Supreme Court
New South Wales
Common Law Division

Case Title:	Konneh v State of New South Wales (No.2)
Medium Neutral Citation:	[2013] NSWSC 390
Hearing Date(s):	10/02/2012
Decision Date:	19/04/2013
Jurisdiction:	Civil
Before:	Garling J
Decision:	(1) Notice of Motion of the State filed 23 December 2011 is dismissed. (2) The plaintiff is to file and serve by 4pm 2 May 2013, a further amended statement of claim, which designates only one solicitor acting as the solicitor on the record for the plaintiff. (3) The State is to pay the plaintiff's costs of the motion. (4) The plaintiff is to pay the State's costs of, and occasioned by, the filing of the further amended statement of claim.
Catchwords:	PROCEDURE –notice of motion seeking to strike out paragraphs of amended statement of claim – irregularity of pleadings – whether two solicitors on record is contrary to the interests of justice. TORT –novel pleading of knowledge for wrongful arrest and false imprisonment.
Legislation Cited:	Bail Act 1978 Civil Procedure Act 2005 Law Reform (Vicarious Liability) Act 1983 Legal Profession Act 2004 Police Act 1990 Uniform Civil Procedure Rules 2005

	Young Offenders Act 1997 Workers Compensation Act 1926
Cases Cited:	Carter v Marine Helicopters Ltd (1996) 9 ANZ Insurance Cases 61 – 299; Dallison v Caffery [1965] 1 QB 348 Dey v Victorian Railways Commissioner [1949] HCA 1; (1949) 78 CLR 62; Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125; George v Rockett [1990] HCA 26; (1990) 170 CLR 104; Gibson v Parkes District Hospital (1991) 26 NSWLR 9; Herbert v Badgery (1893) 14 LR (NSW) Eq 321; Konneh v State of NSW [2011] NSWSC 1170; Lewis v Daily Telegraph (No 2) [1964] 2 QB 601; Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; New South Wales v Fahy [2007] HCA 20; (2007) 232 CLR 486; O'Hara v Chief Constable, Royal Ulster Constabulary [1997] 1 All ER 129; [1997] AC 286; Rahman v Dubs [2012] NSWSC 1065 Spencer v The Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118;
Category:	Procedural
Parties:	Musa Konneh (P) State of New South Wales (D)
Representation	
	Counsel: M B J Lee SC / P Batley (P) M T McCulloch SC /D F Villa (D) Solicitors: Maurice Blackburn Pty Ltd (P) Public Interest Advocacy Centre Ltd (P)

Crown Solicitor (D)

File number(s): 2011/187125

JUDGMENT

1 On 7 June 2011, Mr Musa Konneh brought proceedings against the State of New South Wales, claiming damages, including aggravated damages for wrongful arrest, false imprisonment and assault.

2 The Statement of Claim pleaded that the proceedings were brought by Mr Konneh on his own behalf and, pursuant to Part 10 of the *Civil Procedure Act* 2005, as a representative proceeding.

3 The group members on whose behalf the proceedings are brought by Mr Konneh were described in this way, namely, persons who:

> "(a) were detained by a member of the New South Wales Police Force for only a breach of a bail condition or bail conditions; and
>
> (b) the alleged breach of the bail condition or bail conditions related to an alleged offence or offences which were being or had been prosecuted in the Childrens Court of New South Wales; and
>
> (c) at the time of the detention were not then subject to the bail condition or bail conditions which were alleged to have been breached."

4 The State took exception to the terms of the Statement of Claim and moved to have a number of paragraphs of it struck out.

5 On 7 October 2011, Hoeben J (as his Honour then was), struck out parts of the Statement of Claim and ordered that the plaintiff file and serve an Amended Statement of Claim which accorded with the judgment: *Konneh v State of NSW* [2011] NSWSC 1170.

6 On 21 November 2011, an Amended Statement of Claim was filed. The State was still not satisfied that the Amended Statement of Claim was appropriate and, accordingly, on 23 December 2011, filed a Notice of Motion seeking to have a number of paragraphs in the Amended Statement of Claim struck out.

7 This judgment deals with that Notice of Motion.

8 On 22 December 2011, Mr Konneh filed a Notice of Motion seeking a variety of orders of a kind appropriate to a representative proceeding. He sought to have determined the scope of the trial, whether the group ought be an opt out group, and if so, how notices might be sent to ensure that group members were aware of the proceedings. He also sought consequential relief.

9 It was agreed that it was appropriate for the Court to deal with the strike out motion first because it is not until the pleadings are finalised and settled, that the matters raised by the plaintiff in his Notice of Motion ought be determined.

10 For the reasons which follow, I have not been persuaded that I should strike out the parts of the pleading which the motion addresses.

The Proceedings

11 Mr Konneh, who was at all relevant times a juvenile, was charged with a number of offences, in respect of which, he alleges that, initially on 28 July 2010, he was granted conditional bail.

12 He next pleads, and therefore accepts, that he was in breach of those conditions of bail and, as a consequence, on 9 August 2010, was arrested and detained overnight. When he appeared before the Parramatta Childrens Court on the following day, 10 August 2010, he was before the Court for the purpose of redetermining bail.

13 He pleads that the Magistrate, then presiding, as is not uncommon in the Childrens Court, proceeded to finalise all outstanding charges against Mr Konneh by dismissing them under s 31 of the *Young Offenders Act* 1997.

14 Mr Konneh pleads that the consequence of the dismissal of these proceedings is that he was thereafter at liberty and not subject to any grant of bail nor any conditions imposed as a grant of bail. Thus, it follows, that he was not obliged to comply with the conditions which had been imposed on 28 July 2010, when he was initially granted bail. In other words, he alleges that his liberty was entirely unconditional.

15 He pleads that on 14 August 2010, two police constables attended at his home and arrested him for being in breach of his bail conditions. He pleads that he was taken in a police truck to the Campsie Police Station where he was detained until he was conveyed to the Penrith Court Cell Complex. Accordingly, he pleads that he was detained, and wrongly so, from about 9.20pm on 14 August 2010, until about 3pm on 15 August 2010. At that time he was put before the Parramatta Childrens Court by an audio-visual link from the Penrith Court Complex, and, so it is pleaded, he was set free.

16 Arising out of these circumstances, Mr Konneh alleges that he was wrongfully arrested, falsely imprisoned, and during the course of the false imprisonment, he was assaulted. The assault comes about because it is said that he was handcuffed on a number of occasions, searched on a number of occasions including being strip searched, and that this touching, handcuffing and strip searching all occurred without his authority.

17 He pleads that his arrest, imprisonment and the assault were all unlawful and thereby constituted a tort giving rise to an entitlement in damages.

18 In the alternative, he pleads that the police officers did not have reasonable grounds to arrest and detain him under s 50 of the *Bail Act* 1978, because the officers did not undertake such searches and enquiries as were reasonable in the circumstances, so as to obtain accurate information about his bail status.

19 In various parts of the Amended Statement of Claim, the pleading sets out in greater detail the failures of the police officers to act reasonably.

20 Central amongst those allegations which are repeated in a number of paragraphs, is a pleading of fact about the computer system which was then in operation in the NSW Police Force, and which was apparently, the source of erroneous information about the bail conditions to which he was apparently subject. That system is referred to by the acronym COPS.

21 Paragraphs 8, 9 and 10 of the Amended Statement of Claim plead various factual assertions with respect to the police computer system. They are in the following terms:

> "8. At relevant times the police computer system known as the 'Computerised Operational Policing System' or 'COPS' (COPS) contained information which recorded, inaccurately, that the plaintiff and Group Members were subject to a bail condition when:
>
> (a) they were at liberty and not subject to any bail conditions; or
>
> (b) they were on conditional liberty, but the conditions of that liberty were otherwise than as recorded on COPS.
>
> Particulars
>
> With respect to the plaintiff, COPS recorded that the plaintiff was subject to the Konneh Bail Conditions (as defined below) or a bail condition notwithstanding the fact the Court's file and the computer system known as 'JusticeLink' recorded that the Charges had been dismissed; in addition to the claims of Keith Moffitt and Reginald Simpson that are pleaded below (and whose claims are proposed to be dealt with at the initial trial),

particulars of the balance of Group Member claims will be provided after a trial of the common issues.

9. At all material times when the plaintiff and Group Members were detained, senior police officers within the NSW Police force were aware that the information on COPS as to bail conditions:

(a) was unreliable;

(b) was often inaccurate;

(c) was information the reliability of which did not provide a reasonable basis for assuming it recorded the accurate bail status of a person whose details were purported to be recorded in COPS.

10. At material times when the plaintiff and Group Members were detained, the knowledge of senior police officers within the NSW Police Force pleaded in paragraph 9, should be attributed to the NSW Police Force, and by reason of this fact, the members of the NSW Police Force referred to in paragraph 1(a).

Particulars

Any rule of attribution by which the knowledge or mental state of individual senior police officers should be attributed to the NSW Police Force requires an organic approach which goes beyond the law of agency and, following discovery and interrogatories as to the repositories and extent of the relevant knowledge (and prior to any initial trial), the plaintiff and Group Members will identify, in the context of the statutory scheme relevant to the arrest of a minor, the facts, matters and circumstances and relevant policy matters relied upon to support the special rule of attribution upon which the plaintiff and Group Members rely."

22 An example of how this factual material is used in the pleadings can be found in paragraph 20 which is to the following effect:

"In the alternative, Senior Constable Ngoc Tran and Constable Matthew Lord did not have reasonable grounds to arrest and detain the plaintiff under section 50 of the *Bail Act* as they did not undertake the searches and inquiries that were reasonable in the circumstances to obtain accurate information about the plaintiff's bail status given the existence of the following facts or matters or any combination of the following facts or matters:

(a) the matter pleaded in paragraph 9 above; and/or

(b) the matter pleaded in paragraph 10 above; and/or

(c) that they ought to have known that the information on COPS as to bail conditions:

(i) was unreliable;

(ii) was often inaccurate;

(iii) was information the reliability of which did not provide a reasonable basis for assuming it recorded the accurate bail status of a person whose details were purported to be recorded in COPS; and/or

(d) they did not undertake any searches and inquiries other than accessing the information on COPS as to the bail conditions of the plaintiff;

(e) they did not review the Court file or make inquiries of persons who were able to review or have access to information contained on the Court file;

(f) that the plaintiff was 18 years old at the time of his arrest; and/or

(g) an arrest of a person interferes with his or her fundamental right of liberty; and/or

(h) the NSW Police Force's 'Code of Practice for CRIME (custody, Rights, Investigation, Management, Evidence)' acknowledges that the arrest of a person is an extreme action and requires police officers to always consider alternatives to arrest; and or

(i) that the plaintiff had put the arresting officers on notice of the inaccuracy of the information about his bail status; and/or

(j) that accurate information about the plaintiff's bail status could easily have been obtained; and/or

(k) that at the time of his arrest the plaintiff was at home and presented no obvious flight risk; and/or

(l) that they made no attempt to negotiate with the plaintiff any less onerous method of ensuring he was not a flight risk while they made further inquiries to confirm his bail status; and/or

(m) there was no urgent need to arrest the plaintiff."

23 Because this is a representative pleading, it is a requirement of s 161 of the *Civil Procedure Act* 2005 that a plaintiff sets out in the statement of claim, the common questions of law or fact which the plaintiff alleges arise

in the proceedings and which are applicable to the group members. Included in those common questions are the following:

> "2. Whether one or other of the matters pleaded in paragraph 9 was true during all of the relevant periods.
>
> 3. Whether, if true, that matter or matters had the consequences as pleaded in paragraph 10.
>
> 4. The content of the duties of arresting officers to the plaintiff and group members in the event that one or other of the matters alleged in paragraph 9 and/or 10 was true.
>
> 5. Whether in the premises, a police officer could ever have reasonable grounds for believing that a person has breached their bail condition without first confirming the bail information from a source or sources other than COPS.
>
> …
>
> 9. Whether the arrest and detention of young persons solely on the basis of inaccurate information on COPS when there is a well-known risk that the information is inaccurate, and no procedures have been implemented by the NSW Police Force to minimise that risk, is a circumstance warranting an award of exemplary damages."

24 The State is sued as the only defendant because it is alleged that it is vicariously liable for the conduct of the arresting officers, pursuant to s 8 of the *Law Reform (Vicarious Liability) Act* 1983. I do not understand there to be any dispute that if Mr Konneh proves that he was wrongfully arrested, that the State accepts that it is an appropriate defendant.

Mr Konneh and Group Members

25 The Amended Statement of Claim pleads the specific facts and circumstances relating to the Mr Konneh in paragraphs 11 – 31 inclusive.

26 From paragraph 32 onwards, the Amended Statement of Claim pleads the claims of other identified group members. The first is a Mr Keith Moffitt. Insofar as the pleading relates to Mr Moffitt, paragraph 39 of that pleading is substantially similar to paragraph 20, which deals with Mr Konneh's arrest.

27 From paragraph 52 onwards, the Amended Statement of Claim deals with Mr Reginald Simpson. Paragraph 61 of the pleading dealing with Mr Simpson's claim is in substantially the identical form to paragraphs 20 and 39 dealing with Mr Konneh and Mr Moffitt respectively.

28 Each of the pleadings relating to Mr Moffitt and Mr Simpson include, by reference, the factual matters asserted about COPS in paragraphs 8 - 10 (inclusive).

Defence of the State

29 The State has filed a defence to the original statement of claim. Although it will need to be amended to reflect an answer to the current pleading, the document is sufficient for present purposes to gain an understanding of the way in which the State intends to defend the proceedings.

30 In general terms, the State admits the matters of fact pleaded by Mr Konneh as to his arrest and detention. Importantly, the State admits that at the time of his last arrest, which is said to be unlawful, he was not subject to any bail conditions.

31 However, the State pleads that the arrest was lawful. It asserts in paragraph 16 that:

> "(b) … prior to arresting the plaintiff the arresting officers held a belief on reasonable grounds that the plaintiff was at liberty on bail and that the plaintiff had failed to comply with his bail undertaking given on 28 July 2010; and
>
> (c) says that the arrest was lawful by reason of s 50 of the *Bail Act* 1978."

32 A similar defence is pleaded with respect to the other identified group members, although in the case of Mr Simpson, the State pleads that at the time of his arrest he was at liberty on bail within the meaning of s 50 of the *Bail Act*.

33 In all cases, the State pleads that the searching, handcuffing and touching of Mr Konneh and the identified group members was authorised by law as a consequence of the lawful arrest and detention of each individual.

34 There can be no doubt that in the conduct of the defence, the information available to the arresting officers and the reasonableness of their conduct in relying upon that information, including the reliability of the source of the information will be part of the relevant factual dispute.

Notice of Motion of the State

35 The State moves the Court to strike out paragraphs 9 and 10 of the Amended Statement of Claim, which I have earlier set out. In addition, it seeks to strike out paragraphs 20(a), (b) and (c) and those identical parts of paragraphs 39 and 61 which are to the same effect.

36 As well, the State seeks to strike out questions 2, 3, 4, 5 and 9 of the Common Questions.

37 Mr Konneh submits that the Court ought not strike out those parts of the Amended Statement of Claim. In so submitting, he accepts that the contents of paragraphs 9 and 10 in particular, constitute what can properly be described as a "novel" pleading.

Basis of Motion

38 The State moves for the orders in the motion upon the basis of the provisions of r 14.28 of the UCPR. Relevantly, the rule is in the following form:

> "(1) The Court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
>
> (a) discloses no reasonable cause of action or defence, or other case appropriate to the nature of the pleading, or

(b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or

(c) is otherwise an abuse of the process of the Court."

39 The State argued that the particular paragraphs which were attacked by its Notice of Motion, ought be struck out because the paragraphs had a tendency to cause prejudice, embarrassment or delay in the proceedings: r 14.28(1)(b). However, as the submissions were developed, it became clear that a submission was also being put that the reason that the pleadings caused prejudice, embarrassment or delay was because the paragraphs had no legitimate part in any reasonable cause of action.

40 If a party applies for summary determination of a claim upon the basis that the cause of action pleaded is groundless, or I would add, an essential element of the cause of action is groundless, then it is appropriate to apply the usual legal tests for summary dismissal. These principles are well known. I have referred to them comprehensively in *Rahman v Dubs* [2012] NSWSC 1065 at [36]ff. I adhere to what I there said.

41 In *Dey v Victorian Railways Commissioner* [1949] HCA 1; (1949) 78 CLR 62 at [13], Dixon J said:

> "The application is really made in the inherent jurisdiction of the Court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable is well-settled. The case must be very clear indeed to justify the summary intervention of the Court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court… But once it appears that there is a real question to be determined, whether of fact or law, and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."

42 Most recently, in the High Court of Australia, French CJ and Gummow J in *Spencer v The Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 said at [24]:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such

> disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis the action is frivolous or vexatious or an abuse of process. The same applies where such disposition is sought in the summary judgment application supported by evidence …"

43 But, as Mr Konneh has accepted, this relevant part of his pleading can properly be considered as novel. In short, in the context of the organisation which is the NSW Police, he seeks to argue that actual knowledge is gained, transmitted, and available to be known by individual police officers in an organic or holistic way. He also argues that constructive knowledge (that is, what an officer ought reasonably to have known) is relevant when assessing the reasonableness of the actions of the individual police officers.

44 The novelty of the pleadings calls up for consideration the authorities which deal with the interaction of novelty and summary dismissal.

45 In *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9, Badgery-Parker J was dealing with a question of whether an amended statement of claim should be struck out in circumstances where the question was whether a pleading of the existence of a duty to deal fairly and in good faith with an applicant for benefits under the *Workers Compensation Act* 1926 ought be summarily dismissed.

46 Before his Honour, it was argued that such a duty did not exist, although it was conceded that the facts pleaded were capable of constituting a breach of such a duty, if the law allowed of the existence of such a duty. As his Honour put it at page 14:

> "The real substance of the issue … now before this Court is whether the tort sought to be alleged in fact exists in the common law."

47 His Honour held that the well known principles relating to summary dismissal in *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at 129, applied. However, in

the face of an acknowledgement by the plaintiff that there was no case in any jurisdiction in Australia in which the cause of action pleaded had been accepted, his Honour said:

> "that the proposed cause of action is novel does not compel a decision adverse to the plaintiff. In *Champtaloup v Thomas* [1976] 2 NSWLR 264 at 271, Glass JA said :
>
> > 'It is no longer appropriate to react with outraged dignity when a litigant propounds a novel theory judiciously constructed from elements of received doctrine.'
>
> However, the fact that such a cause of action as the plaintiff seeks to assert has never before been successfully relied on in this State, or elsewhere in Australia or the United Kingdom, is very relevant to the question whether the proposed course of action does exist in the law."

Relevant Legislation

48 In order to understand the issues posed in the proceedings, and the Notice of Motion, it is necessary to have an understanding of the *Bail Act* 1978. That is because Mr Konneh refers to it in the Amended Statement of Claim and because the State relies upon s 50 to justify the conduct of each of the police officers who were involved in the arrest of Mr Konneh, and the other group members.

49 Section 50 is in Part 7 of the *Bail Act.* That Part deals with non-compliance with bail undertakings and conditions. It is, relevantly, as follows:

> "**50. Arrest for absconding or breaching condition**
>
> (1) Where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition:
>
> (a) a police officer may arrest the person without warrant and take the person as soon as practicable before a court, or
> (b) … "

50 There will be an issue in the proceedings as to whether s 50 can be applicable in the circumstances pleaded, because, as Mr Konneh argues, he was not " *… a person released on bail …"* at the time he was wrongfully arrested. The State argues that s 50 can be applicable if the arresting officer had a reasonable belief that the person whom he or she was arresting was " … *released on bail"*.

51 The parties propose that, in due course, this would be a question which is properly to be dealt with by the separate question procedure in Part 28 of the Uniform Civil Procedure Rules 2005. Whether or not that would be appropriate should wait for the time when the issue directly arises. In light of this, it is inappropriate for any view to be expressed in this judgment on that issue.

The Cause of Action Pleaded

52 The cause of action pleaded by the plaintiff, which for present purposes can be confined to the tort of wrongful arrest and false imprisonment, is one, the elements of which are well-known. There is no novelty in pleading such a cause of action.

53 The novelty arises from the pleading of actual, or else, constructive knowledge. This arises because of the necessity in their defence of the allegations, for the State standing in the shoes of the arresting police officers, to establish that they had reasonable and probable cause for the arrest. Diplock LJ said in *Dallison v Caffery* [1965] 1 QB 348 at 370:

> "Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest."

54 The test includes an objective element. Diplock LJ said in *Dallison* at 371:

> "The test whether there was reasonable and probable cause for the arrest and prosecution is an objective one, namely, whether a reasonable man assumed to know the law and possession of the

> information which in fact was possessed by the defendant, would believe there was reasonable and probable cause."

See: *O'Hara v Chief Constable, Royal Ulster Constabulary* [1997] 1 All ER 129; [1997] AC 286.

55 In *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104, the High Court of Australia said, at 112:

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of a state of facts which are sufficient to induce that state of mind in a reasonable person".

56 The State accepts that whether or not the arrest of the plaintiff or a member of the group was to be lawfully effected by an individual police officer, that officer, whether acting in accordance with s 50 of the *Bail Act*, or else at common law, had to personally hold a belief which had a subjective and an objective element to it – namely, whether a particular police officer held a belief and the identification of the content of that belief, and, if so, whether the grounds for the belief were reasonable.

57 Thus, the question becomes whether there can be any, and if so, what attribution of knowledge about COPS to the individual police officer such as to constitute a part of the officer's actual knowledge, and whether, having regard to the nature of the source of the knowledge, it was reasonable to rely upon it.

Knowledge Attribution

58 It is to be observed that the sequence of knowledge attribution is thus:

(a) COPS is an unreliable system;

(b) that unreliability was known to senior police officers within the NSW Police Force;

(c) the knowledge of those senior police officers should be attributed to the NSW Police Force, that is, the organisation;

(d) because the organisation had that knowledge, the individual police officers who are part of the organisation ought have that knowledge attributed to them.

59 Alternatively, as it was put in oral submissions, that where reliance was placed upon COPS by a member of the NSW Police Force, then that reliance could not amount to reasonable grounds because the individual officer knew, or ought to have known, that the COPS system was unreliable.

60 It can be seen that this is an entirely novel approach to the attribution of knowledge. The ordinary rules of attribution which exist by statute or by the common law, are intended to fix a company with the knowledge of a particular individual who is an employee, or perhaps agent, of the company.

61 As the Privy Council explained it in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, at 506:

> "Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution."

62 The organisation, the NSW Police Force, is not a company. However, it has some of the features which are seen in a *persona ficta.* It is established pursuant to s 4 of the *Police Act* 1990. The Commissioner of Police is, subject to the direction of the Minister for Police, responsible for the management and control of NSW Police: see s 8 *Police Act*.

63 The legislation has a particular nature and affects the manner of operations of the members of NSW Police. It was described in this way in

New South Wales v Fahy [2007] HCA 20; (2007) 232 CLR 486 by Gummow and Hayne JJ at [21]:

> "Read as a whole, … the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer

64 One feature of an hierarchical and disciplined force is the possession of, and transmission through the ranks, of information which is sufficient to enable each member of the force to carry out their duty in an efficient and responsible manner. In the case of a police force, such conduct is often that of an individual constable exercising an independent statutory function, such as the power of arrest.

65 Thus, in the absence of any statutory provisions relating to, or else, creating any rules of attribution, then how knowledge is acquired within the NSW Police Force is a matter of fact, to be determined by the tender of evidence relevant to the particular circumstances in dispute.

Discernment

66 Applying these general remarks to the issues here, what is sought to be shown is that the knowledge of senior police officers about the reliability of the COPS system became part of the knowledge of all officers, including the arresting officers here. On any view, the road selected by the pleading is a steep and rocky one and not without obstacles. However, at this stage, I find it hard to say that it is an impossible road for Mr Konneh and the group members to navigate. Nor am I prepared to find that they may not be able to prove such knowledge.

67 As well, there will undoubtedly, in the evidence, be a question as to whether the accuracy (or inaccuracy) of the information recorded in the COPS system, was notorious, such as would lead, perhaps by inference,

to a finding that the information did form, or else must have formed, part of the actual knowledge of the relevant officer.

68 As well, it cannot be doubted, at least at this early stage of the proceeding, that issues about the reliability of COPS may be relevant to the objective reasonableness of the arresting officer's conduct. That is because it is always part of the objective assessment to consider the source of the information, including assessing the reliability of that source or those sources. By way of an example, if the only information available to an arresting officer was that which, uncorroborated, came from a well known liar who had previously been convicted of perjury, then it may not be objectively reasonable for an officer to act on the basis of that material alone, and hence they may not discharge their onus of showing reasonable and probable cause for the arrest.

69 Here, the information was apparently in COPS. Whether, and to what extent, COPS is reliable as a source, is in no different position to the individual source of the kind described in the example in the previous paragraph. The mere fact that the source is a computer and not a human being does not change the principle involved. After all, the information held in the computer is entered, or else, omitted to be entered, by a human being.

70 It must be said that to have included paragraphs 8 to 10 in the Statement of Claim, rather than in a reply to a defence once filed, which defence would need to plead specifically the facts and matters relied upon as relevant to establish the arrest as lawful, is unconventional. Effectively, it pleads material which anticipates a defence, and answers that anticipated defence.

71 This would legitimately have been the subject of a pleading attack by the State. However, commendably, the State in its submissions concentrated on the substance of the allegations in the challenged paragraphs and sought to demonstrate that they had no part to play at all in any of the

issues which may arise. In the circumstances of this case, that approach should be followed in this judgment. It is a success for substance over form. One of the consequences of this approach was that it was not made pellucidly clear until oral submissions in answer to the State's submissions quite what role the challenged paragraphs had to play in the consideration of the appropriateness of the pleading. However, there was no procedural disadvantage to the State in dealing with these matters as the submissions on the motion were developed.

72 For all of these reasons, I am not satisfied that the orders sought in the State's notice of motion should be made.

Other Issues

73 One matter which was raised by the Court, and which was the subject of submissions by the counsel for the plaintiff, was the irregular form of the Amended Statement of Claim, insofar as it recorded that there are two solicitors acting for the plaintiff and the group members.

74 At the start of the Amended Statement of Claim under the heading "Filing Details", the names of the plaintiff's legal representatives are set out in this way:

> "Legal Representative: Ben Slade – Maurice Blackburn Pty Ltd
> Alexis Goodstone – Public Interest Advocacy Centre Ltd "

Further on their contact details are provided.

75 At the end of the Amended Statement of Claim under the heading "Signature of Legal Representative" appears the certification required by s 347 of the *Legal Profession Act* 2004, which is expressed in the singular voice. Underneath the certification is the signature of each of the legal representatives whose names have appeared at the start of the pleading. Both describe the capacity in which they are signing the pleading as "Solicitor on the Record".

76 Thus it is that the pleading suggests, and Senior Counsel for the plaintiffs accepts, that there are two solicitors on the record for the plaintiffs.

77 There are no specific rules in the Uniform Civil Procedure Rules 2005 which provide for, nor authorise a party to be represented by two solicitors on the record simultaneously. On the contrary, there are many rules, particularly those in Part 4 and Part 7 of the UCPR which, when they refer to a solicitor do so in the singular, and as expressed, are incompatible with the concept of a party being represented by more than one solicitor simultaneously.

78 Part 21 of the UCPR deals with Discovery, Inspection and Notice to Produce Documents. Of particular importance is the requirement of r 21.4(3) which requires a party giving discovery to do so by provision of a list of documents, as a part of which, the solicitor for the party must provide a certificate of advice with respect to the advice provided on discovery obligations. Rule 21.5 requires, in the nominated circumstances, an undertaking by a party's solicitor that such advice has been delivered. Compliance with this particular obligation would be problematic if there was more than one solicitor on the record for a party.

79 For over one hundred years, various decisions in this and other courts have declined to recognise the legitimacy of a party having two solicitors on the record simultaneously. In *Herbert v Badgery* (1893) 14 LR(NSW) Eq 321 at 329, Owen CJ in Eq did not allow costs for two solicitors to represent one party.

80 On the question of two solicitors representing one party, in *Elphick v Westfield Shopping Centre Management Company Pty Ltd* [2011] NSWCA 356, Young JA, at [5], expressed the view that plaintiffs *" … must always be represented by the same solicitor"*. He also said at [4] *" … it is contrary to the proper practice in this court."* His Honour noted that it was possible for leave to be sought to allow such a thing to occur but no such leave has been sought or granted in these proceedings.

81 In the United Kingdom, the Court of Appeal held in *Lewis v Daily Telegraph (No 2)* [1964] 2 QB 601, that the proceedings were not properly constituted because co-plaintiffs were, without leave, purporting to be represented by two solicitors at the same time. Pearson LJ said at 619 that *" … it was not regular, and not in accordance with the proper practice, that two firms of solicitors should be placed on the record as representing [the plaintiffs] …"*.

82 Russell LJ, at 623, accepted that an order allowing two solicitors on the record might be made *" … but this must be, I think, rare and should only be done to avoid injustice."*

83 In New Zealand, Williams J in *Carter v Marine Helicopters Ltd* (1996) 9 ANZ Insurance Cases 61-299, noted that with respect to the named defendant which had two separate and distinct interests, namely an insured interest and an uninsured interest, that *"… very considerable practical difficulties would arise if it were represented … by different solicitors . .."*. He refused to permit dual representation.

84 I am of the view that in this case, in the absence of leave being granted, that the Amended Statement of Claim is in its present form irregular because two solicitors claim to be the solicitors on the record.

85 And I can see significant difficulties in practice with allowing the position to continue. For example, where the Court orders the solicitor on the record to do something, upon which of the two solicitors does the obligation for compliance fall? Against whom, can the Court take enforcement action if the order is ignored? So far as the opposing party is concerned, upon which of the two solicitors would service be adequate in accordance with the UCPR. Must the solicitor serve the relevant documents or, perhaps, a Notice to Produce on both solicitors on the record? Can the solicitor pick and choose where to serve the document? Would there be available double costs where both solicitors do the same thing, such as attending

the Court's Registry together to file documents? From which solicitor does counsel receive his or her instructions about cross-examination of witnesses? What if counsel's instructions are different, which instructions are to be preferred?

86 Whether any of these circumstances will actually occur cannot be predicted with any accuracy. However, that does not mean that the Court ought not be concerned or vigilant to ensure that the proceedings are not derailed or delayed in any way, in the event that any of these difficulties may arise. I have concluded that it is not in the interests of justice to allow the existing dual representation to continue, and the plaintiff must elect which of the two solicitors he wants to be the solicitor on the record, by the filing of a further amended statement of claim.

Orders

87 I make the following orders:

(1) Notice of Motion of the State filed 23 December 2011 is dismissed.

(2) The plaintiff is to file and serve by 4pm 2 May 2013, a further amended statement of claim, which designates only one solicitor acting as the solicitor on the record for the plaintiff.

(3) The State is to pay the plaintiff's costs of the motion.

(4) The plaintiff is to pay the State's costs of, and occasioned by, the filing of the further amended statement of claim.

(5) Proceedings adjourned for further directions to 9.30am on 3 May 2013.

(6) Liberty to apply on 48 hours notice.

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