118 Paragraphs

PATSALIS v NEW SOUTH WALES - BC201207319

Supreme Court of New South Wales -- Court of Appeal
Allsop P, Basten JA and Sackville AJA

CA 2011/151237, CA 2012/98738, CA 2012/140236, CA 2012/148426

25 June, 25 September 2012

Patsalis v State of New South Wales [2012] NSWCA 307

ADMINISTRATIVE LAW -- Judicial review -- Challenge to validity of departmental guidelines -- Whether challenge only available in respect of a particular decision or exercise of statutory power.

APPEAL -- Leave to appeal -- Significant issues of principle -- Availability of mandatory injunction for threatened negligent conduct -- Conditions of incarceration -- Whether leave to appeal should be granted.

CONSTITUTIONAL LAW -- Jurisdiction of Supreme Court -- State Act purported to require felons in custody to obtain leave to commence civil proceedings -- Whether jurisdiction of Supreme Court limited by the principle of attainder -- Whether limitation arose under the general law in 1901 -- Kirk v Industrial Court of New South Wales [2010] HCA 1; 239 CLR 531; Dugan v Mirror Newspapers Ltd [1978] HCA 54; 142 CLR 583 discussed -- Felons (Civil Proceedings) Act 1981 (NSW), s 4.

COSTS -- Costs of appeal -- Whether appropriate to depart from usual order as to costs -- Whether constitutional argument raised by applicant extended hearing of matter -- Whether resolution of factual issue on appeal affected outcome of case.

COSTS -- Costs of trial -- Prisoner sought to challenge conditions of incarceration -- Whether appropriate to order costs against unsuccessful prisoner raising issue with wider consequences -- Whether order of primary judge within available discretion.

PROCEDURE -- Judicial review -- Whether person serving sentence for serious indictable offence requires leave to commence proceedings in relation to the terms and conditions of incarceration -- Felons (Civil Proceedings) Act 1981 (NSW), s 4.

REMEDIES -- Mandatory injunction -- Applicant sought quia timet relief -- Whether injunction available for threatened negligent conduct -- Whether respondent in breach of legal duty -- Whether statutory duty or duty arising under the general law -- Whether distinction between judicial review of discretionary decision and quia timet relief -- Civil Liability Act 2002 (NSW), ss 43 and 43A; Crimes (Administration of Sentences) Act 1999 (NSW), ss 10-13.

STATUTORY CONSTRUCTION -- Felons (Civil Proceedings) Act 1981 (NSW), ss 3 and 4 -- Requirement that person in custody as a result of conviction for a felony obtain leave to commence civil proceedings -- Whether leave requirement applies to applications for relief in accordance with public law principles -- Whether leave requirement now applies to any person in custody as a result of a conviction for a serious indictable offence -- Whether appropriate to refer to repealed provision to assist in construction of unrepealed provision -- Crimes Act 1900 (NSW), ss 580E-580F.

WORDS AND PHRASES -- "Civil proceedings".

The applicant is serving a sentence for a serious indictable offence. Section 4 of the Felons (Civil Proceedings) Act 1981 (NSW) ("the Felons Act") prevents such a person from instituting "civil proceedings" in any court except by leave of that court.

On 9 May 2011 the applicant filed a statement of claim seeking damages for negligence from the respondent ("the statement of claim proceedings"). He also sought leave to commence those proceedings. The negligence was said to relate to the failure of the respondent to protect the applicant from an assault by another inmate, and also the conduct of the defendants in denying him access to his legal documents.

Also on 9 May 2011, the applicant filed a summons seeking injunctive relief and mandatory orders against the respondent and the Commissioner of Corrective Services, among other officers of the State ("the summons proceedings"). On the same date, a motion was filed seeking leave in respect of the summons. The applicant sought to be housed in an area of the correctional centre in which he would be protected from other inmates, to be given access to all of his legal documents, and to be housed on his own in a "one-out" cell.

The summons proceedings were dismissed in the Common Law Division. The applicant sought leave to appeal from those orders to this Court. The applicant also challenged the order of Beech-Jones J that he pay 75% of the respondent's costs in the summons proceedings, other than the costs of a motion dealt with by Schmidt J.

The issues for determination on appeal were:

(i) whether s 4 of the Felons Act applies to the applicant's application for judicial review,
(ii) whether s 4 of the Felons Act imposes a leave requirement in cases where there had been no disability under the principle of attainder,
(iii) whether a mandatory injunction was available to require the respondent to house the appellant in a one-out cell,
(iv) whether the sections of the Corrective Services NSW Operations Procedures Manual dealing with the access of inmates to legal papers were invalid, and
(v) whether the costs order made by Beech-Jones J should be disturbed.

In relation to the operation of the Felons Act, the applicant sought to argue that the Felons Act purported to abolish or remove an inherent characteristic of the Supreme Court, being an effect inconsistent with the reasoning of the High Court in *Kirk v Industrial Relations Court of New South Wales* [2010] HCA 1 ; 239 CLR 531. Being a matter arising under the Constitution, the proceedings were adjourned so that notices under s 78B of the Judiciary Act 1903 (Cth) could be filed and served. However, no Attorney sought to intervene and the matter was dealt with on written submissions.

The court held (per Basten JA, Allsop P and Sackville AJA agreeing), granting leave to appeal in part and allowing the appeal in part:

In relation to (i)

1. The implication drawn in *Kirk v Industrial Court of New South Wales* from the language of s 73 of the Constitution involved a limitation on State legislative power. Such a limitation cannot affect principles of the common law: any limitation on them must flow from the terms of the Constitution itself. The limitation on the jurisdiction of the Supreme Court involved in the principle of attainder arose under the general law: [23]-[24]

Kirk v Industrial Relations Court of New South Wales [2010] HCA 1 ; 239 CLR 531, distinguished

Lange v Australian Broadcasting Corporation [1997] HCA 25 ; 189 CLR 520; *Dugan v Mirror Newspapers Ltd* [1976] 1 NSWLR 403, referred to

2. To the extent that the applicant sought to assert a right for which relief was available in accordance with public law principles, s 3 of the Felons Act had no application and s 4 did not impose a leave requirement in respect of such proceedings: [6], [55], [117]

In relation to (ii)

3. Section 4 of the Felons Act did not impose a leave requirement in respect of judicial review proceedings. There was no suggestion that the scope of s 4 was intended to be extended by the repeal of the distinction between misdemeanours and felonies, s 4 in its present form should not be construed as having some wider operation than when enacted: [41], [55], [113]

Dugan v Mirror Newspapers Ltd [1976] 1 NSWLR 403, referred to

In relation to (iii)

4. The applicant's claim of an entitlement to a one-out cell must take into account various mechanisms within the Crimes (Administration of Sentences) Act 1999 (NSW), as well as the Crimes (Administration of Sentences) Regulation 2008 (NSW), by which that goal could be achieved. That fact tends to strengthen the conclusion that intervention by the court was not appropriate, and militates against remittal for further consideration: [79]

5. In respect of possible quia timet relief against threatened negligent conduct, it is at least doubtful whether s 43 of the Civil Liability Act 2002 (NSW) would apply to a claim in negligence for breach of the duty to take reasonable steps to protect the safety of a prisoner. That would appear to be a duty arising under the general law, rather than a "statutory duty" imposed, presumably, by the Administration Act. If s 43A of the Civil Liability Act were engaged in the present case, there were would be no liability unless conduct of the Commissioner of Corrective Services was manifestly unreasonable in the sense identified in that provision. If that were so, to contend that in no case could the relevant change in circumstances of incarceration be permitted would constitute an almost insuperable hurdle for the applicant: [87]-[88]

JMR v Department of Juvenile Justice [1999] NSWSC 169, discussed

6. Injunctive relief, if available in respect of threatened negligent conduct, is available where the court was not satisfied as to the reasonableness of the proposed course of conduct. The risk of harm to the applicant was properly balanced against a variety of considerations presently unknown. Once that approach is accepted, no error is shown in the conclusion reached: [89]-[91]

In relation to (iv)

7. The applicant challenged the validity of parts of the Manual, and not the conduct of the Commissioner and his staff. However, as the Manual was merely a set of departmental guidelines it was only capable of challenge in the context of a particular decision or exercise of power under the Administration Act: [63]-[64], [97]-[98]

In relation to (v)

8. The applicant has not demonstrated a basis for a grant of leave to reconsider whether the respondent should bear the responsibility for the confusion as to the issues to be addressed before the primary judge: [100]

9. It may well be appropriate not to order costs against an unsuccessful prisoner in circumstances where the issue raised was reasonably arguable and might have had wider consequences with respect to the administration of the prison system. However, the result in a particular case would remain a matter of discretion. The order made by the primary judge was entirely within the range of the available discretion and no error of principle was identified: [101]-[104]

McCallum v Commissioner of Corrective Services [2002] NSWSC 497 ; 129 A Crim R 590; *Knight v Secretary to the Department of Justice (Re Costs)* [2004] VSC 29, discussed

(NSW) Civil Liability Act 2002 s 43, 43A

(NSW) Civil Procedure Act 2005 ss 3, 98

(NSW) Constitution s 73

(NSW) Crimes Act 1900 ss 4, 18, 376, 580E, 580F

(NSW) Crimes (Administration of Sentences) Act 1999 ss 10, 11, 12, 13, 75, 76A, 232

(NSW) Crimes (Administration of Sentences) Regulation 2008 regs 8, 10, 33

(NSW) Crimes (Appeal and Review) Act 2001 s 76

(NSW) Crimes Legislation Amendment (Sentencing) 1999 Sch 3, Pt 3

(UK) Criminal Appeal Act 1906 s 139

(NSW) Criminal Appeal Act 1912 s 4

(NSW) Crown Proceedings Act 1988 s 3

(NSW) Felons (Civil Proceedings) Act 1981 ss 3, 4, 5, 7

(CTH) Judiciary Act 1903 s 78B

(NSW) Prisons Act 1952 s 46

(NSW) Supreme Court Act 1970 ss 66, 69

(NSW) Uniform Civil Procedures 2005 r 42.1

(NSW) Vexatious Proceedings Act 2008 ss 4, 5

Baba v Parole Board (NSW) (1986) 5 NSWLR 338; *Johns v Release on Licence Board* (1987) 9 NSWLR 103; *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417; *Dugan v Mirror Newspapers Ltd* [1976] 1 NSWLR 403; *Dugan v Mirror Newspapers Ltd* [1978] HCA 54 ; 142 CLR 583; *Ex parte Waldron* [1986] 1 QB 824; *Howard v Jarvis* [1958] HCA 19 ; 98 CLR 177; *JMR v Department of Juvenile Justice* [1999] NSWSC 169; *Kelleher v Corrective Services Commission (NSW)* (1987) 8 NSWLR 423; *Kirk v Industrial Relations Court of New South Wales* [2010] HCA 1 ; 239 CLR 531; *Knight v Secretary to the Department of Justice (Re Costs)* [2004] VSC 29; *Lange v Australian Broadcasting Corporation* [1997] HCA 25 ; 189 CLR 520; *Macari v Mirror Newspapers Ltd* (unrep, NSWSC, 4 March 1980); *McCallum v Commissioner of Corrective Services* [2002] NSWSC 497 ; 129 A Crim R 590; *Patsalis v New South Wales* [2011] NSWCA 364; *Potier v Director-General, Department of Justice & Attorney General* [2011] NSWCA 105; *Powch v R* [1987] HCA 41 ; 163 CLR 496; *Prisoners A to XX Inclusive v New South Wales* [1994] 75 A Crim R 205; *R v Lavender* [2005] HCA 37 ; 222 CLR 67; *Raymond v Honey* [1983] 1 AC 1; *R v Board of Visitors of Hull Prison, Ex parte St Germain* [1979] QB 425; *R v Patsalis (No 22)* [1999] NSWSC 1320; *Rendell v Release on Licence Board* (1987) 10 NSWLR 499; *Rich v Groningen* (1997) 95 A Crim R 272; *Schneidas v Jackson* [1982] 2 NSWLR 969; *Smith v Commissioner of Corrective Services* (1978) 1 NSWLR 317; *Solosky v R* (1979) 105 DLR (3d) 745; *Vezitis v McGeechan* [1974] 1 NSWLR 718, cited

Blackstone Commentaries on the Laws of England in 1769, Book 4, Ch 30, p 385

R P Meagher, J D Heydon, M Leeming, "Meagher, Gummow and Lehane's Equity: Doctrines and Remedies", 4th ed (2002) Butterworths at [21]-[105]

Pearce and Geddes, Statutory Interpretation in Australia (7th ed, 2011) at [3.32]

Second Reading Speech of the Attorney General (New South Wales Parliamentary Debates, 1980-1981, Third Series, Vol 160) at 4813-4814

The Oxford History of the Laws of England, Vol XIII, p 129 (K Smith), Book 4, Ch 30, p 385

Allsop P.

[1] I have read the reasons in draft of Basten JA and the additional remarks of Sackville AJA. I agree with both; and I agree with the orders proposed by Basten JA. I only wish to add the following.

[2] The substantive legal context to the passing of the Felons (Civil Proceedings) Act 1981 (NSW) was the decision of the High Court in *Dugan v Mirror Newspapers Ltd* [1978] HCA 54 ; 142 CLR 583. The leading judgment in that case was that of Jacobs J. For present purposes, its importance in the interpretation of s 4 of the Felons (Civil Proceedings) Act is two-fold: first, there was considerable doubt whether a person convicted of a non-capital felony was disabled from bringing an action in the same way that someone convicted of a capital felony was: see *Dugan* at 602-603; secondly, the nature of the disability was the inability to "maintain an action ... for a civil wrong": *Dugan* at 602.

[3] By 1981, capital punishment had been abolished in New South Wales. The distinction between felony and misdemeanour remained. The text of s 4 as introduced utilised the word "felony". Thus the generality of that expression can be seen to have simplified the application of the relevant rule. No longer was it necessary to explore the law of attainder or reach back to earlier times and arcane law as to the rights of convicted criminals.

[4] The purpose of the leave provision was to ameliorate the perceived harshness of the doctrine of attainder. The leave requirement was also to prevent abusive proceedings: see s 7 and generally the Second Reading Speech of the Attorney General (New South Wales Parliamentary Debates, 1980-1981, Third Series, Vol 160 at 4813-4814).

[5] The question as to the content and meaning of the phrase "civil proceedings" was not discussed in the Second Reading Speech. It is not defined. Such a phrase naturally takes its meaning from context. Whilst the context may be seen to be the whole historical context of English and Australian colonial law, the High Court's decision in *Dugan* as the apparent catalyst for the Act is the primary point of context. The notion of an "action for a civil wrong" is aptly understood as a claim for a private remedy to redress an injury from wrongful conduct. Its form may be at common law, in equity or in statute. Whether or not damages or some form of compensation is necessary to be sought need not be decided.

[6] In contradistinction to such a private action to redress a wrong, is a complaint about the exercise of public power. A person in custody is at all times under the control of public power. The challenge to the exercise of public power (at least insofar as it concerns the conviction, sentencing and incarceration of the person covered by the Act) is not easily conformable with the expression of an action for a civil wrong.

[7] It is unnecessary to chart the metes and bounds of the phrase "civil proceedings" in ss 3, 4 and 5. It is sufficient to recognise that the State's concession was properly made. The precise limits of the phrase can await a case where the answer to the question is decisive.

Basten JA.

[8] On 24 September 1999, the applicant (Michael Patsalis) was convicted of murder. On 23 February 2000 he was sentenced to imprisonment for 21 years and six months, with a minimum term of 16 years. Accordingly, he is now serving a sentence for a serious indictable offence: Crimes Act 1900 (NSW), s 4, Serious indictable offence. The significance of this characterisation of the offence derives from the terms of s 4 of the Felons (Civil Proceedings) Act 1981 (NSW) ("the Felons Act") which now states:

> 4 **Leave to sue required for persons convicted of serious indictable offences**
>
> A person who is in custody as a result of having been convicted of, or found to have committed, a serious indictable offence may not institute any civil proceedings in any court except by the leave of that court granted on application.

[9] The proceedings in this court involved applications for leave to appeal from four judgments in the Common Law Division. Underlying those judgments was a common question concerning the scope of the procedural requirement imposed by s 4 of the Felons Act. On one view, the constraint applies to civil claims for damages (and related proceedings), but not to applications for judicial review of administrative decisions or other applications in the supervisory jurisdiction of the court reflected in s 69 of the Supreme Court Act 1970 (NSW). This issue had been identified as requiring resolution on an application for extension of time within which to seek leave to appeal from a judgment of Schmidt J, which is now before this court: see *Patsalis v New South Wales* [2011] NSWCA 364. By 25 June 2012, when the present applications came on for hearing, the respondent (the State of New South Wales) had accepted that the Felons Act did not apply to proceedings for judicial review. That concession should be accepted, but the reasoning behind it must be articulated and demonstrated to be correct. That course, which has been greatly assisted by the comprehensive submissions for the State justifying its concession, will be undertaken below.

[10] By a notice of motion dated 7 April 2011, the applicant sought leave under s 4 of the Felons Act "to institute proceedings by way of Statement of Claim seeking damages for negligence". The statement of claim, to which the motion referred, was filed on 9 May 2011, which appears to have been the date on which the motion was also filed. Both the motion and the statement of claim were numbered 2011/151152. Also on 9 May 2011, the applicant filed a summons seeking injunctive relief and mandatory orders against the State and the Commissioner of Corrective Services (and other officers of the State). The orders sought were directed to decisions relating to the conditions of the applicant's incarceration.

[11] The summons was correctly perceived as commencing a separate proceeding and was numbered 2011/151237. Unfortunately, the voluminous papers before this court did not disclose any motion seeking leave to commence those proceedings. However, a search of the court's computer records and files revealed that a motion was filed on 9 May

2011 seeking leave in respect of the summons. On 24 August 2012, the same omission was identified by the solicitors acting for the applicant in relation to the principal application and remedied.

[12] The primary order sought in the summons proceedings was expressed as follows:

> (1) Court orders in the nature of mandatory injunction and Court orders in the nature of mandamus to compel and command the first defendant [the State] or the Commissioner of Corrective Services to house the plaintiff in the same pod or wing which houses inmates who are ex-police officers, ex-prison officers, ex-lawyers and the like at Dawn De Loas Correctional Centre or similar correctional centre or complex on the basis that the plaintiff's life and safety is under genuine and real and immediate threat, inter alia, because other inmates are of the belief and understanding that he used to be an ex-police officer and on the basis that the plaintiff's psychological and mental well being has been harmed inter alia because he is regularly victimised because other inmates are of the belief and understanding that he used to be an ex-police officer. Furthermore, to always house the plaintiff in a one out cell on the basis of the submissions dated 31 March 2011 ....

[13] While the primary relief sought was an order in relation to the circumstances of his incarceration, the summons also sought orders requiring that the defendants provide the applicant with access to all his legal documents and be allowed to keep his legal documents in his cell at all times: paras (8) and (9).

[14] The primary relief sought in the statement of claim was an order for payment of damages for negligence on the part of the State for failing to protect the plaintiff from an assault by a cellmate. However, there was also a claim for negligence resulting from conduct of the defendants which allegedly caused the applicant to be denied access to his legal documents for a period of months. The statement of claim contained "grounds" which commenced with the full history of denial of proper access to seven "tubs" of property which appear to have included all his legal documents. The statement of claim referred to the failure of identified officers in the Department of Corrective Services to place the applicant in a cell by himself ("one-out") so that he could have a reading lamp on at night after the time when other inmates wished to go to sleep: para 76. It was alleged that the assault on the night of 8 August 2010 was a result of having his light on when his cellmate had required him to turn it off.

[15] On 16 May 2011 the documents in both matters came before the Registrar who accepted the notices of motion and directed that both be forwarded, together with affidavits in support and the proposed process, to the duty judge to consider leave to proceed. After some delay, the matter was listed before Schmidt J. In a judgment delivered on 26 July 2011, which is not available on the NSW Caselaw website, her Honour dealt with the application under the Felons Act in the summons matter 2011/151237. She identified the nature of the relief sought in the summons: at [2]-[3]. There was no reference to a claim for damages, from which it may be inferred that the motion in relation to the statement of claim was not considered.

[16] With respect to the claim for access to legal documents, in reliance on the reasoning of this court in *Smith v Cmr of Corrective Services* [1978] 1 NSWLR 317 at 320-322, Schmidt J held that "leave to commence proceedings in respect of the complaints as to the access given Mr Patsalis to his legal documents, must be refused as an abuse of process": at [11]. (The State does not now seek to uphold that order.) On the other hand, her Honour was satisfied that judicial review was properly available in respect of decisions concerning the classification and segregation of prisoners, although no claim had been made expressly by reference to those statutory powers: at [12]. The primary judge was satisfied that a prima facie basis for that relief had been established: at [13]. Her conclusion at [14] was in the following terms:

> For those reasons, I grant leave to institute these proceedings, other than in respect of the relief sought in relation to the access Mr Patsalis is given to his legal documents.

[17] That order was accurately recorded on the court's computerised records (JusticeLink). The paragraphs relating to the claims in respect of access to legal documents (paras 8 and 9) were crossed out in an amended summons, in compliance with the order made on 26 July 2011.

[18] Despite the absence of any reference to a claim for damages in the only relevant judgment before this court, on 26 July 2011 an order was entered on JusticeLink in matter 2011/151152:

> Plaintiff granted leave under s 4 of the Felon's [sic] (Civil Proceedings) Act 1981 to institute these proceedings.

[19] Whether this order was entered in error is not clear. There is no challenge to it before this court and it need not be considered further.

[20] If the State's concession be correct, no leave was required for the applicant to seek review of the conditions of his incarceration, including his access to the legal documents, by way of proceedings under s 69 of the Supreme Court Act. Accordingly, the motion in the summons matter was otiose and the order made, including its qualification, should be set aside. It is convenient next to address the correctness of the concession.

A constitutional argument

[21] The principal submissions as to the operation of the Felons Act turned on principles of statutory construction. However, written submissions filed for the applicant on 24 April 2012 sought to raise a new and independent argument in relation to the right of the applicant to bring judicial review proceedings. The argument was founded on the analysis set out in *Kirk v Industrial Court of New South Wales* [2010] HCA 1 ; 239 CLR 531 at [97]-[100]. As no notice had been given to the Attorneys General under s 78B of the Judiciary Act 1903 (Cth), consideration of the submissions in this respect had to be adjourned to allow that procedural step to be taken. In the event, no Attorney sought to intervene and the matter can be dealt with on the basis of the written submissions filed for the applicant and the State.

[22] The applicant's argument commenced with reliance upon s 73 of the Constitution, conferring jurisdiction on the High Court with respect to appeals from the Supreme Court of a State. Adopting the reasoning in *Kirk*, it was then submitted that the legislative power of the State did not extend to abolishing or removing any inherent characteristic of the Supreme Court. One of those characteristics was the power to grant relief in the nature of certiorari, prohibition and mandamus (and habeas corpus) in exercise of the supervisory jurisdiction of the court. Those steps in the argument should be accepted; it is the next step which was controversial. That involved the proposition that "the common law principle of attainder could not have had the effect of prohibiting decisions affected by jurisdictional error (concerning felons) from review by a State Supreme Court": written submissions, para 5. Such a step, it was submitted, would involve an ouster of the jurisdiction underpinning s 73 and the creation of "islands of power immune from supervision and restraint" referred to in *Kirk* at [99].

[23] For the purpose of this submission it was assumed that the doctrine of attainder (or civil death) prevented a convicted felon from bringing any proceedings based on any civil right. The last step in the submission, however, turned the reasoning in *Kirk* on its head, in two ways. First, the implication derived in *Kirk* from the language of s 73 of the Constitution involved a limitation on the power of the State to enact legislation limiting the supervisory jurisdiction of the Supreme Court based on jurisdictional error. While implications drawn from the Constitution can influence the development of the common law (cf *Lange v Australian Broadcasting Corporation* [1997] HCA 25 ; 189 CLR 520) the implication derived in *Kirk* does not limit or qualify common law principles.

[24] Secondly, *Kirk* identified the inherent characteristics of a Supreme Court which could not be diminished by reference to the jurisdiction of the Supreme Court under the general law as it operated in 1901. Thus *Kirk* referred at [97] to a statement in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442 to the effect that a privative clause in a statute could preclude the issue of certiorari for error of law on the face of the record, but did not affect the jurisdiction of the court based on "a manifest defect of jurisdiction in the tribunal that made [the order], or of manifest fraud in the party procuring it". It would follow from that reasoning that if, under the common law as at 1901, attainder prevented a person under sentence for a felony from bringing proceedings in any court, such a limitation would have to be reflected in any description of the inherent characteristics of a State Supreme Court in 1901. That such a limitation arose under the general law in 1901, at least in relation to those convicted of capital felonies, is evident from the decision of the High Court in *Dugan v Mirror Newspapers*, discussed below.

[25] The central proposition raised by the applicant, based on the operation of s 73 of the Constitution and its application in *Kirk's* case, must therefore be rejected.

[26] There is, however, a more limited submission to be derived from the disquiet expressed in *Kirk* in relation to the creation of islands of executive power immune from control by the courts. That principle has underlain the historical antagonism towards a privative clause which purports to withdraw from judicial review the exercise of an executive power. The assumption is that if an exercise of such power is not subject to review by the judicial arm of government, it is not subject to relevant legal controls. It follows that any limitations imposed by law on the exercise of such power will be unenforceable, at least at the suit of individuals who may suffer as a result of conduct for which there is no legal justification. Just as statutory grants of power to the courts should not be subject to implied limitations, so principles of general law which limit the jurisdiction or power of courts to determine the legality of executive conduct should not

extend beyond established authority, strictly construed. One consequence of that approach may be to limit the principles of attainder to those convicted of capital offences, beyond which, as noted in *Dugan v Mirror Newspapers*, there was no established authority under the general law in 1901 or, indeed, in 1981.

[27] The application of that approach to the operation of the leave requirement not now limited to those convicted of felony is a matter to be addressed. Of specific relevance for present purposes, a similar question may arise with respect to the operation of that approach with respect to judicial review proceedings, as opposed to civil actions for damages and other forms of private law relief. These are not, however, based on constitutional principle, but on principles of statutory construction.

Felons Act: application to judicial review proceedings

[28] In June 1950, Darcy Dugan was convicted of a capital offence and sentenced to death. The sentence was commuted to penal servitude for life. He was released on licence, but committed an armed robbery for which he was convicted and sentenced in May 1970. His licence was presumably revoked. Whilst back in custody, a Sydney newspaper published a series of articles concerning him, which he claimed were defamatory. He issued proceedings claiming damages for defamation. The newspaper defended the proceedings, pleading that a convicted felon still serving a sentence imposed upon him was precluded from bringing an action for damages at law. The defence was upheld by Yeldham J in *Dugan v Mirror Newspapers Ltd* [1976] 1 NSWLR 403. The judgment was upheld by this court and, on further appeal, by the High Court: *Dugan v Mirror Newspapers Ltd* [1978] HCA 54 ; 142 CLR 583. The leading judgment with which all members of the court agreed (other than Murphy J who dissented) was that of Jacobs J. He identified the issue at 602:

> The question as it arises is a narrow one. It is whether a man convicted of a felony in respect of which he had been sentenced to death and spared the penalty of death upon condition that he be kept in that penal servitude can maintain an action in New South Wales for a civil wrong.

[29] Noting that the death sentence resulted in attainder, pursuant to which a person was "disabled to bring any action", his Honour was satisfied that the defence was made good. He continued (at 602 and 603):

> Whether or not it was law (separate from the law of attainder) that a person convicted of a non-capital felony was disabled to bring an action either wholly or until he had endured the punishment to which he was adjudged appears to me uncertain. I can find no clear authority upon the question. ...
>
> ...
>
> However, on such an important question of civil right, authority or principle would need to be found to support such a supposed rule when it cannot be based on attainder. I have not been able to find such authority or any principle from which it could be deduced. I would therefore expressly leave the question open.

[30] Given the limited scope of the doctrine, combined with the abolition of capital punishment in New South Wales in 1955, the issue might have been considered one of limited significance. However, in 1980, Cantor J held that the disability extended to a felon serving a sentence for a non-capital crime: *Macari v Mirror Newspapers Ltd* (unrep, NSWSC, 4 March 1980). A similar approach was accepted by Hunt J in *Schneidas v Jackson* [1982] 2 NSWLR 969 at 970, noting that that view had been "assumed generally". No issue was raised in this case as to the correctness of those decisions.

[31] On 1 January 1982, ss 3, 4 and 5 of the Felons Act commenced; as enacted they read:

> **Felon may sue**
>
> 3. Subject to this Act, a person shall not, by reason of his having been convicted of, or found to have committed, a felony, be incapable of instituting and maintaining any civil proceedings in any court.
>
> **Leave required in certain cases**
>
> 4. A person who is in custody as a result of his having been convicted of, or found to have committed, a felony may not institute any civil proceedings in any court except by the leave of that court granted on his application.
>
> **Grant of leave**

> 5. A court shall not, under s 4, grant leave to a person to institute proceedings unless the court is satisfied that the proceedings are not an abuse of process and that there is prima facie ground for the proceedings.

[32] The simplicity of the statutory scheme concealed a difficulty: did s 3 operate only in respect of persons who would otherwise have been incapable of instituting and maintaining civil proceedings? If so, was the leave requirement in s 4 also limited to such persons?

[33] The answers to these questions have been obscured by later statutory developments. On 1 January 2000 the distinction between felonies and misdemeanours was abolished. The Crimes Act no longer adopts that language: Crimes Legislation Amendment (Sentencing) 1999 (NSW), Sch 3, Pt 3 ("the 1999 Amendment Act"). Thus new s 580E stated:

> **580EAbolition of distinction between felony and misdemeanour**
>
> (1) All distinctions between felony and misdemeanour are abolished.
> (2) In all matters in which a distinction has previously been made between felony and misdemeanour, the law and practice in regard to indictable offences is to be the law and practice applicable, immediately before the commencement of this section, to misdemeanours.

[34] The Felons Act was also varied by repealing s 3 and amending s 4 so that it no longer refers to persons convicted of a "felony", that concept being replaced by the phrase "serious indictable offence". (Indeed, it may be that the title to the Act is the only legislative recognition of "felons" remaining on the statute books.)

[35] The 1999 Amendment Act also abolished the punishment of "penal servitude": Crimes Act, s 580F. However, s 580E(3) provided that any proceedings for an offence "that were commenced before the commencement of this section (being proceedings for an offence that was previously a felony or misdemeanour) are to continue to be dealt with, and to be disposed of, as if [the 1999 Amendment Act] had not been enacted". It may be for that reason that, in sentencing the applicant on 23 February 2000, Kirby J in fact imposed a sentence of penal servitude: *R v Patsalis (No 22)* [1999] NSWSC 1320 at [81].

[36] There are aspects of the 1999 Amendment Act which are awkwardly expressed. Thus, s 580F provides that any sentence of penal servitude in force immediately before the commencement of the section is to be taken to be a sentence of imprisonment thereafter: s 580F(2). It does not in terms deal with a sentence of penal servitude imposed after the commencement of the provision.

[37] It follows from s 580E that any disability flowing from conviction for a felony, prior to the commencement of the section, was thereafter removed. That conclusion is consistent with the repeal of s 3 of the Felons Act by the same statute.

[38] Arguably, once the common law disability was removed, s 4 took on a freestanding operation, with the result that leave is required in order for any person in custody as a result of a conviction of a serious indictable offence to institute "any civil proceedings in any court". However, that reasoning ignores historical considerations.

[39] In construing the scope of s 4, it should also be accepted that it is permissible to look at the scope and purpose of a repealed provision to determine the scope of an unrepealed provision: Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) at [3.32]; *R v Lavender* [2005] HCA 37 ; 222 CLR 67 at [31] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing at [139] and Heydon J agreeing at [148]); see also at [116] (Kirby J). Thus, *Lavender* held, by reference to a repealed pleading provision (Crimes Act, s 376) that a statement in s 18, dealing with the offences of murder and manslaughter, did not require that a homicide be "malicious" for the purposes of manslaughter, although the section provided that no act or omission "which was not malicious" should be within the section: s 18(2)(a).

[40] In considering the operation of s 3, reference may be had to three propositions derived from the judgment of Jacobs J in *Dugan v Mirror Newspapers* at 602-603:

(a) attainder was the consequence of a capital sentence;
(b) the result of attainder was to disable a person from bringing a civil action, and
(c) there was no clear authority as to whether a person convicted of a non-capital felony was disabled from bringing a civil action.

[41] In these circumstances, s 3 should have been understood as operating broadly to remove the disability imposed by the general law against the bringing of any civil action. It did so on condition that the person thus enabled obtained leave from the court for such proceedings. The apparent purpose of s 4, read in its original statutory context, was to condition the removal of the disability on the need to obtain leave; there was no indication that it had any wider purpose, namely of imposing a leave requirement where there had been no disability.

[42] However, it is not necessary to reach a firm conclusion as to this point of construction because no party contended that the section did not apply to all persons who were, at the time they wished to institute civil proceedings, in custody as a result of conviction for a serious indictable offence. (It is not necessary for present purposes to consider persons found to have committed such an offence, but who had not been convicted for it.) The issue was whether the reference to "civil proceedings" included proceedings by way of judicial review in the supervisory jurisdiction of the Supreme Court. However, the history remains apposite to the construction of the term "civil proceedings" in s 4.

[43] The term "civil proceedings" has an apparent simplicity about it which may, on reflection, prove to be misleading. In the only case in which this issue appears to have been expressly addressed, Handley AJA held that the implication from the statutory text and the background to its enactment "is that proceedings are either civil or criminal, and proceedings which are not criminal are civil": *Potier v Director-General, Department of Justice & Attorney General* [2011] NSWCA 105 at [10]. Accordingly, he rejected a submission that proceedings seeking relief in the nature of mandamus against the Administrative Decisions Tribunal and seeking leave to appeal from a decision of the Appeal Panel of the Tribunal were not covered by s 4. In *Schneidas*, Hunt J assumed without discussion that the Felons Act applied to proceedings seeking such relief.

[44] There are undoubtedly cases in which a reference to "civil proceedings" is intended to be by way of distinction from criminal proceedings: see, eg, Civil Procedure Act 2005 (NSW), s 3, "*civil proceedings* means any proceedings other than criminal proceedings". On the other hand, in the Crown Proceedings Act 1988 (NSW), s 3, there is a rather different form of definition, namely "*civil proceedings* includes civil proceedings at law or in equity, and also includes proceedings by way of preliminary discovery, cross-claim, counterclaim, cross-action, set-off, third-party claim and interpleader". As counsel for the State correctly submitted, the language is apt to take its meaning from its context. In respect of the Felons Act, no assistance by way of definition has been provided.

[45] Contrary to the intimation in *Potier*, the historical background does not support the proposition that all legal proceedings are necessarily either criminal proceedings or civil proceedings. Nor as a matter of policy does there seem to be any good reason why a prisoner should be able to bring criminal proceedings without leave, but not civil proceedings. In *Ex parte Waldron* [1986] QB 824, the English Court of Appeal considered whether a protective provision stating that no person should be "liable ... to any civil or criminal proceedings ... in respect of any act purporting to be done in pursuance of this Act ... unless the act was done in bad faith or without reasonable care", extended to proceedings for judicial review by way of certiorari or a declaration challenging the applicant's compulsory admission to hospital. The court held the provision did not preclude such proceedings. Further, it held that such proceedings were not precluded by a provision that "[n]o civil proceedings shall be brought against any person ... without the leave of the High Court". That provision, which is closer in form to s 4 of the Felons Act, was construed by reference to its purpose which, in common with most protective provisions, was designed to avoid liability on the part of officers exercising statutory functions in good faith: see also *Vezitis v McGeechan* [1974] 1 NSWLR 718 (Taylor J), holding that a protective provision in s 46 of the Prisons Act 1952 (NSW) would not prevent proceedings for relief in respect of a legitimate complaint that the Commissioner had acted in breach of the Act or Regulation.

[46] Proceedings may be classified according to (a) the nature of the relief sought, (b) the court in which the relief is sought or (c) the subject matter of the relief. Thus, an appeal may be civil if challenging an order in civil proceedings or criminal, if challenging an exercise of criminal jurisdiction. Like an appeal, judicial review proceedings can be instituted in respect of orders made in the exercise of civil or criminal jurisdiction.

[47] Proceedings in the supervisory jurisdiction of the Supreme Court may be brought in the Common Law Division or the Court of Appeal, even though they involve a challenge to a conviction or other order made in the exercise of criminal jurisdiction. As a matter of principle, where an appeal lies by statute from a Local Court conviction to the District Court, the appeal would be classified as a criminal proceeding. Similarly, if a stated case were taken from the District Court to the Court of Criminal Appeal, the jurisdiction would be classified as criminal. On the other hand, if the same orders were challenged by way of summons in the Court of Appeal, the subject matter would remain criminal, although the place in which the proceedings were brought and their form might be characterised as civil.

[48] The characterisation may be seen as somewhat arbitrary if it depends upon the form of the proceedings rather than the subject matter in question. For example, an accused may seek to challenge the legality of a search warrant which has provided evidence the prosecution seeks to tender at a criminal trial. That may be done by way of proceedings for judicial review or by a collateral attack in the course of the criminal proceedings. Similarly, as explained in *Smith v Commissioner of Corrective Services*, proceedings could be brought, in principle, either before a civil court or before a criminal court in respect of conditions of incarceration which had the potential to interfere with a fair trial. As explained by Beech-Jones J in one of the applications more fully discussed below, the criminal court may have greater powers to investigate factual matters and may have a broader range of relief available to it than would a civil court, in order to ensure a fair trial.

[49] As a matter of history, the present distinction between civil and criminal proceedings post-dated the introduction of English law to this State in 1828. Prior to the Criminal Appeal Act 1907 (UK) and the Criminal Appeal Act 1912 (NSW), challenges to convictions for felonies were by way of writ of error, being a form of prerogative relief and having more in common with judicial review than with other forms of modern procedure: *The Oxford History of the Laws of England*, Vol XIII, p 129 (K Smith). Thus, when Blackstone wrote his *Commentaries on the Laws of England* in 1769, the only judicial procedure available to challenge a conviction for a felony (with the possible exception of a question reserved) was by way of writ of error. He stated (Book 4, Ch 30, p 385):

> But writs of error to reverse attainders in capital cases are only allowed ex gratia; and not without express warrant under the king's sign manual, or at least by the consent of the attorney general. These therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family.

[50] Once a right of appeal was conferred by statute various consequences followed. There was no general law disability against bringing proceedings to challenge a criminal conviction, whether by way of appeal under the Criminal Appeal Act, or by way of proceedings in the supervisory jurisdiction of the Supreme Court. Similarly, prisoners held in custody were entitled to bring habeas corpus to challenge the legality of their detention. To the extent that other laws conferred rights in respect of the term, nature and conditions of their imprisonment, the presumption of access to the courts in respect of those rights was co-extensive with the rights. None of the rights presently in dispute was conditioned on the nature of the offence for which the prisoner was sentenced.

[51] The scope and operation of the Felons Act may be illustrated by reference to the applicant's claim for access to legal documents. That is said to be based upon his right of access to the courts and, by extrapolation, his right to petition the Governor under s 76 of the Crimes (Appeal and Review) Act 2001 (NSW) "for a review of [his] conviction or sentence or the exercise of the Governor's pardoning power". The significance of the applicant's claim, in considering the question of statutory construction, is that whatever consequences may have flowed from attainder under the common law, they have been greatly reduced by the effects, whether intended or not, of modern statutory reforms.

[52] *Raymond v Honey* [1983] AC 1 involved a complaint that prison authorities had opened a letter from the respondent to his solicitors, believing it contained matter not relating to pending proceedings. Upon finding that it contained an allegation against a prison governor, the letter was stopped. The respondent then prepared an application to the High Court for leave to apply for an order of committal of the officer stopping the letter for contempt of court: at 10B. The application, including a statement, a draft affidavit and exhibits was also stopped. The proceedings before the House of Lords was concerned with both the original letter and the application to the High Court. The question was whether the conduct of the prison officers was "calculated to obstruct or interfere with the due course of justice, or the lawful process of the courts, [which] is a contempt of court": per Lord Wilberforce at 10D. Lord Wilberforce then identified a second principle that "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication: see *R v Board of Visitors of Hull Prison, Ex parte St Germain* [1979] QB 425 at 455 and *Solosky v R* (1979) 105 DLR (3d) 745 at 760, Canadian Supreme Court, per Dickson J."

[53] Thus, where a prisoner has a legal right enforceable by a court under the general law, conduct calculated to obstruct or interfere with his or her access to the courts will constitute a contempt, for which, in turn, there will be a right of access to the courts for relief in respect of the contempt. Such a right may be removed or conditioned by statute, but the intention in that respect must be clear. While the imposition of a leave requirement, which vests control of access to the courts within the courts themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the pre-

sumption in favour of non-interference will mean that the leave requirement will not be given an expansive construction.

[54] Further examples could be given of circumstances where relief may be sought from either a civil or criminal court. Thus, the validity of a transfer from one prison to another was challenged (without application for leave under the Felons Act) in *Kelleher v Corrective Services Commission (NSW)* (1987) 8 NSWLR 423, and in criminal jurisdiction in a case involving an escape from custody, where the issue was whether the custody was lawful or not: *Powch v R* [1987] HCA 41 ; 163 CLR 496. There are also a number of cases where applications have been made to review decisions relating to the circumstances of imprisonment, or release on parole or licence, without invoking the Felons Act: see *Baba v Parole Board (NSW)* (1986) 5 NSWLR 338; *Johns v Release on Licence Board* (1987) 9 NSWLR 103 and *Rendell v Release on Licence Board* (1987) 10 NSWLR 499. Other cases, both reported and unreported, involving single judges may also be found: see *Patsalis v New South Wales* [2011] NSWCA 364 at [14]. Some may, of course, be cases where the need for leave was overlooked or simply not insisted upon by the various respondent authorities. There are other cases in which leave was apparently sought, at least from single judges, without the issue being agitated: *Patsalis* at [17].

[55] Read in accordance with these principles, and to the extent that the applicant sought to assert a right for which relief was available in accordance with public law principles, s 3 of the Felons Act had no application; nor, read in context, did s 4 impose a leave requirement in respect of such proceedings. There being no suggestion that the scope of s 4 was intended to be extended by the repeal of the distinction between misdemeanours and felonies, s 4 in its present form should not be construed as having some wider operation than when enacted.

[56] A statutory regime where there has been a conscious attempt to be comprehensive in terms of the proceedings for which leave is required may be seen in the Vexatious Proceedings Act 2008 (NSW), ss 4 and 5. The Felons Act is, by contrast, a simple statute directed to a particular mischief, being the feudal notion of civil death for capital offences which was out of tune with modern attitudes to punishment, including rehabilitation, even of offenders convicted of most serious crimes. The mischief was alleviated by removing the disability, but subject to the qualification to be found in the requirement for leave. The requirement for leave is itself a constraint on access to the courts, being an important civil right which is no longer removed from those convicted of serious indictable offences. Accordingly, it is appropriate to adopt an approach to the question of statutory construction which limits the civil rights in question only to the extent necessary to give effect to the statutory provision.

[57] For these reasons, the State's concession that the applicant did not need leave under the Felons (Civil Proceedings) Act, s 4, to bring the proceedings instituted by way of summons, was correct and should be accepted.

Challenges to conditions of incarceration

(a) issues

[58] On 21 February 2012 the applicant filed an amended summons in matter 2011/151237. The relevant amendments were twofold: first, para 9 which sought relief in respect of access to legal documents for "all inmates" was deleted (although para 8 dealing with access of the applicant to all of his legal documents remained intact); in relation to the conditions of incarceration, an additional ground was added referring to paras 9.3.3 and 9.3.1.1 of the Operations Procedures Manual of the Department of Corrective Services, which purported to set out a policy pertaining to the quantity of legal appeal documents an inmate is allowed to have in his or her cell at any one time.

[59] However, before the amended summons was heard, a motion for interlocutory relief was heard by Schmidt J, who delivered judgment on 7 March 2012, dismissing the motion: *Patsalis v New South Wales* [2012] NSWSC 178. In a careful assessment of the circumstances as revealed by the evidence at the time of the hearing, and the statutory scheme within which decisions as to occupation of cells with or without other inmates were made, interlocutory relief was found to be inappropriate. There is an appeal from that judgment, but, the amended summons having been dealt with on its merits by a final judgment, delivered by Beech-Jones J on 23 March 2012, following a hearing which took place just one week after the interlocutory judgment was delivered, it is no longer useful to review the interlocutory judgment and leave to appeal from that judgment should be refused.

[60] Accordingly, the issues in contention are to be addressed by reference to the judgment of Beech-Jones J in *Patsalis v New South Wales* [2012] NSWSC 267, delivered on 23 March 2012. That judgment raised significant issues of principle which, despite the clarity with which they were addressed, warrant a grant of leave to appeal, although the appeal should, for reasons explained below, be dismissed.

(b) background

[61] The procedural history set out above gives rise to a degree of awkwardness in considering the application for leave to appeal from the judgment of Beech-Jones J. That is not a criticism of the judgment, which identified with precision the issues to be addressed, the evidential basis on which the matter had proceeded, the appropriate legal principles and the consequences of their application. The difficulty arose because the primary judge proceeded on the basis that leave was necessary for the applicant to bring judicial review proceedings and that leave had been granted by Schmidt J in relation to the summons in matter 2011/151237 other than with respect to access to legal documents. In effect, that limited the issues to those relating to the applicant's entitlement to be detained one-out, that is without a cellmate. That limitation was unfortunate because the demands of the applicant for access to and use of his legal documents were closely related to his asserted need for a one-out cell.

[62] The point of distinction was further muddied by the inclusion in the amended summons, by consent, of a new prayer 9 which, so far as relevant, read as follows:

> 9
>
> (a) The plaintiff challenges the lawfulness of the Department of Corrective Services['] policy at paragraph [9.3.1.1] and at paragraph [9.3.3] of the Operations Procedures Manual adopted by the Commissioner; and the Department of Corrective Services['] policy pertaining to the quantity if legal /appeal documents an inmate is allowed to have in his/her cell at any one time.
>
> ...
>
> (d) The ground upon which the plaintiff challenges the policy ... is that the policy unlawfully infringes, to an unnecessary and impermissible extent, a basic right recognised at common law, namely the right to unimpeded access to the Courts ....

[63] Precisely why it was thought appropriate to deal with a separate issue in respect of which leave had neither been sought nor granted, but not a related issue in respect of which leave had been refused, was not apparent and was not the subject of discussion in this Court. The fact that leave, it is now accepted, was not required means that there was no error on the part of the primary judge in considering this additional challenge. The effect, however, of that consideration was to address the claim for access to legal documents at a level of abstraction (by reference to a departmental policy), but not by reference to the specific circumstances of the applicant himself. There was an irony in adopting this course which was compounded by uncertainty as to the legal status of the Manual. As noted by Beech-Jones J at [83], if the Manual were a series of instructions issued under a specific provision of the Crimes (Administration of Sentences) Act 1999 (NSW) ("the Administration Act"), being the primary statute regulating prisons in New South Wales, then it would be challengeable on the basis that it exceeded the authority conferred on the Commissioner by the Act. On the other hand, if the Manual were merely a set of departmental guidelines it would only be capable of challenge in the context of a challenge to a particular decision or exercise of power under the Administration Act. It now turns out that the Manual was indeed a series of departmental guidelines; as a result, it was not realistically capable of challenge absent consideration of an exercise of statutory power which miscarried, for example, because an officer applied the guideline inappropriately. That, however, was precisely the kind of challenge for which leave had been refused by Schmidt J.

[64] In his conclusion, Beech-Jones J rejected the challenge to the Manual on the basis that, even if it were a statutory instruction, it was not, in an abstract sense, beyond power, because the prisoner's right of access to legal documents was not absolute and unfettered and its operation would vary according to the circumstances of the particular case. Because the Manual did not impose an inflexibly rigid regime applicable in all circumstances, his Honour was not satisfied that it was invalid.

[65] Despite these difficulties, which are both legal and practical, it is convenient to address the issues by reference to the matters considered below.

(c) entitlement to one-out cell

[66] From the time the summons was issued in May 2011 until the hearing before the primary judge in March 2012 the circumstances of the applicant's incarceration had changed a number of times. This history was set out by the primary judge at [23]-[43]. The evidence revealed that, since the applicant saw a psychiatrist, Dr Samir, on 23 February 2012 he

has been detained in a one-out cell in F Block at Dawn De Loas Correctional Centre. Accordingly, he no longer required a judicial order to achieve that result, but nevertheless maintained his claim in relation to future circumstances, seeking an order that the Commissioner "always house the plaintiff in a one out cell": amended summons, para 1.

[67] As the applicant recognised, in order to obtain such relief, he needed to establish that he had an on-going entitlement to be so held, being an entitlement which did not depend upon the exercise of a discretionary power by the Commissioner or the manager of the Correctional Centre in which he found himself from time to time. That legal entitlement he sought to derive from the statutory scheme for control of a prison and obligations arising under the general law.

[68] The submissions for the applicant, both in this court and before the primary judge, commenced with the provision stating that the Commissioner "has the care, control and management of all offenders who are held in custody": Administration Act, s 232(1)(a1). Reliance was then placed upon the judgment in *Howard v Jarvis* [1958] HCA 19 ; 98 CLR 177 at 183, where Dixon CJ, Fullagar and Taylor JJ stated that the gaoler was under a common law duty to exercise reasonable care for the safety of a prisoner during his detention in custody. The next step in the argument asserted that Dr Samir had expressed a professional psychiatric opinion that the applicant suffered from a psychiatric condition requiring that he be held in a one-out cell, being a condition which was unlikely to resolve, at least during the period of his incarceration. The condition was one involving paranoia, resulting from the assault by a fellow prisoner in his cell in October 2010. The applicant asserted that to require him to have a cellmate would "inevitably" lead to the applicant doing things which would upset the cellmate, causing him to be attacked and possibly killed.

[69] The evidential basis for these assertions was somewhat flimsy, though possibly through no fault of the applicant. It is not in doubt that the applicant did see Dr Samir and that a form was signed by a staff member of Justice Health, being the departmental section responsible for providing health services to prisoners, stating that the inmate "has special health needs that should be addressed" and recommending "one out cell placement". No time limit was placed on the recommendation, which was signed and dated 23 February 2012, although not by Dr Samir himself. There was, in fact, no report from Dr Samir. As a somewhat unorthodox means of providing evidence of a professional psychiatric opinion, the applicant read an affidavit of 20 June 2012 in which he sought to recount the opinion of Dr Samir summarised above. Counsel for the State accepted that an opinion of the kind suggested had been formed, although he objected to the use of the word "always" in relation to the need for one-out placement, to the extent that it implied an opinion that the condition was permanent. However, counsel did not seek leave to proffer evidence from Dr Samir to a contrary effect.

[70] The primary judge noted that he had also been referred in argument to cl 33 of the Crimes (Administration of Sentences) Regulation 2008 (NSW) ("the Regulation") which provided:

> **33 Accommodation**
>
> (1) Each inmate must be housed in and occupy a cell by himself or herself, unless for medical or other sufficient reason it is necessary for inmates to be associated.
> (2) If it is necessary for inmates to be associated, the inmates required to be associated (whether in a cell or in dormitory accommodation) must be carefully selected.
> (3) Each inmate must be provided with a separate bed and sufficient clean bedding to suit the climatic conditions.

[71] After setting out cl 33 at [49], the primary judge embarked upon a consideration of the circumstances in which it would be possible to interfere with an administrative decision of a prison manager. He concluded that the decisions which had been made in relation to the placement of the applicant could not be characterised "as either manifestly unreasonable or as a breach of any relevant duty of care": at [62]. With respect to the future, he stated at [64]:

> Mr Patsalis seeks to confine the approach of determining whether a transfer could involve a breach of the duty of care owed to him to a contention that it would necessarily be a breach of that duty for the authorities to take any step that may increase the risk of harm to him.

[72] He considered that assessment to involve a "hypothetical merits review" which he characterised as "doubly objectionable" in judicial review proceedings: at [65]. The primary judge then returned to the operation of cl 33 at [67]. After noting that the clause appeared to confer an enforceable right to occupy a one-out cell, he continued:

> It is [sufficient] to note that sub regulation 33(1) allows for an exception to the requirement that an inmate "be housed in and occupy a cell by himself or herself". This re-enforces my conclusion that the Court could not grant an injunction in the form sought by Mr Patsalis. Such an injunction would prevent that exception being invoked.

[73] The premise underlying this reasoning was that the management exercise involved in placing prisoners in particular forms of accommodation depended upon a range of factors including security, fire risk and good administration, adopting a statement from the judgment of Gillard J in *Rich v Groningen* (1997) 95 A Crim R 272 at 278. However, the reasoning did not discuss the extent to which cl 33 imposed legal constraints on the principles to be applied by the Commissioner and his staff in housing prisoners. The relevant practice was revealed in the following passage in the judgment:

> [44] A review of Mr Patsalis' affidavits reveal[s] that, from time to time, the prison authorities have had to consider the competing claims of various inmates when addressing who would occupy a two out cell and who would occupy a one out cell. At times Mr Patsalis has been able to occupy a two out cell with no other inmate and on other occasions he has had a cellmate. When medical certification as to his mental health issues was obtained on 23 February 2012 a determination was made that his need for the only one out cell in F block outweighed that of the then occupant.
>
> [45] This was confirmed by Mr Warwick's evidence. He described the process by which Mr Patsalis was moved into the one out cell on 23 February 2012 and Inmate M was moved out. He stated that Inmate M had been on a waiting list for the one out cell for longer than Mr Patsalis and that he also wished to use it for the purpose of working on his legal proceedings. He stated that, in the absence of a medical certificate for Mr Patsalis, the one out cell would be allocated on the basis of which inmate has been on the waiting list longer. He stated that, if inmates did not perceive the system of allocation of one out cells as fair and equitable then there was a "risk of Mr Patsalis being harassed by other inmates in the wing for receiving preferential treatment". He confirmed that, as a result of the completion of the certificate at the direction of the psychiatrist on 23 February [2012], Mr Patsalis was assessed as the "category C1 inmate with the greatest medical need for a one out cell".
>
> [46] As to the future position of Mr Patsalis, Mr Warwick stated that if another category C1 inmate at Dawn de Loas obtained a medical certificate indicating a greater medical need for a one out cell then Mr Patsalis would be removed from the one out cell in place of that inmate. In that event, accommodation would be found for Mr Patsalis that was "suitable, having regard to corrective services policies and procedures".

[74] The evidence there summarised reveals an approach which appears to involve a reversal of the scheme embodied in the Regulation. Thus, rather than identifying an obligation to house prisoners individually, subject to justifiable exceptions, the practice is only to house prisoners individually if they can establish a good reason for individual accommodation and then according to the strength of their respective claims.

[75] Although accepting that cl 33 had been raised in argument before the primary judge, in submissions filed on 6 July 2012, counsel for the State noted that no reliance had been placed on that provision until after Mr Warwick gave his evidence, summarised by the primary judge in the passage set out above. Counsel then submitted that, if there were some doubt as to the legality of the practice revealed in the affidavit, the matter should be remitted to the primary judge for further evidence as "[t]he division between one-out cells and other cells at prison facilities is plainly an important matter of public policy that raises, amongst other things, significant prisoner safety, security, resource allocation and funding issues": submissions, para 11.

[76] That course is not necessary. Mr Warwick's affidavit of 9 March 2012, on which the primary judge based his findings included the following additional statements:

> One-out cell
>
> 40. At Dawn De Loas, all of the accommodation is "two-out cell" accommodation, with the exception of the one-out cell that Mr Patsalis is currently housed in ("the one-out cell"). [This statement was subsequently amended to indicate that each block within the Centre had a one out cell.]
>
> ...
>
> 51. It is not presently possible to convert other cells at Dawn De Loas into one-out cells because there are a number of inmates who must be housed at Dawn De Loas for rehabilitation purposes and for safety reasons. Converting other cells into one-out cells would restrict the capacity of Dawn De Loas to house such inmates. Dawn De Loas has been gazetted as having accommodating [accommodation for?] a certain number of prisoners and prisoner allocation/movement decisions are made on that basis.
>
> 52. If another inmate had a greater medical need for the one-out cell than Mr Patsalis, accommodation will be found for Mr Patsalis that is suitable, having regard to Corrective Services' policies and procedures. Depending on the circumstances, Corrective Services may make a new protective custody direction for Mr Patsalis, having regard to the criteria for protective custody directions ... , or it may determine that some other arrangement is suitable.

[77] It may be inferred from this material that operational procedures take into account, as a "sufficient reason" for the purposes of cl 33(1), the available physical accommodation for convicted prisoners (and others required to be held in correctional centres) and the fact that it may be impossible at a particular time to provide each inmate with a one-out cell. It was not suggested in argument that such practical considerations contravened cl 33(1).

[78] Further, any assessment of cl 33 must take into account other aspects of the custodial regime provided by the Administration Act. Thus, for example, ss 10 and 11 provide:

> **10 Segregated custody of inmates**
>
> (1) The Commissioner may direct that an inmate be held in segregated custody if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to:
> (a) the personal safety of any other person, or
> (b) the security of a correctional centre, or
> (c) good order and discipline within a correctional centre.
>
> ...
>
> **11 Protective custody of inmates**
>
> (1) The Commissioner may direct that an inmate be held in protective custody if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to the personal safety of the inmate.
> (2) The Commissioner may also direct that an inmate be held in protective custody if the inmate requests the Commissioner in writing to do so.
>
> ...
>
> **12 Effect of segregated or protective custody direction**
>
> (1) An inmate subject to a segregated or protective custody direction is to be detained:
> (a) in isolation from all other inmates, or
> (b) in association only with such other inmates as the Commissioner (or the general manager of the correctional centre in the exercise of the Commissioner's functions under section 10 or 11) may determine.
>
> ...
>
> **13 Form of direction**
>
> A segregated or protective custody direction must be in writing and must include the grounds on which it is given.

[79] The applicant's need for a one-out cell involved an element of protective custody. Mr Warwick explained that prisoners who are moved to Dawn De Loas do so on the basis that they will lose "protection" status: para 35. However, as the last paragraphs of Mr Warwick's affidavit set out above recognised, if necessary, a further protective custody direction could be given in respect of the applicant. In short, the applicant's claim of entitlement to a one-out cell must take into account various mechanisms within the Administration Act, as well as the Regulation, by which that goal could be achieved. That fact tends to strengthen the conclusion reached by the primary judge that intervention by the court was not appropriate, and militates against remittal for further consideration.

[80] Against that statutory background, it is necessary to consider the basic proposition underlying the applicant's claim, as identified by the primary judge, namely that he sought quia timet relief in the form of a mandatory injunction, because he feared harm. However, a mandatory injunction is not available except in support of a legal right which is under threat. The applicant's submission that he was at risk of harm if forced to associate in a cell may be accepted; it does not follow, however, that the Commissioner would be in breach of any legal duty by placing him in a cell with another inmate. That is because the obligation of the Commissioner is not to guarantee the safety of the applicant but to take reasonable care to avoid harm inflicted by a third person (or indeed by himself): *Howard v Jarvis*, above at [68].

[81] The primary judge referred in this context to a passage in R P Meagher, J D Heydon, M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002, Butterworths) at [21-105] where the authors noted that an injunction to restrain a negligent act should not be refused merely because no tort was committed until damage was caused, referring to the Supreme Court Act, s 66(2). However, the authors also noted that there was "no known case of an injunction being granted to restrain the commission of the tort of negligence".

[82] The primary judge noted, in the course of considering in principle the availability of quia timet relief, the discussion in the judgment of Dunford J in *Prisoners A to XX Inclusive v New South Wales* (1994) 75 A Crim R 205 at 213, holding, obiter, that the court had power to grant an injunction to restrain tortious conduct. Accordingly, Dunford J proceeded, "if the plaintiffs are able to establish by evidence that the failure by the department to permit their use of condoms constitutes a breach of the duty of care it owes to them, they may be entitled to injunctive relief". The primary judge noted, by way of caution against the over enthusiastic embrace of such a possibility, that liability in negligence on the part of the Commissioner or his staff would face the hurdles imposed by ss 43(2) and 43A(2) of the Civil Liability Act 2002 (NSW): at [56].

[83] The primary judge also referred to the judgment of Studdert J in *JMR v Department of Juvenile Justice* [1999] NSWSC 169. The plaintiff in that matter sought judicial review of a decision to remove a young person from one centre to another. The plaintiff, who had settled in well at the centre in which he was held, was fearful of being removed to Mt Penang where he believed he would be "gang raped": at [15]. The first three grounds, each of which was rejected by Studdert J, alleged that the transfer decision was manifestly unreasonable, was made in breach of the rules of procedural fairness and was ultra vires. The fourth ground was that the implementation of the decision should be restrained to prevent the commission of the tort of negligence. Studdert J was satisfied that the defendants owed the plaintiff a duty to exercise reasonable care for his safety: at [59]. Ultimately, his Honour was not satisfied on the evidence that the risk of physical harm was made out. He stated at [75]:

> Ms Moen [counsel for the plaintiff] submitted that the effect of the medical evidence is that a transfer to Mt Penang would expose the plaintiff to very significant triggers of stress including the fear of sexual assault and that deterioration in the plaintiff's mental condition is likely if the transfer takes place. I am not persuaded that the evidence warrants a finding of likelihood of harm attendant upon transfer. Certainly there would be a risk of harm and probably a greater risk than at Worimi. However that is not the only matter to be considered.

[84] In *JMR* the countervailing consideration, regarded as "fundamental" by the relevant custodial officer, was the need to assess the plaintiff before granting parole: at [78]. That, it was suggested, would be difficult unless he was moved from the relatively protected environment in which he was then placed to the "wider environment" that could be afforded at Mt Penang: at [80]. After reviewing further evidence, Studdert J concluded:

> [83] It seems to me that it is altogether reasonable and appropriate that the plaintiff should be exposed to the wider environment at Mt Penang before his suitability for parole can be more properly assessed. It seems to me further to be altogether reasonable and appropriate and important to assess the potential danger the plaintiff may pose to the community following his ultimate release against the background of his broader experience at Mt Penang.
>
> [84] I have concluded therefore that I am not satisfied that apprehended breach of the defendants' duty of care to the plaintiff in the event of the transfer proceeding has been established.

[85] Although, at [63], Studdert J expressed the view that relief might be refused on a discretionary basis, the exercise in fact undertaken appeared to involve the balancing of the possible risk of harm to the plaintiff against other beneficial effects which were expected to flow from his transfer. In short, the duty to take reasonable care encompasses a range of considerations which undoubtedly include the risk of harm which might eventuate in particular circumstances within the custodial system, but also must encompass other objectives of the custodial system, including preparation for release back into the community. The question raised by the present case is whether, and if so how, the court should balance the risks to the individual of a particular custodial regime against the lack of resources available to the Commissioner, having regard to the needs of other prisoners and of the system for the administration of the prison population generally, as compared with the balance which must be undertaken between conflicting interests of the individual prisoner, as in *JMR*.

[86] The primary judge distinguished the approach taken in *JMR* on three bases: at [56]. The first point of distinction was that in *JMR* the transfer decision had been made and the reasons for it were known. In the present case, no decision had been made or even foreshadowed and the circumstances which might give rise to the withdrawal of the present accommodation were hypothetical.

[87] The second point of distinction was said to be the subsequent enactment (and, by implication, applicability in the present case) of ss 43(2) and 43A(2) of the Civil Liability Act. However, s 43 applies to liability based on "a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the

authority". Although the point was not fully debated, it is at least doubtful whether s 43 would apply to a claim in negligence for breach of the duty to take reasonable steps to protect the safety of a prisoner. That would appear to be a duty arising under the general law, rather than a "statutory duty" imposed, presumably, by the Administration Act.

[88] Section 43A applies to proceedings where "liability is based on" the exercise or failure to exercise a "special statutory power", being a power conferred by or under a statute of a kind that persons generally are not authorised to exercise without specific statutory authority: s 43A(2). Again, the scope of this provision was not explored. While the claim might be for breach of a general law duty of care, the liability might be "based on" an exercise of a "special statutory power", namely the power to hold in custody and manage the accommodation of prisoners. If s 43A were engaged in the present case, there would be no civil liability "unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of ... its power": s 43A(3). Clearly that provides a high hurdle for an applicant seeking quia timet relief. Because there would be no liability unless the Commissioner were manifestly unreasonable in the sense identified above, to contend that in no case could the relevant change in circumstances be permitted would constitute an almost insuperable hurdle for the applicant.

[89] Finally, the primary judge noted that a different approach applied to quia timet relief where the court is required to determine the facts, as compared with judicial review of a discretionary decision where, generally speaking, the court will not review the factual findings accepted by the administrative decision-maker. The distinction is entirely sound: what is less clear is the point which the primary judge sought to make of the distinction. Injunctive relief, if available in respect of threatened negligent conduct, is available not because the decision-maker held a belief as to the reasonableness of the proposed course of conduct, but because the court was not satisfied as to the reasonableness of the proposed course of conduct. Civil liability (actual or threatened) does not necessarily depend on the validity or invalidity (in administrative law terms) of a particular course of conduct. At least until the enactment of the Civil Liability Act, a statutory authority could act validly but negligently, thereby incurring civil liability for damages caused. Where they apply, ss 43 and 43A of the Civil Liability Act may result in the same test being applied in respect of the validity of conduct and in respect of civil liability for damages which it may cause, but the nature of the inquiry may differ.

[90] Whether the primary judge applied ss 43 or 43A to the case before him is unclear. He said he was not satisfied that placement decisions made in the past involved conduct that "could be characterised as either manifestly unreasonable or as a breach of any relevant duty of care": at [62]. It should be inferred that he included, albeit disjunctively, the lower test as one which had not been satisfied. In the same paragraph, his Honour expressed a tentative view that decisions taken since December 2011 had been "reasonable" and certainly had not been shown to be unreasonable.

[91] Secondly, the primary judge held that satisfaction that placement in a cell with another prisoner would be necessarily unreasonable required taking into account a variety of considerations presently unknown, including the applicant's future classification, his medical condition at the relevant time, the competing needs of other detainees for a one-out cell and the suitability of other detainees to be placed with the applicant: at [63]. Once it is accepted that such factors are properly to be balanced against the risk of harm to the applicant, no error is shown in the conclusion reached. That exercise should be accepted as appropriate, absent any statutory provision to the contrary; putting to one side reliance on cl 33, addressed above, none was identified.

[92] It is neither necessary nor appropriate, given the limited submissions made to the court, to reach a final conclusion with respect to the higher test. However, accepting the tentative position apparently adopted by the primary judge that, at least in respect of s 43A(3), the higher standard of unreasonableness was necessary in order to establish liability, the conclusion reached is put beyond serious objection.

(d) validity of policy directive

[93] Exhibit 1 before the primary judge comprised two sections (in effect chapters) taken from a document headed "Corrective Services NSW Operations Procedures Manual". The challenge was directed to two provisions in "Section 9 inmate private property". (The other chapter, entitled "Section 14 segregated and protective custody", was not referred to as relevant for present purposes.) Section 9 ran to some 35 pages; Section 9.3 covered some five pages and was headed "Property Limits and Control".

[94] Before going to the substance of the provisions in the Manual said to be invalid, it is appropriate to consider the extent to which property is dealt with in the Administration Act and the Regulation. Section 75 of the Administration Act confers a power on the Commissioner to confiscate property "unlawfully in the possession of an inmate", from

which it may be inferred that some property may be lawfully in the possession of an inmate. The Act makes further reference to inmates' money (s 76A), a matter not presently relevant.

[95] The Regulation provides that an inmate must surrender all property at reception: cl 8. The general manager of the centre then determines which property may be retained at the centre: cl 10. The Regulation does not appear to deal further with questions as to what property may be retained at the centre and what may be made available to the prisoner in his or her cell. The Manual assumes that the prisoner will have access to "personal legal documents and tapes" which material may be inspected for contraband but which is otherwise treated as confidential: cl 9.2.8.6. The relevant provisions under challenge were set out by the primary judge at [70]-[71]. His Honour then noted certain ambiguities in the relevant parts of the Manual and referred to the fact that the applicant had access to one storage tub of documents in his cell but had five additional storage tubs available from time to time. He concluded at [75]:

> Allowing for the uncertainties I have described, I interpret the above parts of the Manual as establishing a standard position consistent with Mr Patsalis' position; ie prisoners may maintain a single storage tub within their cell and a number of storage tubs elsewhere which they can access through the arrangements noted in paragraph 9.3.1.1. I also interpret these parts of the Manual as enabling "negotiation" with "local management" as to the possibility of having additional storage tubs in their cells as well as negotiation over the number of storage tubs that will be held elsewhere at the gaol.

[96] The primary judge also gave consideration to the practical circumstances which might be accepted as generally consequent upon that reading of the Manual. He continued at [75]:

> It may be that the parameters for negotiation over whether additional tubs can be kept in their cell are very narrow. No doubt issues such as health and safety and the position of other occupants in the cell will be very significant. There is also the wider goal of maintaining consistency throughout the correctional centre that is no doubt part of the process of ensuring that grievances about differential treatment do not fester. However a fixed rule that never permitted a prisoner to have more than one storage tub in their cell under any circumstances would in my view be in real jeopardy of successful challenge via at least one of the mechanisms that I have described above. An obvious example, where such a rule would be at risk of successful challenge, is a prisoner representing him or herself on a serious criminal charge who must soon address the jury in a document intensive trial. If they were (say) the sole occupant of a cell it would be very difficult to justify refusing the prisoner the ability to have access to more than one storage tub in that cell. I do [not] read these parts of the Manual as preventing "local management" from allowing that to occur.

[97] The wording of the last sentence set out above is significant. As noted above, the challenge was to the validity of parts of the Manual and not to the conduct of the Commissioner and his staff on any particular occasion or occasions. The Manual would be "invalid" only to the extent that it did not permit the degree of flexibility required under general law principles. The "validity" of particular conduct would allow a challenge to the way in which the Manual was applied. For reasons noted above, relating to the scope of the grant of "leave", there was no conduct challenge mounted before the primary judge.

[98] The implicit need for a degree of flexibility in the operation of what have turned out to be departmental guidelines reflected a discussion of legal principle which followed the analysis of the Manual itself, at [86]-[92]. This discussion need not be reviewed, because the relevant principles have already been discussed in dealing with the limitation on the grant of leave by Schmidt J at [61]-[64] above.

(e) costs below

[99] The final matter in respect of which leave is sought concerns an order made by Beech-Jones J on 13 April 2012 that the applicant pay 75% of the costs incurred by the State in matter 2011/151237, other than the costs of the applicant's motion filed on 27 October 2011. (The motion of 27 October 2011 had been dealt with by Schmidt J and costs were addressed in determining that motion.)

[100] The applicant was unsuccessful in obtaining the relief sought before Beech-Jones J. In the absence of some justification for a different order, there was an expectation that an adverse costs order would follow: Civil Procedure Act, s 98 and Uniform Civil Procedure Rules 2005 (NSW), r 42.1. Before the primary judge, the applicant sought a different order on two bases: *Patsalis v New South Wales (Re Costs)* [2012] NSWSC 337 at [2], [10] and [11]. Apart from a claim based on impecuniosity, which the primary judge rightly rejected, the first basis of resistance to the usual order involved a series of allegations as to the conduct of counsel for the State. These submissions were in part sought to be reagitated in this court. It may be accepted that there was some confusion as to the issues to be addressed before the primary judge, but he rejected the contention that responsibility for that lay at the feet of counsel for the State and that

formed a basis for a different order as to costs: at [7]. Nothing in the submissions presented by the applicant warrants a grant of leave to reconsider that issue.

[101] The second basis for resisting an order was to be found in the approach adopted by Burchett AJ in *McCallum v Cmr of Corrective Services (NSW)* [2002] NSWSC 497 ; 129 A Crim R 590 at [13]. Burchett AJ there noted a practice of not awarding costs against an unsuccessful prisoner, stating:

> It would not be appropriate to place the obstacle of the threat of a costs order in the way of any reasonable attempt by a prisoner to have the Court ensure the legality of significant action taken by the commissioner.

[102] Consistently with that reasoning and that of Kellam J in *Knight v Secretary to the Department of Justice (Re Costs)* [2004] VSC 29, it may well be appropriate not to order costs against an unsuccessful prisoner in circumstances where the issue raised was reasonably arguable and might have had wider consequences with respect to the administration of the prison system. However, the result in a particular case would remain a matter of discretion even in such circumstances, as it would in other circumstances which might invoke other principles not relevant to this case.

[103] The primary judge applied these principles. He treated the matters raised by the applicant as broadly falling into two categories, namely the relief sought in respect of a one-out cell (which he considered bound to fail) and the challenge to the validity of specific paragraphs of the Operations Procedures Manual. His assessment of the first matter was disputed. However, to the extent that a reasonably arguable legal issue could be identified in respect of an entitlement to a one-out cell, it was dependent upon cl 33. As that issue was not litigated before the primary judge it could not form the basis of a reassessment in this court.

[104] The fact that the usual order was ameliorated by way of a discount reflected a view that the latter challenge, although occupying less time than the former, had achieved a useful purpose. The order made by the primary judge was entirely within the range of the available discretion; no error of principle was identified in the approach adopted. In such circumstances there is no ground for granting leave in respect of that order.

[105] If a separate grant of leave were deemed unnecessary, the right to challenge the costs order having arisen from the grant of leave in respect of the substantive issues, the appeal from the costs order should nevertheless be dismissed.

Costs of appeal

[106] The principal issue raised by the proceedings before this court was the correctness of the decision of Schmidt J that the applicant required leave pursuant to the Felons Act to pursue the relief sought in his summons and that relief should be refused in respect of his claim to have better access to legal documents. The submissions of counsel who appeared for the applicant in respect of this issue were filed on 1 February 2012. On 13 March 2012 written submissions were filed by the State conceding the legal issues raised on the proposed appeal and not opposing a grant of leave to address the issues.

[107] Although the attempt to raise a constitutional issue proved to be misguided, it did not extend the hearing of the matter, nor should it have imposed any significant separate burden on the State. The applicant should have his costs of the appeal from the judgment of Schmidt J of 26 July 2011, other than the costs associated with the constitutional argument.

[108] In other respects, the applicant appeared for himself. With respect to the interlocutory relief sought from Schmidt J, he conceded that no purpose would be served by pursuing the leave application, following the refusal by Beech-Jones J to grant final relief in respect of the same conduct. In the circumstances it is appropriate to dismiss the application for leave to appeal, with no order as to the separate costs of that matter.

[109] With respect to the challenge to the judgment of Beech-Jones J, there should be a grant of leave to appeal, but the appeal should be dismissed. The State has been successful and the usual order would therefore be that the applicant pay its costs of that appeal. One factor which may militate against such an order is that it was not until the appeal stage of the proceedings that the State resolved an outstanding uncertainty as to the legal status of the Operations Procedures Manual. As the evidence in this court disclosed, the Manual was a statement of departmental policy and was not an instrument promulgated by the Commissioner under the statute. It was unfortunate that this fact was not clarified at trial. Nevertheless, the resolution of that issue did not affect the outcome of the case. However, the issues raised were not unarguable, some clarification of relevant legal principles has been achieved and it is appropriate to make the same or-

der as was made by the primary judge, namely that the applicant pay 75% of the State's costs of the appeal from the judgment and orders (including the costs orders) made by Beech-Jones J.

Conclusions

[110] Although neither party sought declaratory relief, the appropriate way for the court to give effect to its findings, necessary for determining the present proceedings, is to make a declaration as to the operation of the Felons Act. Accordingly, the court should make the following orders:

(A) With respect to the application for leave to appeal from the judgment of Schmidt J delivered on 26 July 2011--
  (1) Grant leave to appeal and deem the draft notice of appeal in the white book to have been filed as the notice of appeal.
  (2) Allow the appeal and set aside the order made by Schmidt J.
  (3) In place thereof, declare that the applicant, although a person convicted of a serious indictable offence, does not require leave pursuant to the Felons (Civil Proceedings) Act 1981, s 4, to commence the proceedings in which he seeks relief pursuant to s 69 of the Supreme Court Act 1970, or a declaration or injunction as an alternative to relief under s 69, with respect to the terms and conditions of his imprisonment.
  (4) Order that the respondent pay the applicant's costs of the proceeding in this court, other than the costs associated with the constitutional issue.

(B) With respect to the application for leave to appeal from the judgment of Schmidt J delivered on 7 March 2012, refusing interlocutory relief--

Dismiss the application with no order as to costs.

(C) With respect to the application for leave to appeal from the judgment of Beech-Jones J delivered on 23 March 2012--
  (1) Grant leave to appeal and deem the draft notice of appeal in the white book to have been filed as the notice of appeal.
  (2) Dismiss the appeal.
  (3) Order that the applicant pay 75% of the respondent's costs of the application and appeal.

(D) In respect of the judgment of Beech-Jones J delivered on 13 April 2012--
  (1) On the basis that leave to appeal was not required, dismiss the appeal.
  (2) Dismiss the application for leave to appeal.
  (3) Order that the applicant pay the respondent's costs in this court.

Sackville AJA.

[111] I have had the advantage of reading the judgment of Basten JA.

[112] I agree that this court should accept the concession made by the respondent that the applicant did not require leave pursuant to s 4 of the Felons (Civil Proceedings) Act 1981 ("Felons Act") in order to institute the proceedings by which he seeks judicial review of various decisions relating to the conditions of his incarceration and to his entitlement to access legal documents while in custody. I would accept the concession on the basis that the filing of a summons by a prisoner serving a custodial sentence which challenges decisions relating to the conditions of his or her incarceration, does not constitute the institution of "civil proceedings" for the purposes of s 4 of the Felons Act.

[113] For the reasons given by Basten JA, there is much to be said for the proposition that s 4 of the Felons Act should be understood as imposing no greater disability than the common law imposed on a person convicted of a felony for which he or she had been sentenced to death, but spared the death penalty. The issue in *Dugan v Mirror Newspapers Ltd* [1978] HCA 54 ; 142 CLR 583, was whether:

> A man convicted of a felony in respect of which he had been sentenced to death and spared the penalty of death upon condition that he be kept in that penal servitude [could] maintain an action in New South Wales for a civil wrong.

142 CLR, at 602, per Jacobs J. The High Court held that such a person was incapable of suing at law or in equity until he or she obtained a pardon or had completed the sentence: 142 CLR at 586, per Barwick CJ; at 603, per Jacobs J (with whom Gibbs and Mason JJ agreed).

[114] *Dugan v Mirror Newspapers Ltd* did not decide that an attainted person was incapable of instituting proceedings claiming prerogative or declaratory relief in relation to the conditions of his or her incarceration. It is not clear whether the common law disability extended this far. If it did not and if the prohibition in s 4 of the Felons Act is no more extensive than the common law rule, a person in custody by reason of having being convicted of a serious criminal offence would not require leave to institute judicial review proceedings seeking relief in relation to administrative decisions which he or she would have otherwise have standing to challenge.

[115] This view of s 4 of the Felons Act has not always been taken. In *Schneidas v Jackson* [1982] 2 NSWLR 969, Hunt J refused leave to a convicted murderer serving a sentence of penal servitude for life to commence proceedings against the Minister for Corrective Services and Prison Officials. The prisoner sought a declaration that he had been held in administrative detention unlawfully and an order that he be restored to normal discipline. In addition, he sought a declaration and relief in the nature of certiorari challenging the validity of certain prison rules. The application for leave was determined on the papers and it appears to have been assumed without argument that the summonses constituted "civil proceedings" for the purposes of s 4 of the Felons Act.

[116] Depending upon the statutory context, a statutory prohibition on persons instituting civil proceedings may not prevent a person applying to the court for judicial review of administrative decisions or conduct said to be beyond power. This proposition is illustrated by *Ex parte Waldron* [1986] QB 824, where it was held that legislation providing that no civil proceedings could be brought against any person in any court in respect of certain acts, did not prevent a patient affected by a compulsory treatment order from challenging the validity of the order. The legislation considered in *Ex parte Waldron* was not identical to s 4 of the Felons Act, but Ackner LJ drew a distinction (at 844) between "a civil suit involving private law proceedings and ... judicial review which involves public law proceedings".

[117] The summonses filed by the applicant in the present case challenged decisions affecting the conditions of his incarceration, including what he alleges are constraints on his ability to gain access to legal materials necessary to support a proposed challenge to his conviction. It is not necessary for present purposes to decide whether s 4 of the Felons Act can never apply to proceedings seeking judicial review. However, in my opinion, proceedings in which a prisoner seeks judicial review on the ground that the prison authorities have acted unlawfully or exceeded their powers, but makes no claim for damages, does not fall foul of s 4.

[118] Subject to these observations, I agree with the orders proposed by Basten JA and with his Honour's reasons.

Order

(A) With respect to the application for leave to appeal from the judgment of Schmidt J delivered on 26 July 2011--

(1) Grant leave to appeal and deem the draft notice of appeal in the white book to have been filed as the notice of appeal.

(2) Allow the appeal and set aside the order made by Schmidt J.

(3) In place thereof, declare that the applicant, although a person convicted of a serious indictable offence, does not require leave pursuant to the Felons (Civil Proceedings) Act 1981, s 4, to commence the proceedings in which he seeks relief pursuant to s 69 of the Supreme Court Act 1970, or a declaration or injunction as an alternative to relief under s 69, with respect to the terms and conditions of his imprisonment.

(4) Order that the respondent pay the applicant's costs of the proceeding in this court, other than the costs associated with the constitutional issue.

(B) With respect to the application for leave to appeal from the judgment of Schmidt J delivered on 7 March 2012, refusing interlocutory relief--

Dismiss the application with no order as to costs.

(C) With respect to the application for leave to appeal from the judgment of Beech-Jones J delivered on 23 March 2012--
  (1) Grant leave to appeal and deem the draft notice of appeal in the white book to have been filed as the notice of appeal.
  (2) Dismiss the appeal.
  (3) Order that the applicant pay 75% of the respondent's costs of the application and appeal.

(D) In respect of the judgment of Beech-Jones J delivered on 13 April 2012--
  (1) On the basis that leave to appeal was not required, dismiss the appeal.
  (2) Dismiss the application for leave to appeal.
  (3) Order that the applicant pay the respondent's costs in this court.

The applicants in all other matters appeared in person.

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Counsel for the respondent: *Mr J J Hutton*

Solicitors for the applicant (CA 2011/151237): *Lexington Law Group*

Solicitors for the respondent: *I V Knight, Crown Solicitor*