule 1A Giles JA in *Samootin v Shea* [2004 NSWCA 115 said at [20]:

“On the evidence before me, [F] does not object to being subpoenaed to give evidence. His stance appears to be that he will comply with the subpoena if a subpoena is issued, and he does not suggest hardship in compliance. Nonetheless, leave should not be given unless there is good reason. Subpoenas are important steps in the litigious process and they carry important consequences. They have consequences not only for the persons subpoenaed, but also for the other parties to the litigation for the court itself. I must be satisfied that there is some point in the subpoena to [F] whereby he is commanded to attend before the Court of Appeal and give evidence. I am not so satisfied. Accordingly, I decline leave to issue the subpoena.”

- 18 In considering whether leave should be refused for the issue of a subpoena regard should be had to the grounds upon which a subpoena may be set aside pursuant to rule 33.4 *UCPR*. Such grounds include that the subpoena is oppressive, irrelevant, an abuse of the process of the court, and where it could be characterised as a fishing expedition eg. when the subpoenaing party does not know what the witness might say but wants to call him or her to find out, hopeful that the evidence will be of assistance to his or her case.

Determination

- 19 The plaintiffs, in their further amended statement of claim alleged that three AFP members including Christopher Noble had taken possession of the child when they did not possess a warrant, that they presented a false warrant, and that the defendant was vicariously liable for their conduct. These allegations were not the subject of objection by the defendant.
- 20 The further amended statement of claim also alleged the three members of the AFP were directed by the Commissioner or Deputy Commissioner of Police to enter the plaintiffs' land and home and to take by force possession of the child from the plaintiffs' home; the Commissioner of

Police or alternately the Deputy Commissioner of Police must have known that they did not possess a warrant and by entering the plaintiffs' land and home without warrant trespassed on the plaintiffs' land and home and that the defendant is vicariously or directly liable for the Commissioner and or Deputy Commissioner. The plaintiffs also claimed exemplary damages from the defendant in respect of the actions of the Commissioner or Deputy Commissioner.

21 Patten AJ struck out this claim as:

“[14] There is no suggestion in the pleading, nor, so I am informed, in the witness statements, that either the Commissioner or Deputy Commissioner was personally involved in any relevant matter. The reference to them seems to be an attempt to indicate that they may, although not joined as parties, attract a liability beyond that of any other member of the Australian Federal Police.”

He also held that a claim for exemplary damages in respect of the actions of the Commissioner and Deputy Commissioner was not sustainable by virtue of s64B(3) of the *Australian Federal Police Act 1979*.

22 The first plaintiff, in oral submissions made on behalf of himself and the second plaintiff on this application, accepted that there was no evidence directly pointing to the involvement of the Commissioner of Police and that he thereby had lost the right to allege exemplary damages on that basis.

23 However the plaintiffs now allege that the three men who took possession of the child were not AFP. The plaintiff said he could not say who these men were. As he put it “so it is people coming to my house who are not members of the Australian Federal Police, I can allege exemplary damages and that is a central point of why we are here today or were before Patten AJ... .”

24 The plaintiffs, who have copies of statements taken by the defendant from the alleged police officers, have adduced no evidence that shows or suggests that the three men who took possession of the child were not Australian Federal Police officers acting in the course of their duties. The plaintiffs themselves had consistently alleged in the earlier versions of the statement of claim that the three men were AFP.

25 The allegation now made, in my opinion, is an endeavour to attempt to reinstate a claim for exemplary damages by another route irrespective of the underlying factual circumstances. I can see no point in granting leave to the plaintiff to subpoena witnesses to give evidence on the issue of the identity of the three men who took possession of the child on 29 September 1998. No acceptable basis for the assertion now made by the plaintiffs has been given and to grant leave to subpoena witnesses on this issue would be oppressive and an abuse of the process of the court.

26 Accordingly I refuse leave to the plaintiffs to subpoena witnesses to give evidence in relation to the men who took possession of the child from the second plaintiff.

27 The further amended statement of claim also claimed and particularised on the part of the first plaintiff loss of capacity to attend to his business due to nervous shock thereby causing him pecuniary loss. In respect of this claim Patten AJ said:

“[19] In relation to the male plaintiff, his cause of action was limited by Bell J as indicated above to trespass to property. Although there may be cases where trespass to property can cause compensable psychological or psychiatric injury... this case, in my view, is plainly not one of them.”

28 His Honour said his conclusion was fortified by what the Court of Appeal had said in relation to Dragan Markisic's statement of claim and he quoted from paragraph [65]-[68] inclusive of the judgment of Giles JA in that case (*Markisic v Department of Community Services of NSW No.2* [2006])

NSWCA 321. His Honour struck out the claim for nervous shock by the first defendant.

29 Such fortification was unnecessary as the plaintiff's claim for damages for nervous shock was not alleged in the further amended statement of claim to be due to the trespass to property but rather to "[25] ... not finding the child at plaintiff's home for being abducted by the three members of the AFP and seeing the traumatic condition of his family, the second plaintiff in particular."

30 The first plaintiff has included a claim for nervous shock on his behalf in the further further amended statement of claim on the basis that such a claim arises because the child was not taken to DOCs after being taken from the house.

31 The allegation that the child was not taken to DOCs appears to be a new allegation presumably made in an effort to restore to the first plaintiff a claim for damages for nervous shock in place of that which was struck out by Patten AJ. The allegation contrasts with the failure to make such allegations in earlier versions of the statement of claim and the allegations in the original statement of claim that the child was delivered to DOCs in accordance with the court order and came under the care of persons identified by name which allegations were verified by both the plaintiffs.

32 The grant of leave to issue subpoenas on this issue in my opinion would serve no purpose and would be oppressive and an abuse of the process of the court. The claim would not fall within the ambit of the leave granted by Bell J and was not before Patten AJ. I refuse leave to the plaintiffs to subpoena witnesses to give evidence on this issue.

33 The plaintiffs wish to assert that the proceedings in the family court were unlawfully instituted and the decision of the court was fabricated as were the purported possession and care orders.

- 34 The further amended statement of claim alleges that the AFP did not possess a warrant to enter the plaintiff's premises and that they presented a false warrant, a copy of which was left at the plaintiff's home (the plaintiffs have the copy document) These allegations were not struck out. Bell J recorded in her judgment that there was no evidence of the issue of a warrant for possession of the child. The defendant conceded that it does not contend that the relevant orders were engrossed in the court room in front of the parties. The first plaintiff (and his brother) assert that they were in the court room at all times and did not hear possession or care orders pronounced.
- 35 However it appears the plaintiffs propose to engage in an inquiry as to whether the proceedings in the Family Court were unlawfully instituted and whether the decisions and purported orders of the court were fabrications. In my opinion it is unnecessary to engage in such an inquiry for the purposes of the application to set aside the judgment of Patten AJ and oppressive for leave to be granted to subpoena witnesses on this issue, particularly when it would appear from the further further amended statement of claim [8] that allegations will be made that some or all of the proposed witnesses are paedophiles and or child predators. Furthermore Dragan Markisic has apparently brought proceedings in the Family Court raising the issue of the validity of the orders of that court.
- 36 I refuse leave to the plaintiffs to subpoena witnesses to give evidence in relation to the proceedings in the Family Court and the making or otherwise of the alleged orders of that court.
- 37 It is apparent that the plaintiffs, by moving to set aside the judgment of Patten AJ, are seeking to engage in a wide ranging, lengthy and unstructured inquiry into all aspects of this matter irrespective that there is apparently no evidence to support many of the allegations now being made or that various issues have been previously determined by the court. The issuing of numerous subpoenas to witnesses for the purpose of such

an inquiry in my opinion is oppressive and would constitute an abuse of the process of the court.

- 38 In all of the circumstances I consider the appropriate course is to refuse leave to the plaintiffs to issue subpoenas to give evidence to the persons named by them in their submissions and to dismiss the application for such leave.

Orders

39 I make the following orders:

- (1) Application dismissed.
- (2) The plaintiffs to pay the defendant's costs of the application.

I CERTIFY THAT THIS AND THE 12
PRECEDING PAGES ARE A TRUE COPY
OF THE REASONS FOR JUDGMENT HEREIN
OF THE HONOURABLE JUSTICE HISLOP

Date 24 April 2009

Associate 