Goyma v Moore & Ors [1999] NTSC 146

PARTIES:	GOYMA, Dick
	v
	MOORE, David DARWIN CITY COUNCIL REID, Jason AH-MATT, Sharon MORRIS, Sharon O'BRIEN, Cathy
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	175 & 176 of 1999
DELIVERED:	22 December 1999
HEARING DATES:	24/25 November 1999
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

STATUTES

By-laws and Regulations – Construction – validity – Control of Public Places – Sleeping in a public place

STATUTES

By-laws and Regulations – Validity prescribed form not in accordance with statute

STATUTES

By-laws and Regulations – validity of regulation contrary to earlier Act

ADMINISTRATIVE LAW

Clerk of Local Court jurisdiction to issue warrant of imprisonment

Local Government Act 1993 (NT) s 115, s 120, s 121, s 182, s 192 and s 193
Justices Act 1928 (NT)
Darwin City Council By-laws 1994 (NT)
Justices (Territory Infringement Notices Enforcement Scheme) Regulations 1990 (NT)

South Australia v Tanner (1989) 166 CLR 164, considered.
Union Steamship v King (1988) 166 CLR 1, applied.
Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 385, considered.
Swan Hill Corporation v Bradbury (1937) 56 CLR 746, considered.
TN & Ors v Walford, unreported, Supreme Court of the Northern Territory, 13 November 1998, considered.
Young v Tockassie (1905) 2 CLR 470, applied.

CRIMINAL LAW

Evidence – proof of exceptions

Dowling v Bowie (1952) 86 CLR 136, applied.

REPRESENTATION:

Counsel:

Plaintiff:	D Beckett, C Howse
1st Defendant:	P Cantrill
2nd Defendant:	D Farquhar
3rd, 4th, 5th & 6th Defendant:	Ms G Martin
Attorney-General (Intervener)	D Lisson

Solicitors:

Plaintiff:	D Beckett
1st Defendant:	Withnall Maley
2nd Defendant:	Cridlands
3rd, 4th, 5th & 6th Defendant:	Solicitor for the NT
Attorney-General (Intervener)	Solicitor for the NT

Judgment category classification:	B
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Mar99042

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Goyma v Moore & Ors [1999] NTSC 146
No. 175 & 176 of 1999

BETWEEN:

DICK GOYMA
Plaintiff

AND:

DAVID MOORE
First Defendant

AND:

DARWIN CITY COUNCIL
Second Defendant

AND:

JASON REID
Third Defendant

AND:

SHARON AH-MATT
Fourth Defendant

AND:

SHARON MORRIS
Fifth Defendant

AND:

CATHY O-BRIEN
Sixth Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 22 December 1999)

[1] In these proceedings the plaintiff calls in question the validity of a Darwin City Council by-law, prohibiting sleeping in a public place, and the procedures which led to his being imprisoned for having failed to pay a penalty and accumulated costs when he was said to have infringed the by-law on different occasions and in various places around the city. He was released from prison by order made on an application for a writ of *habeas corpus* and bailed pending the outcome of these proceedings. He had a few days to serve in prison when the court was asked to intervene.

[2] The first defendant is the Director of Correctional Services under the *Prisons (Correctional Services) Act* 1980 (NT). He appears to submit to such order as the court may make, saving as to costs. The second defendant is the municipal council under the *Local Government Act* 1993 (NT) ("the Act") in relation to the municipality of Darwin. It appears by counsel to contest the plaintiff's claims. The third to sixth defendants are the Clerks of the Court of Summary Jurisdiction under the *Justices Act* 1928 (NT) who were involved in the final steps in the procedures leading to the arrest of the plaintiff. They appear to submit to such orders as the court may make, saving as to costs.

[3] The Attorney-General intervenes under s 17 of the *Crown Proceedings Act* 1993 (NT), the proceedings relating to a matter under or involving the interpretation or validity of a law in the Territory, for the purpose of

submitting argument on a question at issue, that is, the law relating to the enforcement of the penalty.

[4] The Darwin City Council is empowered by s 182 of the Act to make by-laws, not inconsistent with the Act, the Regulations or another Act, for or in relation to the performance of a function vested in it.

[5] In the performance of its functions, the council is charged with the peace, order and good government of its council area and has the control and management of that good government (s 120). Amongst the functions conferred upon it under the Act is the "Control of Public Places" (s 121(2) and Sch 2 to the Act).

[6] Public places are defined in the by-laws as including:

> "(a) every place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of the place;
>
> (b) every place to which the public are admitted on payment of money, the test of the admittance being the payment of the money only;
>
> (c) every road, street, footway, court, alley, thoroughfare or cul-de-sac which the public are allowed to use, notwithstanding that the road, street, footway, court, alley or thoroughfare may be formed on private property; and
>
> (d) land reserved under a law of the Territory for the use of the public or a member of the public."

[7] By-laws may authorise officers or employees of the council to arrest or remove persons offending against a by-law (s 191) and may designate an

offence to be a regulatory offence (s 192), and see s 3 of the *Criminal Code* 1983 (NT). They may prescribe penalties not exceeding $3,000 or imprisonment for six months for contravening a by-law (s 193(1)).

[8] Section 115 provides that subject to the Act, a council has power to do all things necessary or convenient to be done for, in connection with, or incidental to, and may do anything which is not otherwise unlawful for, the purpose of performing its functions.

[9] It is provided in by-law 103(1)(c) that if a person being an adult, sleeps at any time between sunset and sunrise, in a public place, other than in a caravan park as defined, or in accordance with a permit, that person commits a regulatory offence. An authorised person is empowered by by-law 103(3) to direct a person who is in contravention of the by-law to leave the public place, and the person is obliged to do so on pain of committing an offence (s 103(4)).

* *Is the By-law valid?*

[10] The plaintiff's submission is that the by-law controls sleeping not place. The control of conduct is too remote from the function; controlling building in public places or even camping (which it is assumed includes setting up temporary structures) is not objectionable, but to make it an offence for a person to fall asleep and remain asleep in a public place does not fall within the reach of the power; a by-law forbidding a person to scratch his or her

elbow in a public place is obviously invalid, and so is one which creates an offence of being sleep.

[11] The council's argument is that the by-law making power extends to control of activities in public places. The power is deliberately broad reflecting the responsibilities placed upon a municipal council charged with the peace, order and good government of its council area in the performance of its functions; the power enables the council to regulate any activity in public places which has the potential to limit or negatively impact upon the enjoyment by all members of the public of the public place; council must be able to control the use of public places which impact upon, for example, sanitary and recreational facilities which may or may not be available.

[12] Examples put in council's submission of the need for such by-laws fall down when it is recognised that the use or misuse of such facilities do not arise when a person is asleep or as an outcome of sleep. A person who is wide awake is likely to have a greater need or desire to use such facilities. If the argument had any merit, it would have to be premised on the proposition that people who have had a sleep in a public place are more likely to wish to use public facilities than a person who has not. The same response can be made to the argument that the cost of maintaining a public place is increased simply because a person goes to sleep there.

[13] A starting point for any consideration of the validity of the by-law is to determine the "true nature and purpose of the (by-law making) power",

words adopted by the High Court in *South Australia v Tanner* (1989) 166 CLR 161 at 164 from the words of Dixon J in *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155. In order to discharge the performance of its functions for peace, order and good government of the council area, the council is empowered to control public places by the making of by-laws.

[14] Within the limits of the grant, such a power is ample and plenary (as to the plenary nature of the power, see *Union Steamship v King* (1988) 166 CLR 1 at pp 9-10 and, in their application to municipal authorities, see the ancient examples given by Dixon J in *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 363).

[15] Counsel for the council rightly referred to the short extract from the decision of the Supreme Court of Victoria in *Seeligson v City of Melbourne* at p 167 of *South Australia v Tanner*. It is, I think, worth citing here a fuller version from the judgment of Mann CJ:

> "It is a mistake to exercise one's ingenuity in imagining cases which would seem to fall within the actual words of a by-law, and then to emphasize the hardships that would follow in such cases. A great many of such cases would probably be held not to be within the reasonable tenor of the by-law at all, when construed with reference to its subject-matter. But, even if some harmless act would fall within the words of this regulation, it is important to remember that all legislation must of necessity be in more or less general terms, and it is not rendered any the more or the less invalid because an attempt to suppress an evil may conceivably brand as an offence some act which in particular circumstances is harmless. It may well be a matter of opinion about many by-laws, as to whether they are not what might be called a somewhat fussy exercise of legislative

> powers, that they trench on the liberty of a great many people because of the use made of that liberty by comparatively few."

[16] Is there any limit on the grant of the statutory power to the council to make by-laws for or in relation to the performance of its functions in the control of public places? As to "control", the remarks of Dixon J in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 385, although in a different context, may yet be apposite, "an unfortunate word of wide and ambiguous import". The functions of the council are described in short form in the Schedule, but the amplitude of the power is demonstrated by reference to s 190 of the Act:

> "By-laws may provide for matters of prohibition, restraint or regulation, either absolutely or in relation to classes, grades, situations, distances or other acts, matters or things to be laid down or referred to in general terms, and whether or not a right of approval, disapproval or inspection is vested in a council, an authorised person or an officer or employee of the council."

This provision may have been derived from the observations of Dixon J in *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 in relation to "regulating" at p 762. In my opinion when s 190 is incorporated as part of the by-law making power, by-law 103(1)(c) is brought within the ambit of what is authorised by the statute. It prohibits sleep in the situation described, that is, in public places between sunset and sunrise.

[17] The power of the council to make by-laws under the heading "Control of Public Places" includes the power to make by-laws controlling the conduct of people in public places. The notion that the power is limited to control of

place alone cannot be sustained, control of public places must be interpreted broadly so as to include control of conduct in those places.

[18] The public use and enjoyment of public places, especially parks, street footpaths and beaches after sunset and before sunrise might be disturbed by the presence of a person asleep therein. Furthermore, presence of one sleeping person may well lead to a gathering of people for a like purpose. It cannot be denied that many people finding others sleeping in a public place in the night disturbing, regardless of the cause of the sleep. Further, there is an issue relating to the safety of the person or persons asleep being exposed to those who may choose to take advantage of their condition in the dark.

[19] Those responsible for enforcing by-law 103(1)(c) have to choose whether to wake the person and give him or her an infringement notice, or ask him or her to move along, in which case refusal may lead to the giving of a notice. It is a discretion vested in the inspector.

[20] As to an attack on the validity of the by-law based upon its unreasonableness, see the discussion in *Pearce and Argument*, Delegated Legislation in Australia, 2nd Ed 1999. The foregoing observations do not provide a proper basis for consideration of the question; it is impossible to say that no reasonable mind could justify the by-law.

Does TINES apply?

[21] Because so much of the plaintiff's submissions depend upon the wording, the following sets out the whole of s 194 of the Act and the relevant by-laws and the form of infringement notice:

> "194. INFRINGEMENT OFFENCES AND NOTICES
>
> (1) In this section "fixed penalty" means the specified sum referred to in subsection (2) payable in lieu of the penalty which may otherwise be imposed for an offence against a by-law.
>
> (2) Subject to this section, by-laws may provide that a person who is alleged to have infringed those by-laws and on whom a notice of infringement has been served may pay to the council, as an alternative to prosecution, a specified sum, in lieu of the penalty by which an infringement of those by-laws is otherwise punishable.
>
> (3) By-laws which provide for the imposition of a fixed penalty shall specify –
>
> (a) the amount of the fixed penalty;
>
> (b) subject to subsection (4), the form of an infringement notice;
>
> (c) the person or persons who may issue an infringement notice;
>
> (d) the person to whom payment of the fixed penalty may be made; and
>
> (e) the period within which the fixed penalty shall be paid in order to avoid prosecution.
>
> (4) An infringement notice shall indicate –
>
> (a) the name of the alleged offender;
>
> (b) in general terms the nature of the offence alleged to have been committed;
>
> (c) the date, time and place of the alleged offence;
>
> (d) the amount of the fixed penalty;

(e) the period within which, and the place where, the fixed penalty may be paid; and

(f) that the alleged offender may, if he or she so wishes, be dealt with by a court of competent jurisdiction."

By-laws

"20. GENERAL PENALTY

A person who contravenes or fails to comply with these By-laws is guilty of an offence and is liable on conviction to a penalty not exceeding $3,000 and, in addition, to a penalty not exceeding $100 for each day during which the offence continues.

21. FIXED PENALTIES

(1) Notwithstanding by-law 20, a person who is alleged to have contravened or failed to comply with these By-laws and on whom a notice of infringement is served, may pay to the council, as an alternative to prosecution, the sum specified by this by-law instead of the penalty that may otherwise be imposed under by-law 20.

(2) For the purposes of this by-law -

(a) a notice of infringement shall be in the form set out in Schedule 1;

(b) a notice of infringement may be issued by an authorized person;

(c) the sum specified by this by-law is $50 or, in respect of a by-law specified in column 1 of Schedule 2, the sum specified opposite the by-law in column 2 of that Schedule;

(d) the sum specified by this by-law may be paid to the clerk or to the person from time to time performing or carrying out the duties of the cashier of the council; and

(e) in order to avoid prosecution, the sum specified by this by-law shall be paid not later than 14 days after the date of the service of the notice of infringement on the person.

SCHEDULE 1

By-law 21(2)(a)

Local Government Act
Darwin City Council By-laws
NOTICE OF INFRINGEMENT
DARWIN CITY COUNCIL

To:

(*name of alleged offender*)

of:

(*address of alleged offender*)

It is alleged that at (*place*) at (*time*) am/pm on 19 (*date*), you committed an offence as indicated hereunder against the Darwin City Council By-laws:

By-law:

Offence:

(*nature of offence*)

Amount of penalty: $

In pursuance of by-law XX of the Darwin City Council By-Laws you may pay to the Council, instead of the penalty by which the offence is otherwise punishable, the amount shown above to the person at the address shown on the reverse of this notice, not later than 14 days after the date of service of this notice of infringement, in order to avoid prosecution.

Dated 19 .

Authorised person

THIS NOTICE MUST ACCOMPANY PAYMENT

(Back of form)

If you do not wish the offence alleged on the front of this notice of infringement to be dealt with by a court of summary jurisdiction you should read and complete the following:

I, of,
tender the amount shown on the front of this notice, being assured that on

payment of that amount no further action will be taken by the council for this offence.

Signed: Date: 19 .

Payment of the amount in full must be made not later than 14 days after the date of service of this notice of infringement and must be accompanied by this notice. Payment may be made between 8.00 am and 4.15 pm Monday to Friday (except public holidays):

in person - To the Cashier,
Darwin City Council

by post - To the Clerk,
Darwin City Council

On payment of the penalty you will not be liable for a further penalty or costs in this matter.

If you do wish the offence alleged on the front of this notice of infringement to be dealt with by a court of summary jurisdiction you need not take any further action in respect of this notice and proceedings will issue against you in due course."

[22] The plaintiff contends that the Act, the by-laws and the infringement notice all clearly convey the same intent, that is, that an alleged offender served with an infringement notice may pay the penalty within the prescribed time and avoid prosecution. If that is not done, nothing further flows from the infringement notice itself. The alternative to prosecution having been rejected, the council may proceed to prosecute in the ordinary way by complaint and summons in the Court of Summary Jurisdiction.

[23] The alleged offender, it is said, has one chance to avoid the possible cost, inconvenience and potentially greater penalty flowing from the summary judicial proceedings. If he or she wishes to be dealt with by the court, either upon a plea of guilty or not guilty, the indication is to be given that that

course is open. Counsel for the plaintiff submitted that once the last date for payment of a fixed penalty, pursuant to an infringement notice, had passed, then the notice was spent. I consider that conclusion is unavoidable.

[24] For the Council and the Attorney-General it was put that that is not the correct view to be taken of the *Local Government Act* regime, because it is picked up or carried forward by the Territory Infringement Notice Enforcement Scheme ("TINES") to be found in Division 2A of the *Justices Act*. It provides a complex scheme for enforcing the payment of fixed penalties under a variety of Territory legislation relating to infringement notices. A person served with an infringement notice is given opportunity along the enforcement path to pay the penalty (together with accumulating costs) or to require the matter to be dealt with in the Court of Summary Jurisdiction. But if he or she does neither of those things, imprisonment may result as it did in the case of the plaintiff. Before considering whether there was compliance by council officers and Clerks of the Court of Summary Jurisdiction with TINES, it is first necessary to examine whether the defendants contentions are correct.

[25] For those purposes an "infringement notice" relevantly means a notice served or issued under the prescribed provisions of a by-law (*Justices Act* s 60A). By-law 21 is prescribed by reg 2A of the *Justices (Territory Infringement Notices Enforcement Scheme) Regulations*; that regulation is said to provide the link between the two legislative schemes, the *Local Government Act* infringement notices and *Justice Act* enforcement of

infringement notices. I note that an infringement notice under by-law 21 is expressed to be as an alternative to prosecution not in substitution for prosecution.

[26] There is a difficulty in the defendants way arising from s 60B which provides that "the procedures set out in Division 2A may be used, in substitution for any other procedure under a law of the Territory, to enforce an infringement notice". There is no procedure under the *Local Government Act* to which the enforcement scheme under the *Justices Act* could substitute. It was never the intention of the Parliament that penalties under those notices be enforced.

[27] If it is considered that Division 2A is not restricted, as it seems to me to be by s 60B, there is a further obstacle in the way of the defendants. As I pointed out in *TN & ors v Walford*, unreported 13 November 1998, where detailed consideration was given to TINES, it has long been accepted by the courts that delegated legislation made under a later Act, that is, the Regulations under the *Justices Act*, cannot override the provisions of an earlier Act, the Act. (See now Delegated Legislation in Australia, Pearce and Argument, 2nd Ed 1999 par 19.16 et seq). The Regulation is repugnant to the Act because the Act never contemplated the enforcement of the penalty under the infringement notice scheme for which it provided. There is no clear intention to override the law in the Act to be found in the *Justices Act*.

[28] Assuming however that by-law 103(1)(c) is valid, and that TINES operates as a means of enforcing a fixed penalty under the *Local Government Act*, I now turn to consider what is shown to have happened in this case.

[29] The form of infringement notice is in Schedule 1 to the by-laws having been prescribed by by-law 21(2)(a).

[30] Five such infringement notices were said to have been issued to the plaintiff. They are not in evidence, but it is common ground that they all allege that the plaintiff committed an offence against by-law 103(1)(c) "Sleep in a public place". The place, the time and date of the alleged offence are specified.

[31] The copy of an infringement notice exhibited to the plaintiff's solicitor's affidavit is the copy kept by the council, and it is not the same as that served. The evidence of the council explains the system for issue of an infringement notice. They may be issued as the result of alleged infringements of a number of by-laws, and seek to accommodate that fact. The notice served is one of a set and is coloured pink, but is not in conformity with the form prescribed in the Schedule to the by-laws, and more importantly, is not in conformity with the Act. There is a significant addition to the service copy of the form. In the centre of it appears the following:

> "DARWIN CITY COUNCIL BY-LAWS 1994 ALLOWS 14 DAYS FOR PAYMENT OF THIS INFRINGEMENT
>
> If not paid within 14 days the matter may automatically become a courtesy letter according to the Territory Infringement Notice Enforcement Scheme (TINES) and result in an enforcement order being issued by the court without further notice."

[32] It is not suggested that that is part of the prescribed form, and it is a misleading statement as to the law even if TINES is operative. The remainder of the form is substantially as prescribed. In addition to the prominent wording in the box, the following appears on the form:

(1) "You may pay to the Council as an alternative to prosecution the sum specified" within 14 days "in order to avoid prosecution".

(2) "If you do not wish the alleged offence … to be dealt with by the Court of Summary Jurisdiction you should read and complete the following … ".

(3) "I tender the amount shown on the front of this notice being assured that on payment of that amount no further action will be taken by the council for this offence".

(4) "On payment of the penalty within 14 days … you will not be liable for any further penalty or costs".

(5) "If you do wish the offence alleged … to be dealt with by the Court of Summary Jurisdiction you need not take any further action in respect of this notice and proceedings will issue against you in due course".

The words in par [5] appear to me to broadly accord with the legislative intent and the by-law for a Local Government infringement notice but is contrary to what the council now contends.

[33] The notice is designed to provide advice to the alleged offender. But, confusion arises from the inclusion in the notice of material which is not authorised by the by-law making power.

[34] Subsection (1) of by-law 21 picks up the power conferred in s 194(2) of the Act, that is, to make by-laws substituting infringement notices for complaint and summons under the *Justices Act*. Subsection (2) covers what is required to be incorporated into the enabling by-law by s 194(3). Those matters go to the adoption of the infringement notice scheme by the council. I doubt that they are required to be incorporated into the infringement notice.

[35] What must be conveyed to the offender are those matters required by s 194(4). Most importantly, the Act requires that the notice shall indicate that the alleged offender may, if he or she so wishes, be dealt with by a court of competent jurisdiction (s 194(4)(f)). No more is required by the legislation and no less will do.

[36] Reference to the form of infringement notice adopted by the council shows significant departure from the requirements of the statute and the powers conferred by it. The note at the foot of the first page does not indicate that the alleged offender may elect to be dealt with by a court. What it says is that if the penalty is not paid, the council will prosecute (which is

inconsistent with what the council now contends). Further, how is the alleged offender to reconcile that with what appears in the middle of the page, which indicates that if the penalty is not paid, the TINES scheme may operate and an enforcement order issued by a court without further notice. The top of the reverse of the form says what the alleged offender should do if he or she does not wish to be dealt with by the court; the closest the contents of the notice gets to compliance with the statute is at the foot of the reverse page, and does nothing to indicate how the offender's wishes may be conveyed. In effect, it says do nothing if you wish the matter to be dealt with by the court, and conveys the impression that if that course is followed, court proceedings will issue. I do not accept that those words give to an alleged offender a fair statement as to his or her rights.

[37] It was put in that context that "proceedings" means proceedings under TINES whereby the person would know that they had the opportunity to have the matter dealt with by the court. Even if that be so, it does not present the clear option to the alleged offender to invite prosecution before commencement of TINES. One consequence is that the alleged offender must pay $5 by way of costs for the "courtesy letter".

[38] In my opinion, it was the intention of the legislature in enacting s 194(4)(f) to ensure that people served with an infringement notice should then and there be informed of their right to elect to be prosecuted. The prescribed notice of infringement does not conform with that requirement and by-law 21(2)(a) is invalid on that ground.

> "The regulation or by-law may be ultra vires in the sense that it deals with the subject matter not within the scope of the power conferred on the delegated legislative authority, or it may be ultra vires because, although dealing with such subject, it exceeds the prescribed limits within which the authority may be exercised." per Griffiths CJ in *Young v Tockassie* (1905) 2 CLR 470 at 477.

[39] Since all the subsequent steps taken were predicated upon there being a valid infringement notice, they must also be set aside.

[40] Although that is sufficient to dispose of this action, the plaintiff has raised a number of other issues going to the unlawfulness of his imprisonment, and I should deal with the most important of them.

[41] It is put TINES denies procedural fairness to an alleged offender and that there is no clear authority empowering a council to do that. If TINES applies, it is only necessary to look at the options available to an alleged offender upon service of a valid infringement notice, and throughout the course of TINES up to the stage of arrest, to recognise that there is no denial of procedural fairness, he or she has ample opportunity to oblige the council to halt the enforcement process and proceed before a court. If TINES does not apply, nothing adverse to the alleged offender's interest can take place under the notice.

[42] The offence which the plaintiff is alleged to have committed is that he:

(a) being an adult
(b) slept
(c) at a time between sunset and sunrise
(d) in a public place

(e) otherwise than

(i) a caravan park, or

(ii) in accordance with a permit.

[43] If TINES applies, an important step in the enforcement process, which can lead to imprisonment, was the lodgment with the Clerk of a certificate prepared by a council officer stating certain matters and containing other particulars as are prescribed. The Clerk, if satisfied that the facts as alleged in the certificate constitute the offence and that sufficient particulars of those facts are set out in the certificate, registers the certificate (*Justices Act* s 60D).

[44] The certificates of enforcement in this matter broadly conform with the prescribed Form 2 to the *Justice Act Regulations*. However, taking as an example that filed with the Clerk in relation to infringement notice No 3964202, it shows:

(a) by reference to date of birth that the offender was an adult

(b) that he was issued with an infringement notice for "sleep in a public place"

(c) at a time, namely "06:15am", without reference to sunset and sunrise

(d) in Rocklands Drive, Tiwi (which it is not disputed was a public place), and

(e) there is no allegation that

(i) that place was not a caravan park, or

(ii) that the plaintiff did not have a permit.

[45] The plaintiff therefore says that the Clerk could not have been satisfied that the facts alleged in the certificate constituted the offence. I agree. There is no allegation in the certificate that the plaintiff was asleep. It says he was issued with a notice alleging so much, but nowhere is the fact that he was asleep stated. There is no allegation in the certificate that the time at which the offence is alleged to have occurred was between sunset and sunrise. Those are facts which are required to be alleged in the certificate, and any deficiency in that regard cannot be made up by the Clerk from some other source. The certificate is designed to provide jurisdiction to the Clerk to commence the process which can lead to imprisonment.

[46] The failure to allege that the place was not a caravan park, and that the accused did not have a permit presents a more difficult problem, but I think the answer lies in the common law as to the onus of proof of provisos and exceptions, as to which see the following extract from *Dowling v Bowie* (1952) 86 CLR 136 from pp 139-140

> "Where a statue having defined the grounds of some liability it imposes, proceeds to introduce by some distinct provision a matter of exception or excuse it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification."

[47] Reference might also be made to *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520. I also bear in mind that it is within the knowledge of the council as to whether the place is a caravan park and whether the plaintiff had been issued with a permit.

[48] It does not appear that any of the certificates for enforcement are valid because of like deficiencies.

[49] Given that the ultimate result of enforcement of an infringement notice penalty and costs is the imprisonment of the person upon whom it was served, the law requires strict compliance with very step along the procedural way. Every person concerned from the council inspector who decides to issue an infringement notice, rather than give the person an opportunity to move on, through the administrative staff of the council office, those who are charged to serve subsequent process, and the Clerk, bear a heavy responsibility, the responsibility of depriving a person of his or her personal liberty and freedom.

[50] The Clerk stands between the council and the liberty of the subject. An enforcement order is deemed to be an order of the Court of Summary Jurisdiction. The duty resting upon the Clerk is not a ritual requiring no more than a cursory scanning of the shorthand phrases used to allege the facts. The duty requires more than a routine signature. It seems to me that the ultimate power of punishment, which, after all, is really for non-payment of a $50 penalty and cumulative costs of $105, ought to be vested in a

judicial officer. Whatever the legislation may say, the fact remains that the plaintiff has been imprisoned as a result of an administrative process.

[51] It is unnecessary to go into the various allegations of other procedural irregularities and deficiencies of proof.

[52] The relief sought by the plaintiff by way of sundry declarations does not take up all of the arguments addressed upon the hearing and upon which I have ruled. The plaintiff is to file draft minutes of the orders sought in this and the *habeas corpus* proceedings, taking into account these reasons, serve a copy on all parties and arrange for the matter to be brought before the court again to settle the order. The question of costs can be argued at the same time.
