

ACCOMPANYING AFFIDAVIT

6. B.

IN THE COUNTY COURT OF VICTORIA AT MELBOURNE AP- 16-1957

IN THE MATTER of an application under section 54 of the Vexatious Proceedings Act 2014

BETWEEN

THE ATTORNEY GENERAL FOR THE STATE OF VICTORIA

Plaintiff

And

BRIAN WILLIAM SHAW

Defendant

JERENA POBOVIC
COST ORDER APPLICATION (2004)
BS CME

Date of Document:	September 2016 13 <i>December</i>	Solicitors Code:	N/A
Filed on behalf of:	The Applicant	Telephone:	
Prepared by:	Brian William Shaw	DX:	N/A
		Ref:	N/A

I, Brian William Shaw, c/- of PO Box 800 Werribee Victoria do state and affirm the following:-

1 I STATE THAT THIS AFFIDAVIT EXHIBITS THE ORDER (WRITTEN) GIVEN BY JERENA POBOVIC RELATIVE TO A COST APPLICATION BY PUBLIC PROSECUTOR

AFFIRMED BY *Brian W Shaw*

AT *Gisborne*

DATE *Thirteenth day of December 2016*

WITNESSED *C. Clemson*

CARMEL CLEMSON JP
3/84 HAMILTON STREET
GISBORNE 3437
JUSTICE OF THE PEACE FOR VICTORIA
REG. NO 12356

**In the Magistrates Court of Victoria
at Melbourne**

In the Matter of:

BIJANA Polovic

Brian Shaw (Informant)

Against

**Robert Brooking, Peter Buchanan, Philip L. Cain, Stephen Pendrill Charles,
Alex Chernov, Paul Coghlan, Michael Jeffrey, John Spence Winneke**
(Defendants)

APPEARANCES

Mr Shaw	Self represented
Ms Dipietrantonio	Director of Public Prosecutions (Victoria)
Mr Sharp	Commonwealth Director of Public Prosecutions
Mr Burns	Victorian Government Solicitor (representing Robert Brooking, Peter Buchanan, Philip L. Cain, Stephen Pendrill Charles, Alex Chernov, Paul Coghlan, John Spence Winneke)
Ms Pryde	Australian Government Solicitor (representing Michael Jeffrey)

REASONS FOR DECISION

This matter was listed in the Melbourne Magistrates' Court and came before me on 17th may, 2004. Brian Shaw initiated private prosecutions against:

Justice Robert Brooking, a judge of the Court of Appeal Victoria
Justice Peter Buchanan, a judge of the Court of Appeal Victoria
Philip L. Cain, a Master of the Court of Appeal of Victoria
Justice Stephen Pendrill Charles, a judge of the Court of Appeal Victoria
Justice Alex Chernov, a judge of the Court of Appeal Victoria
Paul Coghlan, Director of Public Prosecutions Victoria
Michael Jeffrey, Governor General of Australia
Justice John Spence Winneke, President, Court of Appeal, Victoria

The defendants were charged by Mr. Shaw with the following offences:

With respect to Justices Winneke, Charles, Chernov, Buchanan, and Brooking:

Wilfully and perversely exercising Federal Jurisdiction in a matter in which he has a personal interest under s. 34(b)(1) of the Crimes Act 1914 Commonwealth

With respect to Governor General Michael Jeffrey:

Incitement to treason under s. 316(1) of the Crimes Act (1958) Victoria (3 counts), attempting to pervert the course of justice under s. 43 Crimes Act 1914 Commonwealth, attempting to pervert the course of justice under s.321M Crimes Act 1958 Victoria, and two Counts of Treachery under s. 24AA(1)(a)(i) Crimes Act 1914 Commonwealth

With respect to Master Cain, Attempting to pervert the course of justice under s. 43 Crimes Act 1914 Commonwealth

With respect to Mr Coghlan:

Treachery under s. 24AA(1)(a)(i) Crimes Act 1914 Commonwealth and Attempting to pervert the course of justice under s. 43 Crimes Act 1914 Commonwealth.

In relation to Justice Winneke and Mr. Coghlan, process was issued on 15 March 2004 and was returnable on 8 April 2004. Both cases were adjourned to 17 March 2004.

All other process was issued on 16th April 2004 and returnable on 17th May, 2004.

By notices dated 7th May, 2004, and pursuant to s.9(5) of the Director of Public Prosecutions Act 1983, Damian Bugg, the Director of Public Prosecutions of the Commonwealth of Australia, took over and declined to carry on further the proceedings in so far as they related to all charges laid under the Crimes Act 1914 Commonwealth with respect to each putative defendant.

Ms Dipietrantonio advised the Court on 17 May 2004 that pursuant to s.22(1)(b)(ii) of the Public Prosecutions Act, the Director of Public Prosecutions for Victoria took over the proceedings in relation to the charges under the Crimes Act (1958) Victoria laid against Governor General Jeffrey and that the Director of Public Prosecutions withdrew the charges.

Prior to making any orders, I invited Mr Shaw to address me in relation to the applications to withdraw the proceedings. Mr Shaw addressed me about some aspects of the charges themselves. I was not assisted by his submissions at that time as they did not address the specific issues before me, namely the powers of the Commonwealth Director of Public Prosecutions and Director of Public Prosecutions for Victoria taking over of the prosecutions and what options I had before me once applications were made to withdraw proceedings.

I was satisfied that there were no longer any proceedings before the court and all charges against all defendants were withdrawn.

Mr Burns then applied for costs against Mr Shaw on behalf of the Victorian Government Solicitor's Office in the sum of \$6314.61. A bill of costs was provided to me at the hearing.

Ms Pryde applied for costs against Mr Shaw in the sum of \$2000 on behalf of the Australian Government Solicitor's Office. Ms Pryde did not produce an itemised bill at the time of the hearing, however, a copy was hand delivered to the Melbourne Magistrates' Court on 19 May 2004. The bill was in the amount of \$3267.70. However, in the covering letter accompanying the bill, Ms Pryde indicated that the sum sought to be recovered from Mr Shaw remained \$2000.

Neither the Commonwealth director for prosecutions of director of Public Prosecutions for Victoria sought costs.

Mr Burns, in making the application for costs, did not make any submissions as to why costs ought to be granted, save to say that the Victorian Government Solicitor's Office had been put to expense on behalf of its clients. Similarly, Ms Pryde also made no submissions in support of costs.

I expressed concern about whether Mr Shaw should be made responsible for costs given that the prosecutions had been taken over by the Commonwealth Director of Public Prosecutions and Director of Public Prosecutions Victoria. I also noted that the applications for costs were made on behalf of Government solicitors instructed by the defendants and that it was not the defendants themselves who had suffered a loss as a result of the prosecutions.

Mr Burns provided me with three authorities in support of the costs application and which he submitted supported the notion that the court could make costs orders against a non-party:

Knight and Another v. FP Special Assets Limited and Others (1992) 174 CLR 178
R v. Scott (1993) 114 ACTR 20
Leigh v. Hodgkinson BC9507197

Having read the decisions, I am satisfied that they provide ample authority that costs orders against non-parties are able to be made in appropriate cases, and that this would be a matter which fell into the categories discussed by the cases.

The most apposite authority I was referred to was *Leigh v. Hodgkinson* the facts of which were similar to the matter before me.

The presiding judge, Mr Justice Smith, summarised the particulars of the case before him at BC9507197 at 2 as follows:

"It appears that in or between July and September 1994 the Director of Public Prosecutions for the Commonwealth, in exercise of his powers under s9(5) of Director of Public Prosecutions Act 1983, took over the proceedings from Mr Leigh. At a subsequent hearing on 12 September 1994, the Director of Public Prosecutions announced to the Magistrates Court that he was declining to prosecute the matter and was seeking orders striking out all charges. A

debate ensued at the end of which the magistrate ordered that a cost order should be made in favour of the defendants stating that the defendants had not prolonged the proceedings and were entitled to reasonable costs. Her Worship ordered that costs be ordered against Mr Leigh pursuant to s131 Magistrates Court Act 1984. According to a contemporaneous note of the proceedings, she indicated that she was satisfied that such an order should be made against Mr Leigh observing that the DPP had stepped in at a late stage and "with the public interest at heart".

I reproduce a significant portion of His Honour's judgement due to the similarities between *Leigh v Hodgkinson* and the matter before me.

"In this case there is the complication that the order sought by the defendants was an order against Mr Leigh and not the party on the record, the DPP. The appeal is in fact not against the making of an order for costs in favour of the defendants but the making of that order against Mr Leigh. The result of the order made below was that the lay informant who was no longer a party was required to bear the cost burden of the proceedings as a result of a decision taken by the DPP to discontinue the proceedings, a decision over which the former lay informant had no control. To the extent that that decision involved a consideration of the merits of the proceedings, the merits again were relevant as well as the reasons generally for discontinuance. The decision of the DPP, for example, may have been influenced by public interest considerations - eg the cost to the community which may have outweighed the importance of the matter or the merits of the proceedings. If that were the basis for discontinuing the proceedings, then an issue would arise whether the community through the DPP should bear the cost of a decision that has been made in the interest of the community.

Before her Worship, the defendants carried the onus of proof in their application and they had to place admissible material before the court sufficient to persuade her to make the order sought. The only material before the magistrate was the statement made in open court by the DPP that he proposed to discontinue in the exercise of his statutory power. No evidence was given as to his reasons. Even if it be open to imply a presumption of regularity in that situation (and on that I express no view), such a presumption would do no more than support a conclusion that the decision was properly made. In the absence of the evidence of the DPP's reasons, however, one could not conclude that the decision had not been made on public interest grounds even though there might have been merit in the prosecution. As I have said, if that were the situation then the question would arise whether the DPP on behalf of the community should bear the cost and not the lay informant. It may have been assumed that the DPP's decision was made on the basis that the prosecutions had no merit. While that may well be so for her Worship to base her decision on such an assumption would have been to assume the existence of an opinion or a fact of which there was no evidence. She would also have determined the issue on the basis of the latter's opinion, an opinion of a party to the proceedings that was not tested. Her Worship found that the DPP had not delayed matters and, therefore, added to the costs

but that finding was relevant, in my view, only to the question of an apportionment of costs if Mr Leigh was liable.

It seems to me that there was no relevant material before the magistrate which would have justified the decision made to make Mr Leigh liable not the DPP, and accordingly, the application of the defendants should have failed and the order against Mr Leigh should not have been made.

I reach this conclusion with reluctance because I am conscious of the possibility that the resolution of the question could involve a daunting investigation ending in the same result. If the matter be approached, however, on the basis that it is the defendants who are seeking an order for costs against the non-party rather than the informant on the record, a possible commencement point would be the calling of evidence by the defendants from the person in the DPP's office responsible for the decision not to proceed who could give evidence of his or her reasons and who could then be cross-examined by Mr Leigh to challenge those reasons.

The issue may well be quickly resolved. In the end, however, the fact cannot be escaped that no admissible material was placed before her Worship to support a decision requiring Mr Leigh to pay the defendants' costs rather than the DPP. As a result, it may be said that her Worship made her decision to order costs against Mr Leigh without having regard to relevant considerations. This came about because of the failure of the defendants to adduce admissible evidence in support of their application. Perhaps, therefore, more accurately, the error demonstrated was that there was no basis upon which an order could properly be made against Mr Leigh rather than the DPP. In these circumstances it appears to me that error has been shown such as warrants interference with the order made below."(paragraphs 9 to 12 of BC9507107)

In the case before me, no reasons were given, let alone was there any evidence put before me of reasons, for the withdrawal of the proceedings by either the Commonwealth Director of Public Prosecutions or the Director for Public Prosecutions for Victoria.

In the absence of being provided with reasons for the decisions to withdraw, I am not in the position to evaluate whether or not it is appropriate to make costs orders against the original informant, Mr Shaw, or whether the Commonwealth Director of Public Prosecutions or the Director for Public Prosecutions for Victoria are the appropriate parties against whom costs orders would be appropriately made.

Accordingly, the costs applications are dismissed.

ORDER MADE 24TH MAY, 2004



JELENA POPOVIC
DEPUTY CHIEF MAGISTRATE
MELBOURNE MAGISTRATES COURT