IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No. S352 of 2012

STATE OF NSW
Appellant

and

GREGORY WAYNE KABLE
Respondent

10 **APPELLANT'S REPLY**

Part I: Internet publication

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

Part II: Reply

2. Despite his acceptance of "the long-established principle which is that the findings of unconstitutionality do not of themselves give rise to civil wrongs" (Respondent's Submissions ("RS") at [12]), the respondent's argument depends on the "public law findings" in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable") "flow[ing] across" to his private rights against the appellant such that public and private law may be said to have "coalesced" (RS at [13(a)]). That mode of reasoning should be rejected.

20 3. The respondent's submissions fail to appreciate that the validity of the Community Protection Act 1994 (NSW) ("CP Act"), as decided in Kable, did not turn on the establishment of factual matters. Unlike a case where the Court must be satisfied that facts exist to bring legislation within the scope of a power, or to authorise acts done under such legislation (Heydon J's second category of facts in Thomas v Mowbray (2007) 233 CLR 307 at 512 [614], citing Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 222 per Williams J), the Court in Kable was concerned with characterisation of the CP Act's effect on the institutional integrity of the Supreme Court. Unsurprisingly, given the Court was hearing an appeal against Levine J's order based on the constitutional validity of the CP Act and not a tort claim, it did not make any "public law findings … against the DPP" (RS at [13(c)]). There were in 1995 and 1996 no "constitutional
30 facts", as that term is conventionally understood.

4. The respondent maintains the submission that Kable "conclusively established" that Levine J exercised a "purely executive jurisdiction" (RS at [22]) and did not perform a judicial act when issuing his order of 23 February 1995. The Court of Appeal applied Love v Attorney-General (NSW) (1990) 169 CLR 307, but did so as though Kable was determinative of the character of Levine J's order, Allsop P assuming (at [18], Appeal Book at 518-519) that Kable required Levine J's order to be analysed by reference to the CP Act alone, just as the effect of the warrant at issue in Love depended entirely on the circumscribed statutory authority pursuant to which it was issued: Love at 322, 323. The Court of Appeal thus gave no consideration to whether the

Filed for the State of NSW on 1 March 2013
I V KNIGHT, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Ref: AGD01002816
Contact: Jane Graham

Ph: (02) 9224 5101
Fax: (02) 9224 5122

"indications that the issuing of a warrant pursuant to s. 16 of the State Act is an administrative act" supporting the result in Love (at 321) were applicable to the making of Levine J's order. Analysis of those features in the present case (a) is not precluded by Kable (see Appellant's Submissions ("AS") at [19]) and (b) yields a different conclusion from that reached in Love, in view of the characteristics of the hearing conducted before Levine J, the enforceability of the order made as an order of the Supreme Court and the appeal rights attached: AS at [26].

5. Accepting that Love recognised (at 319, 321) a distinction between the nature of a power, the manner of its exercise and the character of the act involved in the exercise of that power, the existence of those distinctions dictates neither the result of the characterisation process in relation to Levine J's order nor the result reached by the Court of Appeal. While it is true that a duty imposed on a judge to act judicially in exercising a power is not determinative of the character of the act involved (RS at [16], [22]), this merely indicates that a further analysis is required. The same is true of a determination that the power itself is not judicial, the Court in Love having explained that "the conclusion that the power to issue warrants pursuant to s. 16 ... is not judicial is not decisive of the question whether or not the act of issuing a warrant is itself judicial" (at 321) and proceeded to consider that question separately: at 321-322. In the passages relied on by the respondent (RS at [13(b)], citing Kable at 98.7, 107.2, 122.2-122.6, 127.5 and 128.2) and the Court of Appeal, the majority in Kable did not "conclusively establish" (RS at [22]) the character of Levine J's order. To the contrary, the order made in Kable presupposes that that order retained legal effect until set aside: AS at [19].

6. The respondent's reliance on Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 ("Bhardwaj") (RS at [16]) is misplaced. There was no dispute in that case as to either the nature of the power exercised by the member of the Immigration Review Tribunal whose decisions were in issue, or the character of the act involved in making those decisions. It was not suggested in Bhardwaj that judicial power or a judicial act was involved in the Tribunal decision-making process at any point: the Tribunal was conducting, in the exercise of executive power, a merits review of the decision of a Ministerial delegate to cancel Mr Bhardwaj's visa pursuant to Pt 5 of the Migration Act 1958 (Cth): see at 607-608 [23]-[28] per Gaudron and Gummow JJ. Consequently, no analysis of the nature of the power or character of the act was called for. Moreover, Hayne J's concurring judgment specifically noted that attributing legal consequences to the Tribunal's first decision, vitiated by jurisdictional error, "impermissibly confuses administrative decisions with the particular and peculiar features accorded to decisions of superior courts of record" and rejected any analogy with "decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction": at 645 [150], 646 [151].

7. Justice Basten alone considered the effect of the fact that Levine J was exercising federal jurisdiction in any detail, albeit that his Honour did not do so by reference to the distinction drawn in Love between the nature of the power and the character of the act involving its exercise: at [142] (Appeal Book at 567), [150]-[152] (Appeal Book at 570-572). President Allsop noted Levine J's exercise of federal jurisdiction (at [57], Appeal Book at 535), but did not address the possibilities canvassed by Basten JA as to the (in)operation of the CP Act in federal jurisdiction. Contrary to the respondent's submission (RS at [24]), the Court of Appeal majority therefore could not be said to have applied any distinction between "separate sources of authority to decide different types of questions".

8. The appellant places no reliance on any "residual legislative authority" or "residual State jurisdiction" conferred by the CP Act (RS at [17], [22]) in support of its submissions as to the character of Levine J's order. Rather, the appellant submits that there was a single, inseparable exercise of federal jurisdiction by Levine J, in relation to a single matter. His Honour's determination of the constitutional challenge and his inherent finding that the order under s 5 of the CP Act was made within jurisdiction was integral to his decision of the Director of Public Prosecutions ("DPP")'s application for a preventative detention order and not separable from the question of the DPP's entitlement to the order: AS at [20], [24], [25].

9. In contrast with the point at which the declaration of inconsistent interpretation under s. 36(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) was described as having been made by French CJ in Momcilovic v The Queen (2011) 245 CLR 1 at 65 [89], namely, after the Court "ha[d] decided all matters relevant to the disposition of the proceedings" (cf Momcilovic at 221-222 [583] per Crennan and Kiefel JJ), Levine J's order was indispensably necessary to the disposition of the proceedings, whether or not his Honour granted what the DPP sought. The DPP's entitlement to the order could not satisfy the tests for severability from the unquestionably federal matter before Levine J as a "completely disparate claim constituting in substance a separate proceeding", or "a non federal matter which is 'completely separate and distinct from the matter which attracted federal jurisdiction'", or "some distinct and unrelated non-federal claim": Fencott v Muller (1983) 152 CLR 570 at 607-608 per Mason, Murphy, Brennan and Deane JJ.

10. Putting aside the orders actually made in Kable, in Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220, a case identified by Giles JA in Union Club v Lord Battenberg (2006) 66 NSWLR 1 at 17 [69] as exemplifying the full effect given to "retrospective annihilation of an act in the law", the plurality stated that "[a]cts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive' (Dr Drury's Case)": at 225. It was not suggested in Cavanough that it was only third party acts which were thus protected (cf RS at [26]).

11. The cases relied upon by the respondent in support of his further contention that Levine J's order fell into a void category on the basis that it was "so vicious as to violate some fundamental principle of justice" (RS at [30]) do not bear out the existence of such a category of superior court orders. The respondent misunderstands the reference to an "exception or qualification" in Haskins v Commonwealth (2011) 244 CLR 22 at 42 [46] (see RS at [30]), which has nothing to do with depriving superior court orders of their judicial character but instead reserves the existence of an exception or qualification to extra-judicial remarks by Sir Owen Dixon and to the dictum of Field J in Norton v Shelby County (1886) 118 US 425 at 442 concerning the effect of an unconstitutional statute.

12. Contrary to the respondent's submission (RS at [33], [34], [36]), the appellant's submissions concerning the defence of lawful justification do not rely on any honest and mistaken belief, or erroneous interpretation of the law by a gaoler, or a "statutory exemption" as defined in s. 10(1) of the Law Reform (Vicarious Liability) Act 1983 (NSW). Justice Levine's order did not require or provide scope for interpretation or calculation of the type in issue in Cowell v Corrective Services Commission of NSW (1988) 13 NSWLR 714 and R v Governor of Brockhill Prison; ex parte Evans (No. 2) [2001] 2 AC 19. Nor was there any question of implying a missing but necessary element in the statutory scheme, as in Marshall v Watson (1972) 124 CLR 641 at 644. It was not the CP Act that deprived the respondent of his liberty, but the order of Levine J. That order

should not have been made. But it does not follow that the common law of Australia admits of a cause of action sounding in damages; to the contrary, deeply entrenched considerations on the nature of orders of superior courts dictate the result found at first instance.

Response to Notice of Contention

13. Grounds 2-6 of the Notice of Contention (Appeal Book at 598-599) and the respondent's submissions in support thereof (RS at [37]-[39], [44]-[45]) concern claims for collateral abuse of process and malicious prosecution which failed both at first instance (see Appeal Book at 488) and on appeal: Appeal Book at 582. As special leave grounds, these would have no prospects of success. There was no finding of malice or improper purpose, nor any evidence on which such a finding could be based. That, in short, is why the Notice of Contention should be dismissed.

14. As to ground 1 of the Notice of Contention (RS at [40]), Basten JA was correct in his application (at [133]-[134], Appeal Book at 563-564) of Haskins at 41 [43] on the question of direct liability for false imprisonment. Justice Hoeben recognised that there is "no authority for the proposition that the Executive is to be held directly responsible where a person is wrongfully imprisoned after a hearing before a court pursuant to a law enacted by it. Such a proposition misunderstands the operation of responsible government in NSW and misunderstands the elements of the tort of false imprisonment": (2010) 203 A Crim R 66 at 84 [98], Appeal Book at 479. Furthermore, there is no evidentiary basis for the asserted "common design" in which "the Executive Government and Ministers" are said to have participated to detain the respondent: RS at [40]. Justice Hoeben rejected submissions that the executive was somehow a prosecutor or a party to the proceedings before Levine J: at [56]-[60], Appeal Book at 469-470; [98], Appeal Book at 479. In any event, real issues of fact in the respondent's false imprisonment claim as to the existence of and participation in the alleged "common design" would need to be tried by a jury: see s 88(b) of the Supreme Court Act 1970 (NSW) (now repealed, but saved in its operation to the respondent's claim: see cl 19 of Sch 4 to the Supreme Court Act 1970 (NSW); (2010) 203 A Crim R 66 at 68-69 [2]-[4], Appeal Book at 452-453 per Hoeben J).

15. In alleging malicious prosecution and collateral abuse of process, the respondent offers no explanation for how the conduct of the Executive in furtherance of the alleged "tortious plan" is to be "disentangled" (RS at [41]) from that of the legislature in enacting the CP Act. Neither Hoeben J nor the Court of Appeal was prepared to engage in such an attempt at "disentanglement". The requisite mental elements for each of these torts could not be supplied by the respondent's novel concept of "institutional malice", which derives no support from case law. Acceptance of this concept would significantly relax the mental element of torts which, as Basten JA observed (the other members of the Court of Appeal agreeing) are not "purely public law torts": at [103], Appeal Book at 553. It would involve somehow imputing a dominant, collective, improper purpose to Ministers (despite the amendment of what became the CP Act to make it applicable only to the plaintiff having been initiated by the Opposition in the Legislative Council: (2010) 203 A Crim R 66 at 79 [58], Appeal Book at 470; [73], Appeal Book at 473), members of parliament (despite Art 9 of the Bill of Rights 1688 (Imp); see s 6 of the Imperial Acts Application Act 1969 (NSW)) and the DPP (who protested against the CP Act: see Appeal Book at 102-103).

16. Further, there could be no factual basis for a finding of "institutional malice" in this case. In the case of the malicious prosecution claim, factual issues would be for a jury: s 88(b) of the Supreme

Court Act 1970 (NSW). But there is no evidence of ill-will or malice towards the respondent by any person acting on behalf of the appellant or the DPP. Nothing suggests that the DPP did not subjectively think that he had a case warranting the bringing of applications under the CP Act, or that he commenced the proceedings for the purpose of anything other than the invocation of that Act: see Basten JA at [111], Appeal Book at 556. The evidence before Hunter and Levine JJ plainly persuaded them that the order was warranted under the test prescribed in the CP Act.

17. As the Court of Appeal recognised (at [109]-[110], Appeal Book at 555-556 per Basten JA, Allsop P, Campbell and Meagher JJA and McClellan CJ at CL agreeing), having considered A v New South Wales (2007) 230 CLR 500, the element of malice in action for malicious prosecution "is, at least primarily, concerned with the motive of the prosecutor". The appellant was not the prosecutor here and neither this element, nor an absence of reasonable and probable cause, can be satisfied in relation to the DPP, who commenced the proceedings. The DPP is independent of the Executive, pursuant to the Director of Public Prosecutions Act 1986 (NSW) ("DPP Act"), and there was "no evidence of any contact between the Executive and the DPP relating to the bringing of the proceedings": (2010) 203 A Crim R 66 at 79 [56], Appeal Book at 469 per Hoeben J. It is true that the appellant has accepted liability for the allegations pleaded against the DPP (see Appeal Book at 77), but this requires the respondent to make them out in the first place.

18. The claim for collateral abuse of process must fail, unless this Court finds – contrary to the Court of Appeal's decision in Leerdam v Noori (2009) 255 ALR 553 and the full Federal Court's decision in Emanuele v Hedley (1998) 179 FCR 290 at 302-303 [44], relying on Williams v Spautz (1992) 174 CLR 509 at 523, 524, 526 – that the tort is available against a person other than the party who actually instituted the proceedings. This would involve a significant expansion of the tort: Leerdam v Noori at 560 [39] per Spigelman CJ (Allsop P agreeing). In support of his submission that these decisions should be overruled, the respondent claims that the appellant "controlled" not only the DPP's conduct of proceedings in the Supreme Court (notwithstanding the DPP Act and Hoeben J's finding referred to at [17] above) but also the process adopted by the Supreme Court itself, such that the executive was the "real" party: RS at [44]. This seems to rely on nothing more than the Executive's introduction of the bill which, following amendments, was enacted by the parliament and was proclaimed as the CP Act: see also the Second Further Amended Statement of Claim at [13]-[15], Appeal Book at 48-53. It provides no basis for this Court's intervention in relation to what should be regarded as settled law.

Dated: 1 March 2013

M G Sexton SC SG
Tel: (02) 9231 9440
Fax: (02) 9231 9444
Email: Michael_Sexton@agd.nsw.gov.au

M J Leeming SC
Tel: (02) 9223 7395
Fax: (02) 9232 7740
Email: mleeming@selbornechambers.com.au

J E Davidson
Tel: (02) 9231 9445
Fax: (02) 9231 9444
Email: joanna_davidson@agd.nsw.gov.au

Counsel for the Appellant