IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S144 of 2012

BETWEEN **ROSEANNE BECKETT**

Applicant

and

THE STATE OF NEW SOUTH WALES

Respondent

AMENDED RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 First, was the direction that there be no further proceedings against the applicant by the Director of Public Prosecutions (NSW) on 22nd September 2005 the entry of a *nolle prosequi*, or evidence of the entry of a *nolle prosequi*, in light of para 7(2)(b) of the *Director of Public Prosecutions Act 1986* (NSW)?

10 3 Second, if so, should leave be given to argue the correctness of *Davis v Gell* (1924) 35 CLR 275 as an authority that otherwise required the Court of Appeal of the Supreme Court of New South Wales to dismiss the applicant's appeal?

4 Third, if so, should *Davis v Gell* now be overruled so that entry of a *nolle prosequi* (or other action to the same effect), even in a case where the perceived weakness of the prosecution case is not a ground for its entry, dispenses the applicant from showing her innocence of the subject charges?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary

20 ### Part IV: Facts

5 The facts set out by the applicant should be elaborated by the following detail concerning matter noted in the Applicant's Written Submissions ("**AWS**") at para 20.

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6 The Submission to the Director dated 21st September 2005 {AB 127-128} recorded the prosecutor's recommendation in favour of proceeding with retrials on the basis the offences are serious and the public interest requires they be determined according to law. The submission contrasted the assessed strength of the case against the applicant, impliedly in favour of retrials, with the lack of public interest in putting the applicant on trial again given the length of time she had already served in custody.

Part V: Legislation

7 The provisions of para 7(2)(b) of the *Director of Public Prosecutions Act 1986* (NSW) are:

> The Director has the same functions as the Attorney General in relation to:
>
> ...
>
> directing that no further proceedings be taken against a person who has been committed for trial or sentence ...

Part VI: Argument

Nolle prosequi and para 7(2)(b) DPP Act

8 For the reasons given by Tobias AJA (agreed in by Beazley and McColl JJA) at [30] {AB 143} and [72]-[89] {AB 162-168}, which were supportive of the analysis at first instance by Davies J at [13]-[42] {AB 75-84}, the statutory power exercised by the DPP was the power formally exercised by the Attorney General to enter a *nolle prosequi.* The argument for the applicant at AWS 31 and 73 does not explain how any of that reasoning is erroneous.

9 In particular, the passage quoted from *GKA* (1998) 99 ACR 491 at 494 at AWS 73 cannot be read as meaning that the substance of the power contemplated by para 7(2)(b) was different from a *nolle prosequi* by being "wider than a *nolle prosequi*". The passage as fully quoted by Tobias AJA at [37] {AB 82} expressly notes that the power conferred by para 7(2)(b) "includes a power to require entry of a *nolle prosequi*".

10 The express assimilation of the DPP statutory power to the power of the Attorney General should prevent a reading of para 7(2)(b), as may be proposed by the applicant's argument, to the effect that a new and therefore different statutory power has been exercised in this case without the identity, character or consequences of a *nolle prosequi.*

11 The applicant's arguments (cf AWS 5 and 6) do not contest the holding of the Court of Appeal, upholding the decision at first instance, to the effect that there was an extant indictment following the decision and orders of the Court of Criminal Appeal.

The holding of Davis v Gell

12 The applicant accepts that the Court of Appeal followed *Davis v Gell*, at AWS 33. The argument at AWS 35-40 effectively asserts an absence of reasoning to support the decision of this Court in *Davis v Gell*. Subject to what was later said by this Court in *Commonwealth Life Assurance Society v Smith* (1938) 59 CLR 527, there is clear reasoning for the decision in *Davis v Gell*, sound in principle and on authority, and consistent with what Isaacs ACJ called the "broad ground of social justice" permitting actions for malicious prosecution in the absence of an acquittal: 35 CLR 286.

13 The elements of the action as noted by Isaacs ACJ (35 CLR 282) do not in terms include the innocence of the plaintiff. The cases cited by his Honour at 35 CLR 284-285 (addressed in AWS 37) were in support of the need to show the prosecution had been "groundless". As a matter of principle, reflected in the closing passage of the reasons of Isaacs ACJ on this issue at 35 CLR 285, the equivalence between the plaintiff being innocent and the prosecution being groundless appears from that character coming from there being no real cause for the prosecution when all the circumstances are known.

14 The reasoning of Isaacs ACJ on the element of termination of the criminal proceedings in favour of the plaintiff records the historical evolution "obviously on the broadest ground of inherent justice" to permit an action for malicious prosecution notwithstanding the lack of an acquittal, where that had been rendered impossible: 35 CLR 286. The reasoning embraces the entry of a *nolle prosequi* as a favourable termination because the proceeding was not thereafter "capable of a complete termination in [the plaintiff's] favour by way of acquittal" (35 CLR 287). His Honour noted that a *nolle prosequi* does "not at all operate as an acquittal", a proposition presumably not contested by the applicant. That left, in relation to the requirement that the prosecution was groundless, the question of the "evidentiary effect" of the *nolle prosequi*.

15 The analysis by Isaacs ACJ at 35 CLR 289-294 concerning the effect of termination of the criminal proceedings sets out reasoning. The passage cannot be read as conveying "no real reasoning to support the conclusion reached" (cf AWS 40). In particular, the avoidance of "independent controversy" (35 CLR 290) or "conflict of decision" (35 CLR 292), ie between the criminal proceeding and the civil proceeding, provides part of the foundation for his Honour's conclusion. Given that criminal proceedings in which a *nolle prosequi* has been entered bring them to an end only in the sense of putting the accused *sine die*, and proceedings may be re-started thereafter on the indictment, the concern of Isaacs ACJ with the evidentiary effect of a mode of termination that fell short of acquittal was understandable and remains justified.

16 The conclusion reached by Isaacs ACJ at 35 CLR 292 as to the "true rule" clearly exposes the principled basis for the outcome, being the fact that a *nolle prosequi* cannot connote the innocence of the accused.

17 Albeit succinctly, and in a concurring judgement, Gavan Duffy J also centred his conclusion on the proposition that "proof that a *nolle prosequi* was entered on his trial does not entitle the jury to assume that the plaintiff was innocent".

18 The separate reasons of Starke J are to somewhat similar effect, subject to the comment at 35 CLR 297 later corrected in *Smith*. Otherwise, his Honour's reasoning again noted the evolution from the necessity of an acquittal for a case of malicious indictment to the adequacy of some termination of proceedings in favour of the accused other than an acquittal: 35 CLR 297. His Honour's reasoning about the effect of a *nolle prosequi* in this regard is in accord with the other members of the bench – and the inclusion of a grand jury's *ignoramus* or a refusal to commit etc was corrected by *Smith*. Significantly for the present day, and as illustrated by the present case, a *nolle prosequi* may say nothing about the merits of the prosecution let alone in favour of the accused, whereas termination by action of the grand jury or a justice at committal certainly does.

Smith* and *Davis v Gell

19 Contrary to AWS 41, the reasoning for the decision in *Smith* does not undermine the reasoning for the holding in *Davis v Gell*. The correction in *Smith* of the statement in *Davis v Gell* noted above is found at 59 CLR 535-538, 540. It immediately follows the conclusion that *Davis v Gell* had covered the "difficulty" of "the special case of proceedings brought to an end by *nolle prosequi*", stating that *Davis v Gell* had "solved it by leaving the question of innocence or guilt open for inquiry in the civil proceedings" (59 CLR 535). That amounted to accepting the reasoning in *Davis v Gell*, and not just its bare decision. It cut back an excrescence found in *Davis v Gell*, impliedly to what the majority in *Smith* regarded as good law. To the same effect, concerning the understanding of the authorities displayed in *Davis v Gell*, is the comment at 59 CLR 533 concerning the "elaborate examination of the decided cases by Isaacs J and Starke J".

20 The reasons given in *Smith*, including for the correction of *Davis v Gell*, show the principled distinction between a *nolle prosequi* and other modes of favourable termination. The dismissal by a magistrate or refusal of a grand jury was treated as being "in substance" deserving of the same respect as a finding of not guilty (59 CLR 538). The status and function of a committing magistrate and a grand jury are significantly different from that of a prosecutor. The explanation, perhaps elaboration, by the majority in *Smith* of the statement by Bowen LJ in *Abrath* [1883] 11 QBD 440, at 59 CLR 541-542 pointedly does not include a *nolle prosequi* as

an example of "a decision in favour of the accused ... which decision thus established innocence".

21 The conclusion at 59 CLR 543 of the majority in *Smith* did not leave *Davis v Gell* on some small rock in a rising jurisprudential sea. Distinctions with a difference were drawn between the Attorney General refusing to file an indictment and the entry of a *nolle prosequi*. *Davis v Gell* was expressly regarded as covering the later case.

22 The reference in AWS 50 to *Brain* (1935) 53 CLR 343 does not cast doubt on *Davis v Gell* for the holding in question in this case, or the treatment of *Davis v Gell* in *Smith*. The fallacy identified in the *Indian Privy Council* decision of Balbhaddar Singh and Badri Sah was of a statement of the elements different from that set out by Isaacs ACJ in *Davis v Gell*: see per Stake J at 53 CLR 350-351. The parenthetical comment by Dixon J in *Brain* at 53 CLR 379 appears directed to a presently immaterial aspect of doctrine, and in any event was not pursued in *Smith*, otherwise than by the correction *Smith* effected to the excess holding in *Davis v Gell*.

23 The decisions of *Skrijel v Mengler* [2003] VSC 270 and *Noye v Robbins* [2007] WASC 98, noted by Tobias AJA at [57]-[59] {AB 156-157}, and particularly the reasoning of Nettle J in the former support the reading of *Smith* as accepting rather than subverting the decision and holding of *Davis v Gell*.

24 The tour of other jurisdictions' authorities in AWS 55-69 significantly does not include any specific treatment of the difficulty posed by the special case of termination of criminal proceedings by *nolle prosequi*. Nor does the apparent reliance of the applicant on all these cases explain how they would support the sufficiency of a *nolle prosequi* to exclude the scandal of a plaintiff succeeding (and a defendant being barred from resisting on the issue of guilt or innocence) when a *nolle prosequi* was entered notwithstanding a strong prosecution case not continued for reasons (as in this case) having nothing to do with its merits.

25 There is, however, some foreign support for the respondent's position. In *Swick v Liautaud* (1996) 169 Ill 2d 504 (Supreme Court of Illinois) Heiple J (for the Court) said (at p4):-

> ... In the civil malicious prosecution context, the majority rule is that a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceedings via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused (*Restatement (Second) of Torts* ss659, 660, 661 (1977); *McKenney v Jack Eckerd Co* (1991) 304 SC 21, 22, *Wynne v Rosen* (1984), 391 Mass 797, 464 NE 2d 1348). The abandonment of the proceedings is not indicative of the

> innocence of the accused when the *nolle prosequi* is the result of an agreement or compromise with the accused ... The burden of proof of a favorable termination, however, remains with the plaintiff. (See Restatement (Second) of Torts s672 (1977)). Only when a plaintiff establishes that the *nolle prosequi* was entered for reasons consistent with his innocence does the plaintiff meet his burden of proof.

26 Also in *Cult Awareness Network v Church of Scientology* 685 NE 2d 1347 (Ill 1997) Freeman CJ (for the Court), after referring to the *Restatement (Second) of Torts* and the favorable termination of proceedings (at 1352), said (at 1354):-

> In addition, our decision to follow the *Restatement* view on this issue is consistent with our recent opinion in *Swick v Liautaud* ... In *Swick*, we addressed whether a *nolle prosequi* was a favorable termination in the context of malicious prosecution of an underlying criminal action. This court, without dissent, adopted the *Restatement's* approach to the question and held that a *nolle prosequi* may serve as a favorable termination unless the prosecution was abandoned for reasons not indicative of the innocence of the accused. *Swick* ... . Indeed, we stressed that it was the circumstances surrounding the entry of the *nolle prosequi* that must be examined and not the mere form or title of the disposition. *Swick*, ... We today provide similar guidelines for malicious prosecution suits which are predicated upon prior civil proceedings.

27 In *Miazga v Kvello Estate* [2009] 3 SCR 339, the charges were stayed after committal, but before trial. The Court held that the element in relation to this issue was [3] "2 terminated in favour of the plaintiff". This was not an issue in the appeal [30]. Charron J in delivered the judgment for the Court, (McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ), said:-

> 54 The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay. However, where the termination does not result from an adjudication on the merits, for example, in the case of

> a settlement or plea bargain, a live issue may arise whether the termination of the proceedings was 'in favour' of the plaintiff: see, eg, [citations omitted] ... Whether the second element of malicious prosecution was satisfied in the present case was a live issue at trial; however, the question is not before the Court.

28 In *Van Heeren v Cooper* [1999] 1 NZLR 731 at 740-1 the Court stated that the element in relation to termination was "non incriminating" termination. But the Court erred when applying what was said in J G Fleming, *The Law of Torts (10th ed)* at 699 that *Davis* may be "safety discounted" in light of *Smith*. The commentary of Fleming in relation to this issue is totally inconsistent with what *Davis* and *Smith* determined.

Leave to reopen and overruling Davis v Gell

29 The principles for which appropriate citation is given in AWS 70 are not engaged by the authority of *Davis v Gell* in light of *Smith*. The arguments above concern the holding in *Davis v Gell* and its treatment in *Smith* weigh against both reopening and overruling. In specific response to the list of matters in AWS 71:-

(a), (c), (o):

Smith did not doubt *Davis*. *Davis* has been followed by other courts. *Mann v Jacombe* [1961] NSWR 273 did not purport to doubt *Davis*, let alone with superior reasoning. As explained in *Skrijel v Mengler* [2003] BSC 270 at [228]-[229], *Mann* is consistent with *Davis*.

(b),(i),(j),(k),(m),(n),(p):

Smith did not find an error in the whole *ratio decidendi* of *Davis*.

(d):

This case did concern a *nolle prosequi*, but in any event the power in para 7(2)(b) as exercised in this case does not suggest any reason in principle to confine the holding in *Davis* so as not to apply to it.

(e):

Davis is part of the current stream of authority, as recognized by the principled distinction between the case covered by it and those settled by *Smith*, as explained in *Smith* itself.

(f), (g), (h), (l):

Davis and *Smith* constitutes a careful and clear working out of the relevant principles.

(q):

Davis is not manifestly wrong. The public interest does not require a person to be able to proceed civilly as if a prosecution against them had been "groundless", when a *nolle prosequi* was entered notwithstanding an order for a retrial, cogency of a prosecution case as perceived by the prosecutor but service of practically a whole sentence under the quashed convictions.

Part VII: Time estimate

30 The respondent would seek no more than 1 ½ hours.

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16th November 2012

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