Court of Appeal
New South Wales

Medium Neutral Citation: **Director of Public Prosecutions v Priestley [2014] NSWCA 25**

Hearing Dates: 3 February 2014

Decision Date: 25/02/2014

Before: Beazley P at [1];
Emmett JA at [2];
Gleeson JA at [8]

Decision: 1. Refuse leave to appeal.

2. The applicant to pay the respondent's costs in this Court.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: STATUTORY INTERPRETATION - Meaning of staying overnight - Whether void for uncertainty - Question of law alone - Construction of penal provisions.
LOCAL GOVERNMENT - Power to erect notices prohibiting conduct in public places

Legislation Cited: Crimes (Appeal and Review) Act 2001 s56, 59
Local Government Act 1993 s204, 632, 697
Supreme Court Act 1970 s101

Cases Cited: Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164
Carolan v AMF Bowling Pty Ltd t/as Bennetts Green Bowl [1995] NSWCA 69
Director of Public Prosecutions v Priestley [2013] NSWSC 407
Zelden v Sewell [2011] NSWCA 56

Texts Cited: Oxford English Dictionary Online

Category: Principal judgment

Parties: Director of Public Prosecutions (Applicant)
Lance Priestley (Respondent)

Representation: Solicitors:
S C Kavanagh, Solicitor for Public Prosecutions (Applicant)

Counsel:
A Mitchelmore and T Phillips (Applicant)
A M Stewart and J D Donnelly (Respondent)

File Number(s): 2013/157040

DECISION UNDER APPEAL

Court/Tribunal: Supreme Court

Before: Adams J

Date of Decision: 24/04/2013

Medium Neutral Citation: Director of Public Prosecutions v Priestley

Court File Number(s): 2012/243969

JUDGMENT

1 **BEAZLEY P:** I agree with Gleeson JA.

2 **EMMETT JA:** The question in issue in these proceedings is whether the respondent, Mr Lance Priestley, committed an offence under s 632(1) of the *Local Government Act 1993* (**the Local Government Act**). Under s 632(1), a person who, in a public place within the area of a council, fails to comply with the terms of a notice erected by the council is guilty of an offence. Section 632(2) relevantly provides that the terms of any such notice may relate to "the doing of any thing in the place" or the "use of the place or any part of the place".

3 As at February 2012, the City of Sydney Council had erected a notice in Martin Place, Sydney (**the Notice**). The Notice relevantly prohibited the activity of "camping or staying overnight". It is common ground that Martin Place is a public place for the purposes of s 632(1). Mr Priestley was charged with having stayed overnight in Martin Place on the night of 1/2 February 2012 and on the night of 2/3 February 2012 contrary to the prohibition in the Notice.

4 On 17 May 2012, a magistrate of the Local Court dismissed the charges. However, on 6 August 2012, the Director of Public Prosecutions (**the DPP**) appealed to the Supreme Court under s 56(1)(c) of the *Crimes (Appeal and Review) Act 2001* (**the Appeal Act**). By that provision, a prosecutor may appeal to the Court from an order made by the Local Court dismissing a matter that is the subject of summary proceedings, but only on a ground that involves a question of law alone. On 24 April 2013, a Judge of the Common Law Division dismissed the appeal. Under s 101(2)(h) of the *Supreme Court Act 1970* (**the Supreme Court Act**), leave is required for an appeal from such a dismissal. By summons filed on 24 July 2013, the DPP applied for leave to appeal.

5 Mr Priestley is homeless and has been living or sleeping on the streets of Sydney since 1992. During the nights in question, he was part of a protest or demonstration described as "Occupy Sydney". At the relevant times, he was engaged in "an occupation" of Martin Place. The Local Court found that during the nights in question, Mr Priestley from time to time occupied a sleeping bag in Martin Place. At times he appeared to be asleep and at other times he was observed sitting up or standing close to the sleeping bag or getting into it. For at least part of the night of 2/3 February 2012, Mr Priestley was underneath an awning forming a part of a commercial building situated on the opposite side of Martin Place from where he was observed on the first night.

6 The principal question that would arise if leave to appeal were to be granted is whether Mr Priestley "stayed overnight" within the meaning of the Notice. An additional question that would arise in relation to the second charge is whether the area under the awning in question is part of a public place. While the meaning of the phrase "camping or staying overnight" may be of some general public importance, the specific facts found in relation to each of the charges do not provide a suitable vehicle for determining the boundaries of the conduct comprehended by that phrase. Further, the question of the status of the area under the awning appears to be of no public importance.

7 I have had the advantage of reading in draft form the proposed reasons of Gleeson JA. I agree with Gleeson JA, for the reasons given by his Honour, that leave to appeal should be refused.

8 **GLEESON JA:** This application for leave to appeal concerns a notice erected in Martin Place by the City of Sydney Council prohibiting a number of activities, including "Camping or staying overnight". The application was listed for a concurrent hearing with the appeal if the Court determines that leave to appeal ought to be granted.

9 The respondent, Lance Priestley, was charged with two offences of failing to comply with the terms of a notice in a public place (by staying overnight) contrary to s 632(1) of the *Local Government Act 1993* (NSW) (**LG Act**). The Court attendance notices alleged that the first offence occurred between 1 and 2 February 2012 and that the second offence occurred between 9.50pm on 2 February 2012 and 7.15am on 3 February 2012.

10 On 17 May 2012, the respondent appeared before a magistrate in the Local Court at the Downing Centre. The charges were dismissed. The magistrate concluded that because the respondent had departed from Martin Place on various occasions during the relevant nights, this meant that he had not "stayed overnight" within the meaning of the notice and he was, therefore, not guilty of the offences charged.

11 The proceedings in the Local Court were commenced by an informant, who was a New South Wales police officer. Following the dismissal of the charges the matter was taken over by the Director of Public Prosecutions (NSW) who appealed to the Supreme Court under s 56(1)(c) of the *Crimes (Appeal and Review) Act 2001*. This provision permitted an appeal by a prosecutor on a ground involving a question of law alone. In determining such an appeal the Supreme Court may set aside an order dismissing a charge and make such other order as it thinks just, or dismiss the appeal: s 59(2).

12 The primary judge (Adams J) dismissed the appeal: *Director of Public Prosecutions v Priestley* [2013] NSWSC 407.

His Honour stated, contrary to the view of the magistrate, that the notice was not directed only to prohibit remaining in Martin Place between dusk and dawn: at [12]. He accepted that the phrase "staying overnight" concerns the use of Martin Place for the purpose of accommodation, which is a wide term and not confined to sleeping: at [15], but considered that there was uncertainty as to the period for which Martin Place is to be used in this way: at [16]. He found that the notice does not allow persons to know, with any reasonable certainty, when they are prohibited from "staying" (except at the unarguable extreme) and, hence, when their conduct has become criminal: at [16]. His Honour concluded that the prohibition against "staying overnight" fails by its uncertainty to apply the sanction of s 632 to any person's conduct: at [32]. From that judgment an application for leave to appeal has been brought to this Court.

13 Significantly, if leave to appeal is granted, the only substantive relief sought in the draft notice of appeal is declaratory relief that the order of the magistrate dismissing the charges against the respondent for two offences under s 632 of the LG Act was affected by error in the construction of the term "staying overnight". The applicant does not seek an order that, if the appeal were allowed, the matter be remitted to the Local Court to be dealt with in accordance with law. For the reasons set out below leave to appeal should be refused.

Leave is required

14 An appeal to this Court against the decision of the primary judge, being an order of the Court in a Division on an appeal under Pt 5 of the *Crimes (Appeal and Review) Act*, requires leave: s 101(2)(h) of the *Supreme Court Act 1970*.

15 The matters which are relevant when considering an application for leave to appeal to the Court are summarised by Basten JA (Tobias AJA agreeing) in *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[37]. An applicant for leave must establish something more than that the primary judge was arguably wrong in the conclusion arrived at: *Carolan v AMF Bowling Pty Ltd t/as Bennetts Green Bowl* [1995] NSWCA 69 (Sheller JA); *Zelden v Sewell* [2011] NSWCA 56 at [20]-[22] (Campbell JA, Young JA agreeing). Ordinarily, leave will only be granted in matters which involve issues of principle, questions of general public importance, or an issue which is reasonably clear in the sense of going beyond what is merely arguable.

16 The applicant contended that leave should be granted because the proposed appeal raised a question of general public importance. That question was identified by the applicant as whether the prohibition in the notice against "staying overnight" was so uncertain as to be incapable of giving rise to a contravention of s 632(1) of the LG Act that can be enforced against a person, including a person who does not remain in Martin Place continually from dusk until dawn on a given night.

17 As to this question, the applicant submitted that on proper construction of the notice, conduct which involved a person using an area as de facto accommodation for a substantial portion of an evening would infringe the prohibition on "staying overnight". This would be so regardless of whether the period starts before or after midnight (AT tcpt 12 lines, 45-48).

18 The importance of this question was said to arise from the following circumstances. The applicant's solicitor deposed that there are 13 prosecutions pending in the Local Court against other persons charged with "camping or staying overnight" contrary to the notice. This evidence was subsequently clarified by counsel for the applicant who informed the Court that seven of these charges concerned persons charged with "camping or staying overnight". These charges have been stood over for mention at the Downing Centre, Local Court on 5 May 2014. Counsel also informed the Court that no election had been made by the prosecutor as to whether the alleged conduct was either "camping" or "staying overnight", but the intention is to make an election (rather than pursue the charge as a composite phrase), although the timing of such an election was unknown.

19 The respondent opposed the grant of leave.

20 The applicant's contention that the proposed appeal raised a question of general public importance directs attention to: the terms of the relevant provision of the LG Act which prohibited conduct in a public place contrary to the terms of a notice erected by council, the facts relied upon in support of the two charges which were dismissed by the magistrate, and the relevance (if any) of the proposed appeal to the other pending prosecutions.

Relevant legislation

21 Section 632 of the *Local Government Act* relevantly provides:

> "632 *Acting contrary to notices erected by councils*

(1) A person who, in a public place within the area of a council, fails to comply with the terms of a notice erected by the council is guilty of an offence.

Maximum penalty: 10 penalty units.

(2) The terms of any such notice may relate to any one or more of the following:

(a) the payment of a fee for entry to or the use of the place,

(b) the taking of a vehicle into the place,

(b1) the driving, parking or use of a vehicle in the place,

(c) the taking of any animal or thing into the place,

(d) the use of any animal or thing in the place,

(e) the doing of any thing in the place,

(f) the use of the place or any part of the place.

(2A) ...

(2B) ...

(3) The terms of a notice referred to in this section may:

(a) apply generally or be limited in their application by reference to specified exceptions or factors, or

(b) apply differently according to different factors of a specified kind,

or may do any combination of those things."

22 The expression "area", when used in the phrase "... area of a council" in s 632(1), is defined in the dictionary to the LG Act as an area as constituted under Div 1 of Pt 1 of Ch 9. This is a reference to s 204 of the LG Act which provides that the Governor may, by proclamation, constitute any part of New South Wales as an "area" (subs (1)) and the "area" is to have the boundaries determined by the Governor, by proclamation (subs (2)).

23 The expression "public place" is defined in the dictionary to the LG Act as follows:

"public place means:

(a) a public reserve, public bathing reserve, public baths or public swimming pool, or

(b) a public road, public bridge, public wharf or public road-ferry, or

(c) a Crown reserve comprising land reserved for future public requirements, or

(d) public land or Crown land that is not:

(i) a Crown reserve (other than a Crown reserve that is a public place because of paragraph (a), (b) or (c)), or

(ii) a common, or

(iii) land subject to the Trustees of Schools of Arts Enabling Act 1902, or

(iv) land that has been sold or leased or lawfully contracted to be sold or leased, or

(e) land that is declared by the regulations to be a public place for the purposes of this definition."

24 In the present case, the applicant relied upon the meaning of "public place" in subpar (b), which included a public road, and in subpar (d), which included public land that is not the subject of the specified exceptions.

25 As to subpar (b) of the definition of "public place", the expression "public road" is defined in the dictionary to the LG Act to mean a road which the public are permitted to use. In turn, the expression "road" is defined in the dictionary to the LG Act as follows:

"*road* includes:

(a) highway, street, lane, pathway, footpath, cycleway, thoroughfare, bridge, culvert, causeway, road-ferry, ford, crossing, by-pass and trackway, whether temporary or permanent, and

(b) any part of a road and any part of any thing referred to in paragraph (a), and

(c) any thing forming part of a road or any thing forming part of any thing referred to in paragraph (a)."

26 The applicant relied upon the meaning in subpar (a) of the definition of a "road" as including a "thoroughfare".

The notice

27 The notice in this case relevantly read as follows:

"THE FOLLOWING ACTIVITIES ARE PROHIBITED IN THIS AREA

...

Camping or staying overnight

...

Any other act which may cause damage to the area

Any other act which may cause inconvenience or injury to others

MAXIMUM PENALTY $550

THE LOCAL GOVERNMENT ACT 1993

BY ORDER OF THE GENERAL MANAGER

THE CITY OF SYDNEY."

28 The maximum penalty was increased from five penalty units ($550) to 10 ($1,100) on 1 April 2001. Thus, it would appear that the notice had been in place for many years before Mr Priestley was charged.

The facts relied upon as supporting the charges

29 The primary judge (at [6]) summarised the magistrate's findings as follows:

> "1. The defendant was from time to time during the nights in question occupying a sleeping bag, at times appearing to be asleep and at other times either sitting up or standing close to it or getting into it.
>
> 2. On the night of 2-3 February, at about 3.00am, he was underneath an awning outside a commercial building which was on the other side of Martin Place from where he was originally seen with his sleeping bag. The defendant's evidence was that the area is patrolled by private security guards and hence was not council land. The presence of the awning "gives some support for this contention".
>
> 3. At other times the defendant would have left the area to go to Wynyard to take blankets, to a food van, and to get a cup of coffee from an all night store in Hunter Street.
>
> 4. The stills of CCTV recordings taken on the night of 1-2 February show the defendant at 9.00pm, 9.45pm, 10.00pm, 10.43pm, 11.06pm, 11.50pm, 12.23am, (from 1.00am to 2.00am no footage) and then from 2.00am to 3.24am with no movement of the defendant within the sleeping bag. When the police arrived, the defendant sat up and then there was no movement of him in the sleeping bag until 6.00am when he sat up again."

First charge

30 The evidence in support of the first charge was primarily comprised of the stills of CCTV recordings between 9.00pm and 6.00am on the night of 1-2 February 2012, other than from 1.00am to 2.00am when there was no footage. There was evidence also from a police officer who arrived at about 6.00am on the morning of 2 February 2012 and observed the respondent getting up out of a sleeping bag, which was located in a makeshift structure located just outside 53 Martin Place (in the open space between Elizabeth Street and Phillip Street) which was also occupied by other members of the "Occupy Sydney" movement, who were lying in separate sleeping bags. When questioned by the police officer the respondent denied that he had stayed overnight.

31 The magistrate accepted the prosecutor's submission that the respondent was using the place as a base, but found that he also left the place during the night to go to Wynyard to distribute blankets, to go to a convenience store in Hunter Street to obtain coffee, and to visit the food van which attended the Martin Place area in the next block to the east, in front of the Reserve Bank Building (WB 78, lines 16-40,100, lines 25-34).

Second charge

32 The second charge concerned the respondent's conduct on the night of 2-3 February 2012. It became apparent during oral argument on the application for leave that the evidence relied upon by the prosecutor in the Local Court did not support this charge. This was for the following reasons.

33 First, the respondent put in issue whether the area somewhat inaptly described by the magistrate as being "underneath an awning outside a commercial building" was a "public place" as referred to in s 632(1) of the LG Act, thus negating the evidentiary presumption in s 697 LG Act. As noted by the primary judge, the magistrate entertained a doubt that this formed part of the council land but did not make a finding in this regard. By contrast, the primary judge observed that this doubt was unjustified, since the presence of an awning over a CBD thoroughfare in no way suggests private land: at [7]. However, the primary judge appears to have been led into error by the inapt description of the forecourt area outside the Channel 7 Studio window as an "awning outside a commercial building" and otherwise overlooked the photographic evidence before the magistrate. This evidence showed that the forecourt area in question was bounded by the pillars of the building in which the Channel 7 Studio is located. That is, there was no physical awning protruding from the building into Martin Place. There was also evidence that this forecourt area was patrolled by private security guards. There was no evidence as to the boundary of the thoroughfare in Martin Place.

34 In my view, the prosecutor failed to establish beyond reasonable doubt that the area comprising the forecourt in front of

the Channel 7 Studio window was a "public place" as referred to in s 632(1) of the LG Act.

35 Secondly, the failure to prove that the forecourt area outside the Channel 7 Studio window was a "public place" was significant because of the magistrate's finding that the respondent was located in this area at about 3.00am on the morning of 3 February 2012, taken together with evidence of a police officer that the respondent was observed at this same location in a sleeping bag and under blankets at 4.45am, together with the respondent's own evidence (which the magistrate accepted) that he would regularly spend a number of hours in this location each night.

36 Thirdly, the evidence as to the respondent's conduct, precise location, and movements during the night of the 2-3 February 2012 was otherwise insufficient to make out the charge. This evidence, supported by photographic evidence, comprised observations of a police officer who attended Martin Place on that night and can be summarised as follows:

(1) The police officer first observed the respondent setting up a structure in Martin Place at 9.50pm on 2 February 2012. The police officer spoke to the respondent, who he described as being a "spokesperson" for the group of "Occupy Sydney" protestors who were "in the process of a demonstration at this location", and took three photographs of the respondent in the area of Martin Place. This was not evidence that the respondent was sleeping in Martin Place at this time.

(2) The next observation by the police officer was at 1.30am on 3 February 2012, when he attended Martin Place and again spoke to the respondent, noting that he was still wearing the same clothing as earlier observed. The police officer then left the area. Other than establishing that the respondent was present in Martin Place at that time, this evidence did not establish precisely where the respondent was located, nor indeed what he was doing. Again, it was not evidence that he was sleeping in Martin Place.

(3) The next observation by the police officer was at 4.45am on 3 February 2012 when the respondent was first observed and photographed in a sleeping bag and under blankets but, as already noted, on this occasion he was located outside the Channel 7 Studio window.

(4) The final observation by the police officer was at 6.40am on 3 February 2012, when he spoke to the respondent who was still wearing the same clothing, but in addition had a red raincoat on, and observed that he was awake and walking around "the site". Although it might be inferred that the reference to the "site" was a reference to the area where the "Occupy Sydney" movement was located just outside 53 Martin Place, this was not entirely clear as the immediately preceding observation by the police officer was that the respondent was located outside the Channel 7 Studio window.

37 Thus, the only evidence of the respondent sleeping in the area of Martin Place on 2-3 February 2012 was when he was observed in a sleeping bag and under blankets at 4.45am outside the Channel 7 Studio window. However, for the reasons given above, the evidence did not establish that this area was a "public place" as referred to in s 632(1) of the LG Act.

38 In my view, notwithstanding the asserted error by the magistrate in giving the notice a restricted "dusk to dawn" construction, there was no error in the dismissal of the second charge.

Leave should be refused

39 The premise underlying the applicant's written submissions is that the notice is directed to prohibiting using an area as de facto accommodation. The reference in the notice to "camping" was said to indicate that "staying overnight" imports the notion of using a public place as a base for accommodation for the night. In oral argument, the applicant described the "accommodation" factor in terms of using the area as a place where someone sleeps and sits and eats (AT tcpt 15, line 49 - 16, line 7).

40 The ordinary meaning of the word "staying" includes "continuing in a place"; and the ordinary meaning of the word "overnight" is "to stay overnight; to pass the night in a particular place": Oxford English Dictionary Online. Thus the word "overnight" ordinarily encompasses the concept of "staying".

41 It might be considered that the words "staying overnight" require no further elaboration having regard to their ordinary meaning when read in the context of the composite phrase in the notice prohibiting "camping or staying overnight". Arguably the words "staying overnight" do not require exclusivity of location: for example, leaving the place where one passed the night for a toilet stop or to buy a coffee, or to visit a food van or to depart temporarily for some other reason, is not necessarily inconsistent with "staying overnight" in an area.

42 It may be accepted however that difficult questions could arise as to the boundaries of the conduct which might be prohibited by the notice. The construction of the notice contended for by the applicant raises questions as to the length and purpose of "staying overnight", which could have significance for conduct quite distinct from the respondent's conduct giving rise to the charges.

43 A number of examples of conduct which might arguably be prohibited by the notice, on the construction contended for by the applicant, were raised by the Court during oral argument. These included: students participating in a 24 hour sit in of consecutive 8 hour shifts; persons waiting overnight because they had missed the last train from Martin Place; or persons who simply wished to sit in Martin Place overnight. Other examples which readily come to mind include persons lining up in a ticket queue overnight in the vicinity of a ticket booth in Martin Place which is due to re-open in the morning, or persons assembling overnight (whether or not with chairs or in sleeping bags) for an early morning outdoor event or concert which is to be held in Martin Place.

44 Whilst an element of "accommodation" might be said to be present in some of these examples, the factual context is arguably quite different to that which is involved in the charges against the respondent. This is relevant as to whether the proposed appeal raises a question of public importance, in view of the range of conduct which might potentially contravene the notice.

45 In my view, this is not an appropriate case for a grant of leave to appeal.

46 First, as to the suggested question of general public importance, in the absence of an election by the prosecutor in relation to the nature of the particularised conduct to be relied upon for the seven charges pending against other persons, it cannot be said that any of those prosecutions will involve the question of "staying overnight" as opposed to the question of "camping". The contention that the proposed appeal raised a question of general public importance was not made out on the evidence.

47 Secondly, the proposed grounds of appeal are academic in respect of the respondent because, if leave were granted and the appeal allowed, the applicant does not seek to have the matter remitted to the Local Court to be determined in accordance with law.

48 Thirdly, even if the applicant had established that the proposed appeal raised a question of general public importance, the present case is not an appropriate vehicle for a "test case" to determine what particular conduct is prohibited by the notice. The second charge was properly dismissed by the magistrate, for reasons other than those relied upon by the magistrate, and hence does not provide a test case. Otherwise, I do not consider that the specific facts relied upon for the first charge provide a suitable vehicle to determine the boundaries of the conduct which is prohibited by the notice.

Orders

49 I propose the following orders:

(1) Refuse leave to appeal.

(2) The applicant to pay the respondent's costs in this Court.

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