ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 144 of 2012

BETWEEN: **ROSEANNE BECKETT**
Applicant

AND: **STATE OF NEW SOUTH WALES**
Respondent

APPLICANT'S REPLY

Filed on behalf of the Applicant by
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Part I: Internet publication

1. These submissions may be placed on the internet.

Part II: Reply to respondent's submissions

2. The respondent does not dispute that the elements of the tort of malicious prosecution are as articulated by the Court in *A v New South Wales* (2007) 230 CLR 500 at [1]. However, the respondent's amended submissions (RAS) do not identify which of those four elements requires the applicant to establish her innocence in the circumstances of this case. The question of innocence is irrelevant to elements (1) and (3), which concern the prosecutor's identity and motives. Further, the question of innocence cannot go to the second element, namely the requirement that the proceedings have been terminated in favour of the plaintiff: the question as formulated by the respondent for separate determination accepts this element to have been satisfied by a s 7(2)(b) direction. As for the fourth element of the tort, namely whether the defendant acted without reasonable and probable cause, the plurality judgment in *A v NSW* (at [70]) explains that this is to be determined by reference to the material available to the prosecutor when he or she decided to prosecute or to maintain an existing prosecution. If on the basis of such material the plaintiff establishes that the defendant acted without reasonable and probable cause, the requisite element is made out, without the need for the plaintiff to establish that the charges were in fact groundless or that the plaintiff was innocent.

3. The respondent appears to contend that there is a fifth element of the tort of malicious prosecution – namely, that the plaintiff establish innocence – and that this applies only where the prosecution is terminated by entry of a *nolle prosequi*. Alternatively, it appears to be suggested that innocence needs to be established only where the prosecution is terminated by entry of a *nolle prosequi* for reasons which are not indicative of the innocence of the accused. However, any such element of "innocence" was rejected in *Commonwealth Life Assurance Society v Smith* (1938) 59 CLR 527; finds no expression in *A v New South Wales*; and finds no expression in the elements of the tort as articulated, consistently with *A v NSW*, in other common law jurisdictions (see Applicant's Written Submissions (AWS), [55]-[69]).

Reasoning in Davis v Gell (1924) 35 CLR 275

4. At RAS [13] the respondent places some reliance on the fact that in *Davis* Isaacs ACJ held that the plaintiff was required to establish that the prosecution was groundless, rather than required to establish innocence. However, his Honour equated the two concepts (35 CLR at 285.3), explaining that this essential requirement of the tort "means that the plaintiff is innocent, because, the prosecution being groundless, there was, when all the circumstances are known, no real cause for it". The plurality in *Smith* confirmed that this was the essence of the decision in *Davis*: "Their Honours considered that in every action of malicious prosecution the plaintiff must show that the charge was 'unfounded' and that meant that he must show his innocence" (59 CLR at 533.8).

5. At RAS [15]-[16] the respondent submits that the analysis of Isaacs ACJ exposes a principled basis for the outcome in *Davis*. However, that principled basis – namely, the need to establish innocence in all cases – was rejected in *Smith*, following the decision of the Privy Council in *Balbhaddar Singh v Badri Sah* (JCPC no. 66 of 1924). In that decision, the Privy Council held that it was not an essential element of the tort that the plaintiff establish that "he was innocent of the charge upon which he was tried" (*Smith* 59 CLR at 536.8). The Court in *Smith* held that the decision in *Balbhaddar* was directly inconsistent with *Davis*, with the consequence that the latter decision "cannot now be followed" (59 CLR at 535.9; also at 552.5 per Starke J).

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6. Further, the plurality in *Smith* (59 CLR at 540-541) observed that, prior to *Davis*, there could be found "no trace" in the pleading books or text-writers of a requirement that innocence be established as an element of the tort of malicious prosecution. The plurality identified that the sole support in the authorities for any such requirement was the dictum of Bowen LJ in *Abrath's Case*, which their Honours read as conveying "no more than is meant by the statement of Byles J in *Basébé v Matthews* [(1867) LR 2 CP 684]", namely that it is necessary to show favourable termination (59 CLR at 541.9, 539.2).

20 7. Consequently, the respondent's submission (RAS, [29]) that *Smith* did not find an error in the *ratio* of *Davis*, and did not even doubt *Davis*, must be rejected.

8. At RAS [15]-[16] the respondent focuses on the concern expressed by Isaacs ACJ regarding the "evidentiary effect" of entry of a *nolle prosequi* and says it "cannot connote innocence". But if favourable termination is established (as is accepted here), what is "connoted" by a particular mode of termination is irrelevant to any of the other elements of the tort set out in *A v NSW*. As the respondent acknowledges (RAS [17]-[18]) Gavan Duffy and Starke JJ likewise decided *Davis* on the basis of the need to establish innocence, and the inadequacy of a *nolle prosequi* to discharge that
30 burden. When the Court in *Smith*, following *Balbhaddar*, rejected the need to establish innocence as an element of the tort, the basis for that reasoning fell away.

Reasoning in Smith

9. At RAS [20]-[21] and [29] the respondent submits that there was a "principled distinction" given in *Smith* between the entry of a *nolle prosequi* and other modes of favourable termination. This contention should be rejected. The plurality in *Smith* held that the decision in *Davis* "was upon the effect of a termination by the latter process [that is, *nolle prosequi*] and upon the authority of the decision of the Privy
40 Council in *Balbhaddar Singh v. Badri Sah* it cannot be extended further" (59 CLR at 543.7). There are two points to note. *First*, the reasoning in *Balbhaddar*, which was adopted and followed in *Smith*, totally undercut the reasoning in *Davis*, as it specifically rejected any requirement that the plaintiff in a malicious prosecution case establish innocence. *Secondly*, the plurality judgment in *Smith* describes *Davis* as a decision "upon the effect of a termination" by *nolle prosequi*. Insofar as their Honours refer to a point of distinction between the entry of a *nolle prosequi* and other modes of terminating criminal proceedings, such point of distinction appears to relate to the issue whether the entry of a *nolle prosequi* amounts to a termination of the proceedings in favour of the accused (see in particular 59 CLR at 534-535 and 537).
50 However, in *Davis* the Court held that the entry of a *nolle prosequi* was a favourable

termination (as acknowledged by the respondent at RAS, [14], [18]; as accepted in the question stated for separate determination; and see also *Mann v Jacombe* (1961) 78 WN (NSW) 635).

10. The respondent's only response to the proposition that, on the authority of *Smith*, the decision in *Davis* "cannot be extended" to a s7(2)(b) direction is to say that, although the power under that provision is wider than the power to enter a *nolle prosequi*, the former includes the latter (RAS, [9]). However, the fact that the power conferred by s7(2)(b) includes a power to enter a *nolle prosequi* does not alter the fact that the power under that provision is different from, and broader than, the prerogative power. Anything that *Davis* has to say regarding "the effect of a termination" by entry of a *nolle prosequi* could not have any application to any issue regarding the effect of termination by a s7(2)(b) direction; and, in any case, there is no such issue in this case, by reason of the terms of the stated question, which accepts favourable termination.

Other Australian decisions

11. The decisions in *Skrijel* and *Noye* do not advance the matter (cf RAS, [23]). In each case, the court noted that it was bound to follow *Davis* where proceedings were terminated by a *nolle prosequi*, and that this could only be altered by another decision of this Court (*Skrijel* [2003] VSC 270 at [227]; *Noye* [2007] WASC 98 at [246]).

Recommendation to the DPP

12. At RAS [6] the respondent relies on the terms of a recommendation which was made to the DPP in respect of the applicant (and which appears at AB pp 127-128). The Court of Appeal held that this evidence was irrelevant because it was bound by *Davis*; but that if this Court were to reconsider *Davis*, then the evidence might be relied upon to support the correctness of the decision in *Davis* (AB, p140.40-p141.15). The content of the recommendation is irrelevant to the matters on appeal. It does not go to any of the four elements of the tort set out in *A v NSW*, and in particular it cannot go to the issue of favourable termination, which is accepted by the stated question. Further, there are obvious evidentiary difficulties in the respondent's assertion (RAS [24]) that the evidence of the terms of the recommendation made to the DPP establishes the DPP's "reasons" for making a s 7(2)(b) direction.

Other jurisdictions

13. At RAS [24] the respondent says that the review of other jurisdictions in AWS [55]-[69] does not include "any specific treatment of the difficulty posed by the special case of termination of criminal proceedings by *nolle prosequi*". However, insofar as the cases in other jurisdictions display any "specific" or different treatment of proceedings terminated by entry of a *nolle prosequi*, any such different treatment is only in respect of the issue whether the proceedings have been terminated in favour of the plaintiff (see the discussion of the US and Canadian cases below). In circumstances where, as here, it is accepted that there has been favourable termination of the proceedings, then the appropriate course is for the plaintiff's claim in malicious prosecution to be determined by reference to whether she has satisfied the other three elements of the tort identified in *A v NSW*.

14. At RAS [24] the respondent contends that such an approach would leave open the possibility of the "scandal" of a case for malicious prosecution succeeding notwithstanding a strong prosecution case which was not continued for reasons having nothing to do with the merits. There are two points. *First*, despite there being a strong prosecution case, an accused may be acquitted. There is no requirement that an acquittal have been on the merits: see, for example, *Wicks v Fentham* (1791) 4 TR 247; 100 ER 1000, where the plaintiff had been acquitted because of a defect in the indictment. *Secondly*, the hurdles for the applicant to establish her claim are significant. She must establish that the prosecution was initiated *both* maliciously *and* without reasonable and probable cause (see *A v NSW* at [56]). Having regard to the presumption of innocence, there is, if there has been a favourable termination of the relevant criminal proceedings, no "scandal" involved in allowing recovery by a plaintiff who can satisfy the other elements of the tort.

15. In RAS [25]-[26] the respondent relies on two Illinois decisions as providing "some foreign support for the respondent's position". Neither of those decisions is authority for the proposition that a plaintiff, whose prosecution was terminated by entry of a *nolle prosequi*, must plead and prove innocence. Instead, the issue in each of those cases was whether the entry of a *nolle prosequi* amounted to a favourable termination of the proceedings. Those two cases indicated that the answer to that question turned upon an examination of the reasons for the *nolle prosequi* to determine whether they were consistent with innocence. Three points arise. *First*, that is not a uniform position in the US. There are numerous appellate decisions in other states that have held that termination by *nolle prosequi* is a sufficient favourable termination: see, for example, *Roberts v Babkiewicz* 582 F. 3d 418 (2nd Cir. 2009) at 421; *Smith-Hunter v Harvey* 734 N. E. 2d 750 (N.Y. 2000) at 753-754; *Harvey v Bertaut* (1974) La. App, 303 So. 2d 211 at 212; *Mississippi Gaming Commission v Baker* 755 So. 2d 1129 (Miss. App. 1999) at 1134; *Sundeen v Kroger* 133 S.W. 3d 393 (Ark. 2003) at 396. *Secondly*, the *Restatement (Second) of Torts* states that any formal abandonment of the proceedings, in particular by entry of a *nolle prosequi*, qualifies as a final favourable termination for the purposes of the tort, except in certain defined situations (none of which is presently relevant): see §659[c] and comment [e], and §660-§661. *Thirdly*, the Illinois decisions upon which the respondent relies held that it was necessary to examine the reasons for the *nolle prosequi* to determine their consistency with innocence in order to establish that there had been favourable termination: neither of the cases said that there was any need for a separate enquiry, where favourable termination was established, into whether the plaintiff was in fact innocent.

16. Given that the stated question accepts the s 7(2)(b) direction to have brought about a favourable termination, any comments made in one or more states of the US regarding the circumstances in which entry of a *nolle prosequi* will amount to a favourable termination are of no relevance to the present case.

17. Likewise, the *obiter* comment in the Canadian decision of *Miazga* (RAS, [27]) goes only to the issue whether there is a sufficient termination "in favour" of the plaintiff if there has been no adjudication on the merits. Further, various Canadian decisions have held that a stay or withdrawal of charges is a sufficient termination for the purposes of the tort: see, for example, *Romegialli v Marceau* (1963) 42 DLR (2d) 481

at 482; *Banks v Bliefernich* (1988) 44 CCLT 144 at 146; and also the article by Justice Sopinka in (1995) 74 Can Bar Rev 366 at 368-369.

18. The respondent has not pointed to any case in an overseas jurisdiction that has held either that it is a necessary element of the tort for the plaintiff to establish innocence, or that this is a necessary element of the tort only in cases where the proceedings have been terminated by a *nolle prosequi*, or only in cases where the reasons given for the *nolle prosequi* are not indicative of innocence.

10 19. For the reasons set out above, there is no support in those overseas decisions, or in principle, for requiring a plaintiff positively to establish her innocence, as an element of the tort of malicious prosecution, in circumstances where (as accepted here) proceedings have been terminated in her favour by a s 7(2)(b) direction.

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