SUPREME COURT OF QUEENSLAND

CITATION:	*Moosawi v Massey* [2015] QSC 169
PARTIES:	**ALI AL MOOSAWI** (applicant) **v** **LUKE MASSEY** (respondent)
FILE NO/S:	No 4981 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2015
JUDGE:	Dalton J
ORDER:	**Declare that the notice issued by the respondent and dated 8 May 2015 is void**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OTHER MATTERS – where the applicant was issued with a notice under s 228 of the *Health Ombudsman Act* 2013 to attend before investigators of the Office of the Health Ombudsman and answer questions at an interview – where the applicant submitted that the notice was beyond the powers granted under s 228 – where the respondent submitted that the words "give the authorised person information" in s 228(3) should be interpreted as providing a power to require a person to attend and answer questions – whether a clear intention of the legislature to abrogate rights and liberties through the provision of a power to carry out an interrogative process is identifiable – whether s 228(3) allows the Health Ombudsman to require a person to attend and answer questions *Health Ombudsman Act* 2013 (Qld) s 48, s 54, s 161, s 162, s 228, s 229, s232 *Health Practitioners (Disciplinary Proceedings) Act* 1999 (Qld) s 78 (repealed) *Health Practitioner Regulation National Law Act* 2009 (Qld) s 193, Schedule 5 *Health Quality and Complaints Commission Act* 2006 (Qld) s 123 (repealed)

Ex-parte Willey: In re Wright (1883) 23 Ch. D. 118, cited
Lee v R [2013] NSWCCA 68, cited
NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252, considered
Rees v Kratzmann (1965) 114 CLR 63, considered
Smith v Papamihail & ASIC [1998] FCA 1310, considered

COUNSEL: K Mellifont QC for the applicant
A MacSporran QC for the respondent

SOLICITORS: Avant Law Pty Ltd for the applicant
Office of the Health Ombudsman for the respondent

[1] This is an application challenging a notice dated 8 May 2015 served on Dr Moosawi by the respondent on behalf of the Health Ombudsman. The notice was purportedly issued pursuant to s 228 of the *Health Ombudsman Act* 2013 (Qld) (the Act). The applicant says the notice was beyond the powers given by s 228.

[2] The Act established a Health Ombudsman to deal with complaints against health services, including individual practitioners, such as Dr Moosawi. The scheme of the Act is that when a complaint is made to the Ombudsman, it may investigate the complaint – s 80. For that purpose the Ombudsman has the investigative powers in Part 15 of the Act. Part 15 Div 1 provides that an investigator on behalf of the Ombudsman is defined as an authorised person. An authorised person is given powers to enter places (Part 15 Div 2) and while there, may exercise various powers (Part 15 Div 3), and seize various things (Part 15 Div 4).

[3] Then comes Part 15 Div 5 of the Act, which revels in the heading "Other information-obtaining powers of authorised persons". This is the division which contains s 228:

> "(1) This section applies if an authorised person reasonably believes –
>
> (a) an offence against this Act has been committed; and
>
> (b) a person may be able to give information about the offence.
>
> (2) This section also applies if an authorised person reasonably believes a person may be able to give information about a matter being investigated by the Health Ombudsman.
>
> (3) The authorised person may, by notice given to the person, require the person to give the authorised person information related to the offence, or matter being investigated, at a stated reasonable time and place.
>
> (4) A requirement under subsection (2) is an ***information requirement.***
>
> (5) For information that is an electronic document, compliance with the information requirement requires the giving of a clear image or written version of the electronic document.
>
> (6) In this section –

Information includes a document."

The reference to "subsection (2)" in subsection (4) is obviously erroneous.

[4] The notice to Dr Moosawi provided:

> " *Health Ombudsman Act 2013*
>
> Section 228
>
> **INFORMATION REQUIREMENT NOTICE**
>
> ...
>
> **NOTICE**
>
> **TAKE NOTICE** that I Luke Massey, being an authorised person pursuant to section 188 of the *Health Ombudsman Act 2013* (the Act), has [sic] a reasonable belief that you may be able to give information about a matter being investigated by the Office of Health Ombudsman (the Office), namely allegations you had (consensual) sexual intercourse with a patient, [Name], on 29 October 2014.
>
> **The information you are required to provide**
>
> Pursuant to section 228(3) of the Act I hereby require you, Dr Ali Al Moosawi, to attend before investigators of the office at level 12, 400 George Street, Brisbane, Queensland at 12.00pm on Wednesday 20 May 2015, and provide information required about the matter being investigated by verbal responses during interview.
>
> **When you must provide the information**
>
> You are required to attend the interview at **12.00pm on Wednesday 20 May 2015.**
>
> …"

[5] The notice requires Dr Moosawi to attend and answer questions and the applicant's point is that, properly interpreted, s 228 does not allow such a thing.

[6] I think it is plain that "information" in s 228 must be interpreted as including oral information. It is the normal ambit of the term, and it is clear from subsection (6) that it must include more than documentary information. That being so, the respondent contended that subsection (3) is wide enough to countenance a notice to attend and answer questions, for the authorised person has power to issue a notice requiring oral information be provided at a stated time and place.

[7] The respondent relied upon the fact that, in contrast with other provisions at s 48 and s 54 of the Act, s 228 requires that the place for the provision of the information be stated and be reasonable. The other provisions mentioned simply require that information be given to the Ombudsman within a period stated in the notice. Thus, it was said that the necessary implication of s 228 is that the person who receives the notice will attend at the

place stated. That may be one inference available from the contrast in words, but it is not the only one. Oral information could be provided at a stated place by the person who received a notice telephoning to the stated place. Further, providing oral information is not necessarily the same thing as being subjected to an interrogative process.

[8] The respondent also relied upon the fact that, under the current scheme for the regulation of complaints against health practitioners in Queensland, it would be illogical if the Ombudsman did not have a power to compel attendance to answer questions in the course of an investigation. It was submitted that the scheme of the relevant legislation is that more serious complaints are investigated by the Ombudsman, whereas less serious complaints are investigated by a National regulatory body. I accept this. From the Act and the *Health Practitioner Regulation National Law Act* 2009 (Qld) (National Law) it is clear that the regulatory body under the National Law must notify the Health Ombudsman in relation to serious complaints it receives – see s 193(1)(a)(i) and (ii) of the National Law. The Health Ombudsman may ask for the matter to be referred to it. If that request is made, the National body must comply with it. The Health Ombudsman may refer matters to the investigator under the National Law but not if they are serious matters – see s 91(1) of the Act.

[9] The National regulatory body has a clearly worded power to compel attendance to answer questions. The relevant provision in the National Law is as follows:

> "**1 Powers of investigators**
>
> For the purposes of conducting an investigation, an investigator may, by written notice given to a person, require the person to –
>
> (a) give stated information to the investigator within a stated reasonable time and in a stated reasonable way; or
>
> (b) attend before the investigator at a stated time and a stated place to answer questions or produce documents." – Schedule 5, cl 1.

[10] It was submitted that it would be illogical if the Health Ombudsman did not have such a power and that therefore the general words of s 228(3) should be construed widely. I understand the logic of the respondent's submission. On the other hand, the contrast between s 228(3) and the provision in the National Law does beg the question why the legislature chose not to give a distinct power to the Ombudsman's investigators, when it did give a distinct power to the National investigator.

[11] The respondent's interpretation relies upon a wide interpretation given to words which are themselves very general. I reject the interpretation because, while it is literally open, it does not take account of the purpose of the words, which is to interfere with common law rights, and does not take account of the words in their statutory context. In this latter respect, other provisions of the Act are relevant, and so are the Act's predecessors. There is also a more general statutory context.

Interference with Common Law Liberties

[12] In *Rees v Kratzmann*[1] Windeyer J, in discussing the ambit of a power of compulsory examination under the *Companies Act* said, "There is in the common law a traditional objection to compulsory interrogations". He had earlier cited Jessel MR in a bankruptcy case:[2]

> "Now that is a very grave power to entrust to any court or any man, viz., power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself … it is a very extraordinary power indeed …"

[13] It is true that in modern times these powers are not so extraordinary, for there is a "long history of legislation, both at federal and State level … providing for compulsory interrogation and production of documents in aid of the investigation of criminal and other illegal activity."[3] Nonetheless, the power to require attendance and to interrogate the person attending, whether on oath or not, is a power which substantially intrudes upon the liberties of the person summonsed. Generally there must be "a clear statement before legislation will be interpreted to abrogate 'fundamental principles, infringe rights, or depart from the general system of law'", to cite the headnote in *NSW Food Authority v Nutricia Australia Pty Ltd*.[4]

[14] It is true that the Act preserves the right of a person receiving a s 228 notice to claim a privilege against self-incrimination and against exposure to a penalty – see s 229.[5] Section 228(3) is also conditioned so that the time and place of the provision of information must be reasonable. Notwithstanding these matters, a notice to attend and engage in an interrogative process is such an interference with the rights and liberties of the person receiving it that it could only be authorised by clear words.

Statutory Context

[15] I have already remarked upon the contrast between s 228(3) and Schedule 5, cl 1 of the National Law.

[16] Section 161 of the Act provides a further contrast to s 228(3), as follows:

> "(1) The Health Ombudsman may, by notice given to a person (a ***witness requirement notice***), require the person to attend a hearing at a stated time and place to give evidence or produce stated documents or things.

---

1 (1965) 114 CLR 63, 80.
2 *Ex parte Willey; In re Wright* (1883) 23 Ch. D. 118, 128.
3 *Lee v R* [2013] NSWCCA 68, [20].
4 [2008] NSWCCA 252, [97], [98], [201] and [202]. That case concerned compulsory powers of examination under the *Food Act.*
5 It was argued that the Act also makes provision for financial compensation for a person receiving a notice, but the provisions in that regard are so formal, convoluted and uncertain that I cannot see that they are of much assistance in practical terms to someone who receives a notice – see s 232.

> (2) A person required by a witness requirement notice to attend a hearing is entitled to the witness fees prescribed under a regulation or, if no witness fees are prescribed, the reasonable witness fees decided by the Health Ombudsman."

[17] This power appears in the part of the Act which allows the Ombudsman to conduct an inquiry hearing (Part 12 of the Act). By contrast with s 228, it shows that the legislature has given a clearly worded power to the Ombudsman to require someone to attend and answer questions. If that is what was intended at s 228, it would have been simple enough to provide it. Moreover, s 161 is followed, in point of sharp contrast so far as this case is concerned, by s 162 which provides:

> "(1) For the purpose of an inquiry, the Health Ombudsman may, by notice given to a person, require the person to give to an inquiry member stated information within a stated reasonable period and in a stated reasonable way.
>
> …"

[18] Clearly enough – at ss 161 and 162 and in Schedule 5, cl 1 of the National Law – the draftsperson of the Acts has been concerned to distinguish between giving information and attending to answer questions. And while a wide interpretation of the general words, "give information", could encompass attending and answering questions, legislatures throughout Australia have made a distinction between a power to compel the provision of information and the power to compel attendance at interview.[6] That is no doubt because the latter is much more intrusive upon the common law liberties of the person who receives the notice.

[19] In *Smith v Papamihail & ASIC*[7] Carr J dealt with s 19(2) of the *ASIC Act* which provided:

> "The Commission may, by written notice in the prescribed form given to the person, require the person:
>
> (a) to give to the Commission all reasonable assistance in connection with the investigation; and
>
> (b) to appear before a specified member or staff member for examination on oath and to answer questions."

[20] Carr J read the provisions at (a) and (b) as separate powers and ruled that the "and" joining them was disjunctive. He said:

> "I see no inconsistency in Parliament providing a power to the second respondent to require a person to give all reasonable assistance in connection with an investigation, but without requiring that person to appear for examination. In other words, I think that the second respondent has a choice

---

[6] For example: *Australian Securities and Investments Commission Act* 2001 (Cth) s 19(2); *Income Tax Assessment Act* 1936 (Cth) s 264(1); *Competition and Consumer Act* 2010 (Cth) s 155(1); *Telecommunications Act* 1997 (Cth) s 521; *Disability Services Act* 1986 (Cth) s 27(1); *Work Health and Safety Act* 2011 (Qld) s 155(2); *Electrical Safety Act* 2002 (Qld) s 122C(2); *Surveyors Act* 2003 (Qld) s 136.

[7] [1998] FCA 1310.

> in what it may require. Usually, so I would have thought, the power to require a person to appear for examination would be more intrusive and draconian in nature than a requirement to give reasonable assistance in connection with an investigation. In a particular case, the second respondent may not wish to impose an examination on the recipient."

[21] The case is useful here because the judgment recognises that a power to compel attendance to answer questions is a different, and more intrusive, power than a power to compel the provision of information.

[22] As discussed, the Act itself uses clear words at ss 161 and 162. Further, its statutory predecessors also used clear words. The Act repealed the *Health Practitioners (Disciplinary Proceedings) Act* 1999 and the *Health Quality and Complaints Commission Act* 2006. Both those Acts provided for investigation of complaints against health practitioners and had sections allowing investigators to compel the giving of information, and to compel attendance to answer questions. The *Health Practitioners (Disciplinary Proceedings) Act* provided at s 78:

> "For conducting an investigation, an investigation committee or investigator may, by written notice given to a person, require the person –
>
> (a) to give stated information to the committee or investigator within a stated reasonable time and in a stated reasonable way; or
>
> (b) to attend before the committee or investigator at a stated reasonable time and place –
>
> (i) to answer questions; or
>
> (ii) to produce a stated thing."

[23] The *Health Quality and Complaints Commission Act* provided at s 123:

> "(1) An authorised person may, by notice given to a person, require the person –
>
> (a) to give stated information to the authorised person within a stated reasonable time and in a stated reasonable way; or
>
> (b) to attend before the authorised person at a stated reasonable time and place –
>
> (i) to answer questions; or
>
> (ii) to produce a stated thing.
>
> (2) A notice under subsection (1) may require the person to produce things of a stated class or description.
>
> (3) Subsection (1) does not apply for investigating an inquiry matter."

[24] At a much more general level, I think that the broader legislative history, some of which is exemplified at footnote 6 above, gives guidance as to how the words "give the authorised person information" in s 228(3) ought to be interpreted.

[25] In this case I do not think that the language of s 228(3) is clear enough to warrant the interpretation contended for by the respondent. It is ambiguous. While its general words are wide enough to encompass such a thing at a very high level of abstraction, I do not think it should be interpreted in this way.

[26] The Act is poorly drafted. It eschews the use of ordinary English words and instead defines terms which are so bland that they have no precise meaning. The cumulative effect is to render the provisions of the Act incomprehensible without the mental gymnastics required to look up, and then remember, the various definitions so that, upon returning to the section of interest, one can translate it. Inevitably, because words are not chosen as apt for the particular circumstances dealt with by any particular section, their meaning (after translation) is not as precise as it could be. This style of drafting renders the law meaningless to those without the ability or training to perform the requisite mental gymnastics. For lawyers it produces concepts so imprecise that they do not fit sensibly into established legal paradigms. I suspect this style of drafting is to blame for the ambiguity in s 228(3). The words "give information", construed at their most general include a whole spectrum of behaviour, from writing a letter to attending to answer questions. Indeed, they include transmission by semaphore signals. But general and ambiguous words will not be interpreted in a vacuum.

[27] The applicant should succeed. I declare that the notice issued by the respondent and dated 8 May 2015 is void because it is not authorised by s 228.

[28] I note that it was advanced in argument, perhaps independently, by the applicant that the notice was not sufficiently particular in terms of the subject matter of the intended interview. In my view it was particular enough – see *Johns v ASIC*.[8] However, this view is of no moment given my finding as to lack of power.

[29] I will hear the parties as to costs.

---

[8] [1992] FCA 288, see also *Re Florance* [1992] FCA 58, and *Commissioner of Taxation v ANZ Bank & Ors* (1979) 143 CLR 499.