Plenty v Dillon - [1991] HCA 5

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HIGH COURT OF AUSTRALIA

Mason C.J., Brennan, Toohey, Gaudron and McHugh JJ.

PLENTY v. DILLON
(1991) 171 CLR 635
7 March 1991

Trespass

Trespass—Access to premises for service of summons—Whether common law right to enter—Statute permitting service of summons personally or by leaving at usual place of abode or business—Whether implied power to enter—Damages—Justices Act 1921-1975 (S.A.), s.27.

Decisions

MASON C.J., BRENNAN AND TOOHEY JJ. Mr Plenty is the owner and occupier of a small farm at Napperby near Port Pirie, South Australia. He and Mrs Plenty are the parents of a girl who, at the time of the events giving rise to the present litigation, was aged 14 years. An allegation was made in July 1978 that the child had committed an offence and, pursuant to ss.8 and 15 of the Juvenile Courts Act 1971-1975 (S.A.), a complaint was laid against the child alleging that she was in need of care and control. That is the procedure which the Juvenile Courts Act prescribes for dealing with a child against whom an allegation of an offence is made. When such a complaint is laid a justice is authorized to issue a summons to the child to appear before a Juvenile Court: s.61. A justice issued a

summons to the child to appear. The service of that summons was governed by s.27 of the Justices Act 1921-1975 (S.A.). Section 27 (as it then stood) provided:

> " Subject to the provisions of this or any other enactment specially applicable to the particular case, any summons or notice required or authorized by this Act to be served upon any person may be served upon such person by - (a) delivering the same to him personally; or (b) leaving the same for him at his last or most usual place of abode or of business with some other person, apparently an inmate thereof or employed thereat, and apparently not less than sixteen years of age:
>
> Provided that any court or justice before whom the matter comes may refuse to act upon any non-personal service as aforesaid, and may require the summons or notice to be re-served, if it or he is of opinion that there is a reasonable probability - I. that the summons or notice has not come to the knowledge of the person so served; and
>
> II. that such person would have complied with or acted upon such summons or notice if it had come to his knowledge."

2. On 6 and 31 October 1978 the police attempted to serve the summons on the child. On the latter occasion the police effected non-personal service of the summons by leaving it with her father. The child did not appear. Instead of ordering reservice of the summons, the magistrate ordered that a fresh summons be issued. In addition, notices were issued to Mr and Mrs Plenty, pursuant to s.29 of the Juvenile Courts Act, ordering them to attend at the hearing of the complaint against their child.

3. Constable Dillon, accompanied by Constable Will, went to Mr Plenty's farm in order to serve the fresh summons either personally on the child or, by non-personal service, on the father. Their entry onto the farm for this purpose was the occasion of an alleged trespass for which Mr Plenty brought the present action. He joined as defendants Constables Dillon and Will, their senior officer and the State of South Australia. It is unnecessary to trace the full history of the matter except to say that, in the view taken of the facts by a majority of the Full Court of the Supreme Court of South Australia, Mr Plenty had expressly revoked any implied consent given to any police constable to enter upon his farm in order to serve the summons or any other document relating to the matter concerning his child. The appeal to the Full Court proceeded on that footing and the defendants were content to argue the present appeal on the same footing. Thus the issue for determination is simply whether a police officer who is charged with the duty of serving a summons is authorized, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go upon the land in order to serve the summons.

4. The starting point is the judgment of Lord Camden L.C.J. in Entick v. Carrington (1765) 19 St Tr 1029, at p 1066 :

> "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him."

And see Great Central Railway Co. v. Bates (1921) 3 KB 578, at p 582 ; Morris v. Beardmore (1981) AC 446, at p 464. The principle applies to entry by persons purporting to act with the authority of

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the Crown as well as to entry by other persons. As Lord Denning M.R. said in Southam v. Smout (1964) 1 QB 308, at p 320, adopting a quotation from the Earl of Chatham:

> "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.' So be it - unless he has justification by law."

And in Halliday v. Nevill (1984) 155 CLR 1, Brennan J. said (at p 10):

> "The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law."

5. The proposition that any person who "set(s) his foot upon my ground without my licence ... is liable to an action" in trespass is qualified by exceptions both at common law and by statute. The first ground relied on to authorize or excuse the entry of Constables Dillon and Will on Mr Plenty's farm on the occasion of the attempted service of the fresh summons was the common law rule known as the third rule in Semayne's Case (1604) 5 Co Rep 91a, at p 91 b (77 ER 194, at p 195) which reads:

> " In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the (King)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors".

6. The scope of the third rule in Semayne's Case is stated in Tomlins' Law-Dictionary, 4th ed. (1835), vol.I, tit. Execution, III. 3:

> "It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; hence, every man's house is called his castle. 5 Co 91: 3 Inst 162: Moor, 668: Yelv. 28: Cro Eliz 908: Dalt Shar 350. Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case has the following exceptions: 1st. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co 91 b."

The third rule in Semayne's Case provides justification for more than a mere entry onto land; in terms it relates to breaking into a dwelling-house. The justification afforded by the rule is needed only when the alleged trespass is of that kind: see, for example, Penton v. Brown (1664) 1 Keb 698 (83 ER 193); Southam v. Smout, at p 321 et seq. Of course, justification for breaking into a dwelling

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is justification for entering on the land on which the dwelling stands. However, the third rule in Semayne's Case affords justification for an entry, whether by breaking into a dwelling-house or not, only when the purpose of the person making the entry is either "to arrest ... or to do other execution of the (King)'s process". It is not suggested that the defendant police officers proposed to arrest Mr Plenty's daughter. They had no authority to do so. The magistrate had power to issue a warrant for her arrest (Juvenile Courts Act, s.61(2)), but he did not do so. So the question is whether the police officers were engaged in "execution of the (King)'s process".

7. The cases draw a distinction between execution of the King's process and the execution of process sued out for a litigant's private benefit. The distinction is based on the difference between the public interest which is served by execution of the King's process and the private interest which is served by execution of other process: Burdett v. Abbot (1811) 14 East 1, at p 162 (104 ER 501, at p 563); Harvey v. Harvey (1884) 26 ChD 644 . It is by no means clear that proceedings under ss.8 and 15 of the Juvenile Courts Act are proceedings "when the King is party" (cf. Munday v. Gill (1930) 44 CLR 38, at p 86 ; John L Pty. Ltd. v. Attorney-General (N.S.W.) (1987) 163 CLR 508, at pp 518-519 , 523-524, 540) but, assuming that the public interest in such proceedings makes "the King ... party" for the purposes of the third rule in Semayne's Case, the question remains whether the service of a summons pursuant to s.27 of the Justices Act is an "execution of the (King)'s process"? There is a surprising dearth of authority on this question.

8. The present case is not concerned with the application of the third rule in Semayne's Case to an arrest without warrant on a criminal charge (a problem addressed in Lippl v. Haines (1989) 18 NSWLR 620 ; and see Dinan v. Brereton (1960) SASR 101, at p 105), nor with its application to the execution of a justice's warrant authorizing either arrest or search and seizure (a problem addressed in Launock v. Brown (1819) 2 B and Ald 592 (106 ER 482)), nor with its application to the carrying into effect of a court's judgment, order or warrant. It is concerned only with the application of the third rule in Semayne's Case to the service of a summons. It would be surprising to find that the third rule does apply to the service of a summons, for that would mean that the defendants in this case were authorized not only to go onto Mr Plenty's farm but, if need be, after demand for entry, to break down the door of his home to effect service on his daughter. We do not think that so invasive an operation can be attributed to the third rule. We take the third rule's reference to execution of process to relate to the enforcement of process which is coercive in nature, that is, to the execution of process against person or property. That is how the rule was understood in Tomlins' Law-Dictionary: "to do execution, either on the party's goods, or take his body, as the case shall be". The service of a summons is not an execution of process of that nature.

9. A summons to appear before a court of summary jurisdiction to answer an information or complaint does not itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. Service of a summons, unlike the execution of a warrant of arrest, does not coerce a defendant to appear, though a failure to appear in answer to the summons may lead to the issue of a warrant (see Jervis' Act - the Summary Jurisdiction Act 1848 (U.K.) (11 and 12 Vict. c. 43). The essential nature of a summons as the means of according natural justice has been established by long practice. In Reg. v. Simpson (1716) 10 Mod 378 (88 ER 771), when the validity of summary convictions was challenged on the ground that the defendant was not present, Lord Parker C.J., speaking for the Court of King's Bench, said (at pp 378-379 (pp 771-772)):

> " The great objection against these convictions is, that the justices of the peace have no authority to proceed against the party, and convict him of the offence in his absence. As

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> to this matter we are all of opinion, that the conviction is a good conviction, though taken in the absence of the party. And here it is to be observed, that the statute does not give the justices any particular direction, or prescribe any particular form to be observed in the convictions before them; all that the statute requires is, that this conviction be 'by oath of one credible witness.' So that the justices are not obliged to the observance of any rules, unless those of natural justice, which all men are bound to observe. One of those rules I readily own is, that the offender should be heard before he be condemned. But this rule must admit of this limitation, viz. unless the party refuse to appear. For as it would be unjust not to require the justices to summon the party, and give him notice to appear and make his defence, so to require more from the justices, would be to put it in the power of the offender to elude justice, and render his conviction impossible, by wilfully absenting himself."

Thus Blackstone wrote (Commentaries on the Laws of England, (1769), Bk IV, Ch 20, pp 279-280):

> " The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite (Salk 181 2 Lord Raym 1405): though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca, 'Qui statuit aliquid, parte inaudita altera, Aequom licet statuerit, haud aequus suit.'
>
> A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods."

In Burn's Justice of the Peace, 30th ed. (1869), vol.I, p 1126, the author states:

> "It was before (the Summary Jurisdiction Act 1848) absolutely requisite in all cases, unless where the legislature has in express terms dispensed therewith, that the defendant should be summoned, in order that he may have an opportunity of being heard and making his defence. (R. v. Allington, 2 Stra 678; R. v. Benn, 6 TR 198 ; R. v. Commins, 8 D and R 344; Child v. Capel, 2 C and J 579, per Bayley, B.; R. v. Hall, 6 D and R 84; R. v. Justices of Stafford, 5 N and M 94; 1 H and W 328; Painter v. Liverpool Gas Company, 3 A and E 433; R. v. Martyr, 13 East, 56; 11 Co Rep 99.) This is but natural justice, and if a magistrate should proceed against a person without summoning or hearing him, he would be guilty of a misdemeanour, punishable either by information or indictment. (R. v. Allington, 2 Stra 678; R. v. Venables, 2 Ld Raym 1406 ; 2 Stra 630; R. v. Constable, 7 D and R 6 63.)"

Stephen's Commentaries on the Laws of England, 8 th ed. (1880), vol.IV, ch.XI, pp 330-331, stated the effect of the Summary Jurisdiction Act as follows:

> " Where a written information has been laid before any justice of the peace for any county or place in England or Wales, of any offence committed within his jurisdiction, and made punishable on summary conviction, - he is to issue his summons to the party charged, requiring him to appear and answer the charge: and, if the summons be disobeyed, he may then issue a warrant to apprehend him, and bring him before the court".

In Blake v. Beech (1876) 1 Ex D 320, at p 330, Field J. said:

> "The office of a summons is to inform the party to be charged of the offence which he has to meet, and when he has to meet it, and to require his attendance; and the current of modern authority is to shew that if parties are before a magistrate who has jurisdiction as to time and place, no summons or information is necessary".

(See also Paley on Summary Convictions, 9th ed. (1926), p 212.) The coercive nature of a warrant of arrest has long been contrasted with the non-coercive nature of a summons. Burn, The Justice of the Peace, and Parish Officer, 17th ed. (1793), vol.IV, p 285, comments:

> "In other cases, where it is left discretionary in the justices, it seemeth most agreeable to the mildness of our laws to put the party to no more inconvenience than needs must; and therefore where the case will bear it, a summons seems more apposite than a compulsory process."

In Munday v. Gill, Dixon J. (at p 86) distinguished trial on indictment from summary proceedings by pointing, inter alia, to the bringing of the prisoner to the bar of the court "in his own proper person" to stand trial on indictment while, in summary proceedings, "the defendant is given a sufficient opportunity to appear which (unless he be in custody because it is considered that he will abscond) he may exercise or not at his choice, and, whether he avails himself or not of his right to be present, he is dealt with by those assigned to keep the peace, who judge both law and fact." The service of a summons is not the execution of coercive process against either person or property. As Lord Goddard C.J. said in R. v. Holsworthy Justices; Ex parte Edwards (1952) 1 All ER 411, at p 412 :

> "Serving a summons is not an 'execution under the process of any court of justice'; it is simply the commencement of process."

Common law authority tends against the proposition that the third rule in Semayne's Case applies to service of a summons on premises entry onto which has been forbidden by the person in possession and entitled to possession thereof. It follows that the common law gave no authority to Constables Dillon and Will to go onto Mr Plenty's farm in an attempt to serve the fresh summons on Mr Plenty's daughter.

10. Next, it is submitted that the statutory power to serve a summons, either personally or non-personally, carries with it the right to make such entry on land as is necessary to effect service. This argument, which had the support of the courts below, would construe the statute as conferring a right to enter private premises without consent even though the person in possession has no connection with the matter to which the summons relates. Some statutes which confer a power to arrest have not been construed as carrying a right to enter on private property (see per Lord Keith of Kinkel in Clowser v. Chaplin (1981) 1 WLR 837, at p 842; (1981) 2 All ER 267, at p 270)

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although, in other cases, a statutory power of arrest has been held to carry a qualified right to enter: see Eccles v. Bourque (1975) 2 SCR 739; (1974) 50 DLR (3d) 753 ; Halliday v. Nevill, at pp 15-16. But a statute which confers a power to arrest is of a different order from a statute which prescribes the manner of service of a summons and which confers no power on a person to do a thing that that person is not free to do at common law. Section 27 of the Justices Act is merely facultative, giving to the process-server an option as to the manner of service. It confers no relevant power. The option of personal or non-personal service for which s.27 provides relates simply to the sufficiency of the giving of notice to a defendant after which the justices may proceed to hear and determine the matter in the exercise of their jurisdiction. In truth, the provisions of s.27 do nothing to create an implication that a process-server availing himself of either of the options acquires a power to enter upon private land without the leave or licence of the person in possession or entitled to possession thereof.

11. The grounds advanced by the defendants to justify their entry fail. Their entry was wrongful, and the plaintiff is entitled to judgment and an award of some damages. The vicarious liability of the third and fourth defendants was not argued and that question may require further consideration. At first instance, Mohr J. said that, even if a trespass had occurred, the trespass was "of such a trifling nature as not to found (sic) in damages." But this is an action in trespass not in case and the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm. As the subject of damages was not argued before us, it will be necessary to remit the assessment of damages to the Supreme Court. Similarly, the question of vicarious liability should be remitted. Although the plaintiff ultimately succeeds, he failed on many of the issues litigated in the Supreme Court and the question of costs in that Court should be dealt with by that Court. It is desirable to remit these questions to the Full Court where, hopefully, the parties may agree on the orders to be made but where, in any event, the Full Court may make such orders for determining the questions remitted as it may be advised.

12. We would allow the appeal with costs, set aside the order of the Full Court dismissing the appeal against the dismissal of the plaintiff's claim in trespass and in lieu thereof allow the appeal to that Court against the dismissal of that claim. In lieu of the Full Court's order in that respect order that the judgment for the defendants pronounced by Mohr J. be set aside and in lieu thereof judgment be entered for the plaintiff against the first two defendants and against such other defendants as the Supreme Court shall determine for damages for trespass to land to be assessed and that the matter be remitted to the Full Court of the Supreme Court of South Australia to assess the plaintiff's damages, to determine whether the judgment be entered against the third or fourth defendants or both of them and to determine what costs, if any, of the proceedings in the Supreme Court the defendants or any of them should pay to the plaintiff or to direct the manner in which these questions shall be determined.

GAUDRON AND McHUGH JJ. The question in this appeal is whether a police officer has the right under the law of South Australia to enter private property for the purpose of serving a summons after the occupier of the property has notified the officer that he or she has no permission to enter the land.
Factual Background

2. The first and second respondents, who are police officers, went to the appellant's farm on 5 December 1978 in order to serve a summons on his daughter and notices on the appellant and his wife. The summons and the notices were issued pursuant to the provisions of the Juvenile Courts Act 1971 (S.A.) ("the Act"). It was common ground in this Court that the officers did not have any

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express or implied consent to go onto the appellant's land. In earlier statements and correspondence, he had made it plain that, if the summons was to be served, it had to be served by post. The officers found the appellant, his wife and two other persons having a conversation in a double garage, some distance from a dwelling-house on the farm. The garage had no door, the opening on each side being separated by a "pillar" of galvanised iron four feet in width. The appellant and his wife refused to accept the summons and the notices. The first respondent placed them on the car seat in which the appellant was sitting. As the first and second respondents were leaving the farm, the appellant attempted to strike the first respondent with a piece of wood. After a struggle, the appellant was arrested. He was subsequently convicted of assaulting the first respondent in the execution of his duty.

3. As a result of the incident, the appellant sued the respondents in the Supreme Court of South Australia for damages for assault and trespass. The trial judge gave judgment for the respondents. His judgment was upheld by the Full Court. This appeal concerns only the question whether the respondents are liable for trespass to the appellant's land.
The common law right of entry

4. The policy of the law is to protect the possession of property and the privacy and security of its occupier: Semayne's Case (1604) 5 Co Rep 91a, at p 91 b (77 ER 194, at p 195); Entick v. Carrington (1765) 2 Wils KB 275, at p 291 (95 ER 807, at p 817); Southam v. Smout (1964) 1 QB 308, at p 320 ; Eccles v. Bourque (1975) 2 SCR. 739, at pp 742-743; (1974) 50 DLR (3d) 753, at p 7 55 ; Morris v. Beardmore (1981) AC 446, at p 464. A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises: Entick, at p 291 (p 817 of ER); Morris v. Beardmore, at p 464; Southam v. Smout, at p 320; Halliday v. Nevill (1984) 155 CLR 1, at p 10. Except in the cases provided for by the common law and by statute, constables of police and those acting under the Crown have no special rights to enter land: Halliday, at p 10. Consent to an entry is implied if the person enters for a lawful purpose. In Robson v. Hallett (1967) 2 QB 939, Lord Parker C.J. said (at p 951):
"the occupier of any dwelling-house gives implied licence to
any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house." This implied licence extends to the driveway of a dwelling-house: Halliday. However, the licence may be withdrawn by giving notice of its withdrawal. A person who enters or remains on property after the withdrawal of the licence is a trespasser. In Davis v. Lisle (19 36) 2 KB 434 , police officers who had lawfully entered a garage for the purpose of making enquiries were held to have become trespassers by remaining in the garage after they were told by the proprietor to "get outside".

5. The common law has a number of exceptions to the general rule that a person is a trespasser unless that person enters premises with the consent, express or implied, of the occupier. Thus, a constable or citizen can enter premises for the purpose of making an arrest if a felony has been committed and the felon has been followed to the premises. A constable or citizen can also enter premises to prevent the commission of a felony, and a constable can enter premises to arrest an offender running away from an affray. Moreover, a constable or citizen can enter premises to prevent a murder occurring. In these cases there is power not only to enter premises but, where necessary, to break into the premises. However, it is a condition of any lawful breaking of premises that the person seeking entry has demanded and been refused entry by the occupier. See Swales v. Cox (1981) QB 849, at p 853. Furthermore, a constable, holding a warrant to arrest, may enter premises forcibly, if necessary, for the purpose of executing the warrant provided that the constable

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has first signified "the cause of his coming, and ... (made) request to open doors": Semayne's Case, at p 91b (p 195 of ER); Burdett v. Abbot (1811) 14 East 1, at pp 158, 162-163 (104 ER 501, at pp 561 , 563); Lippl v. Haines (1989) 18 NSWLR 620, at p 631. But no public official, police constable or citizen has any right at common law to enter a dwelling-house merely because he or she suspects that something is wrong: Great Central Railway Co. v. Bates (1921) 3 KB 578, at pp 581-582 . Nor, except in the instances to which we have referred, can any person enter premises, without a warrant, to apprehend a fugitive who may be on the premises: Lippl v. Haines, at p 636. Another exception to the general rule that a person who enters premises without the express or implied consent of the occupier is a trespasser is the rule that the sheriff can enter premises, by force if necessary, for the purpose of executing process in cases where the Sovereign is a party to the action: see the third resolution in Semayne's Case, at p 91b (p 195 of ER). Moreover, if the door of premises is open the sheriff may enter "and do execut(ion) at the suit of any subject, either of the body, or of the goods" (at p 92a (p 197 of ER)). But the right to execute at the suit of a subject does not extend to breaking open the outer doors of a dwelling-house: Semayne's Case, at pp 92a, 92b (pp 197, 198 of ER); Burdett v. Abbot, at pp 154-155 (p 560 of ER); Southam v. Smout, at pp 322-323, 326, 329; Tomlins' Law-Dictionary, 4th ed. (1835), vol.1, tit. Execution, III. 3. It has been held, however, that, for the purpose of executing process at the suit of any subject, the sheriff may break open a barn or outhouse which is not part of a dwelling-house: Penton v. Brown (1664) 1 Keb. 698 (83 ER 1193).

6. A number of statutes also confer power to enter land or premises without the consent of the occupier. But the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise be tortious conduct: Morris v. Beardmore, per Lord Diplock at p 455. Thus, in Colet v. The Queen (1981) 1 SCR 2 , the Supreme Court of Canada held that legislation which authorised the issue of a warrant for "the seizure of any firearm" in the possession, custody or control of a person did not authorise entry onto and the searching of the premises of the person named in the warrant. In Clowser v. Chaplin (1981) 1 WLR 837; (1981) 2 All ER 267, the House of Lords held that a legislative power, authorising a constable to arrest without warrant a person who had refused to provide a specimen of breath, did not authorise him to enter private premises, without the permission of the occupier, for the purpose of making the arrest.

7. Although the respondents had no express or implied consent to enter the appellant's land, they contended that they were authorised to do so by the third resolution in Semayne's Case or s.27 of the Justices Act 1921 (S.A.) or both.
Semayne's Case

8. In Semayne's Case, the judges of England resolved that, while "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose" (at p 91b (p 195 of ER)), there were cases where the sheriff might enter private property without the consent of the occupier. The third resolution of the judges provided (at p 91b (pp 195-196 of ER)):

> "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the (King)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm 1 c 17 (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the

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process, of which, if he had notice, it is to be presumed that he would obey it ..."

9. The respondents submitted that the service of the summons and the notices in the present case constituted the execution of process for the purposes of the third resolution in Semayne's Case. Consequently, so it was contended, no trespass had occurred notwithstanding the refusal of the appellant to allow the first and second respondents to enter his land.

10. In terms, the third resolution in Semayne's Case does not deal with the question of entry onto land; it deals with the right to "break the party's house". However, by necessary implication, the right to break the house carries with it the right to enter the land on which the house is situated. Nevertheless, nothing in the third resolution supports the entry of the first and second respondents onto the appellant's land in the present case, for the service of the summons and notices was not the "execution of the (King)'s process".

11. First, the Sovereign is not a party to the present proceedings. In Munday v. Gill (1930) 44 CLR 38, Dixon J. pointed out (at p 86):

> "There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or ex officio information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject."

The summons addressed to the appellant's daughter was the product of a complaint laid by an assistant police prosecutor. The notices ordering the appellant and his wife to attend the hearing were issued by a special magistrate in accordance with the power conferred on him by s.29 of the Act. In John L Pty. Ltd. v. Attorney-General (N.S.W.) (1987) 163 CLR 508, Mason C.J., Deane and Dawson JJ. said (at pp 518-519) that the fact that an officer of the Department of Consumer Affairs had laid an information and that the proceedings were taken and prosecuted by him with the authority of the Acting Minister for Consumer Affairs did not make them proceedings "to which the Crown was a party in any accepted meaning of the words 'Crown' and 'party'".

12. Secondly, the service of a summons is not the execution of process for the purpose of the third resolution. In the third resolution in Semayne's Case, the judges, in referring to the execution of the King's process, were referring to the sorts of execution to which Sir Edward Coke referred in his Reports: final executions which ended the suit or those executions which tended to some end in the suit such as the writ of capias ad satisfaciendum by which a debtor was imprisoned until satisfaction was made for the debt costs and damages: see the discussion in Tomlins' Law-Dictionary under the heading "Execution". The reference to execution of process in the third resolution in Semayne's Case is a reference to the seizure of the body or goods of the defendant and not to the service of process. This can be seen from the use of the term "execution" in the fourth resolution in that case where it clearly refers to seizure and not service. The judges resolved (at p 92a (p 197 of ER)):

> "In all cases when the door is open the sheriff may enter the house, and do execut(ion) at the suit of any
> subject, either of the body, or of the goods; and so may the lord in such case enter the house and distrain for his rent or service".

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It is highly unlikely that the judges were using the term "execution" in the third resolution in a sense different from that used in the fourth resolution. This was obviously the view of the authors of the fourth edition of Tomlins' Law-Dictionary who stated (s.III.3) under the heading "Execution":

> "whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co 91 b."

> 13. In R. v. Holsworthy Justices; Ex parte Edwards (1952) 1 All ER 411, at p 412, the Divisional Court had to consider the meaning of the phrase "any execution under the process of any court of justice" in s.46 of the Offences against the Person Act 1861 (U. K.) (24 and 25 Vict. c.100) which ousted the jurisdiction of justices to hear and determine a charge of assault. Lord Goddard C.J., with whose judgment Byrne and Parker JJ. agreed, said (at p 412):
> "Serving a summons is not an 'execution under the process of any court of justice'; it is simply the commencement of process."

14. For the two reasons set out above, the service of the summons and notices was not the execution of process within the meaning of the third resolution of Semayne's Case.

15. Furthermore, neither principle nor policy justifies the extension of the law expressed in that resolution to cover the case of service of a summons and a fortiori the case of the service of a notice. In principle, there is a fundamental difference between the arrest of a person or execution of process and the service of a summons. In the case of an arrest or execution against the body of a person, the object of the arrest or execution is to ensure that the defendant will meet his or her obligation or answer the charge. In the case of an execution against the goods of a person, the object is to satisfy a judgment already given. The object of serving a summons is different. It is to notify the defendant of the charge and to give him or her an opportunity to defend the charge: see Burn's Justice of the Peace, 30th ed. (1869), vol.I, p 1126; Reg. v. Simpson (1716) 10 Mod 378 (88 ER 771); Blake v. Beech (1876) 1 Ex D 320 ; Munday v. Gill, at p 86. Service of a summons is the first step towards achieving procedural fairness in the litigation. It fulfils a basic requirement of the rules of natural justice. But it is not concerned to compel the attendance of the defendant to answer the charge. If the defendant fails to appear at court on the return date, the magistrate or justice may issue a warrant for the apprehension of the defendant but is not required to do so. He or she may proceed to hear the charge even though the defendant does not appear.

16. Thus, the object of serving a summons is different from the object of an arrest or an execution against the goods or body of a person. There is no logical basis for extending a rule whose object is to ensure the satisfaction of a judgment or obligation or the attendance of a person before a court to the case of the service of a document whose object is the provision of information. The very limited nature of a constable's right to enter private property for the purpose of arrest is by itself a compelling argument for holding that, without making major changes to the law, the common law cannot logically recognise the service of a summons as a ground for entering premises against the will of the occupier. It would be incongruous for the common law to permit entry for the purpose of arrest in a few cases only but to permit entry for the purpose of serving a summons in every case whatsoever.

17. Furthermore, nothing in the policy which underpins the third resolution in Semayne's Case

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suggests that the achievement of its goal will be facilitated or promoted by extending the third resolution to cover the case of the service of a summons. The policy behind the third resolution is that the public interest in securing the Crown revenues and apprehending alleged offenders is greater than any consequential interference to the private rights of the occupiers of property. Serving a summons does not facilitate or promote this policy. The object of the service is not to bring the defendant before the court or to secure the revenues of the Crown but to apprise the defendant of the nature of the case which is alleged against him or her. Whether or not the defendant appears in answer to the summons is a matter entirely for that person.

18. Failure to make an arrest or issue execution may frustrate the administration of justice. But failure to serve a summons does not mean that the administration of justice is frustrated. When the defendant deliberately refuses to accept or evades service of the summons, judgment against him or her may still be entered. The defendant cannot complain in those circumstances that the rules of procedural fairness have been breached. Nor can he or she complain if execution subsequently issues. Of course, in most cases, a justice prefers to have a defendant, who evades service, apprehended and brought before the court by warrant. He or she will prefer to do so not merely for the purpose of ensuring that the defendant does not evade the penalties imposed by law but because of the deep reluctance of those trained in the common law system to permit a charge to be heard against a person in his or her absence. Nevertheless, in such cases it is the warrant and not the summons which secures the defendant's presence.

19. At this late stage in the development of the common law, it seems impossible to declare that, for the purpose of serving a summons, a constable has a common law right of entry upon private property without the consent of the occupier. The general policy of the law is against government officials having rights of entry on private property without the permission of the occupier, and nothing concerned with the service of a summons gives any ground for creating a new exception to the general rule that entry on property without the express or implied consent of the occupier is a trespass.

20. The contention that the respondents are not liable for trespass to the appellant's land because of the third resolution in Semayne's Case must be rejected.
Justices Act 1921 (S.A.), s.27

21. Section 27 of the Justices Act provides in part:

> "Subject to the provisions of this or any other enactment specially applicable to the particular case, any summons or notice required or authorized by this Act to be served upon any person may be served upon such person by - (a) delivering the same to him personally; or (b) leaving the same for him at his last or most usual place of abode or of business with some other person, apparently an inmate thereof or employed thereat, and apparently not less than sixteen years of age".

In terms, s.27 has nothing to say about the right to enter property. In Morris v. Beardmore, Lord Diplock said (at p 455) that the presumption is "that in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct". If service of a summons could only be effected by entry on premises without the permission of the occupier, it would follow by necessary implication that Parliament intended to authorise what would otherwise be a trespass to property. But a summons can be served on a person without entering the property where he or she happens to be at the time of proposed service. Of course, inability to enter private property for the

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purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights. As Woodhouse J. said in Transport Ministry v. Payn (1977) 2 NZLR 50, at p 64, where the New Zealand Court of Appeal had to deal with a similar problem:

> "I am unable to accept the view that it is open to the courts to remedy a 'flaw in the working of the Act' by adding to or supplementing its provisions ... Nor am I able to think that in a matter of this importance Parliament can have taken it for granted that basic rights of citizens were inferentially being overriden."

In our opinion, s.27 of the Justices Act did not authorise the entry of the first and second respondents onto the appellant's property after they were informed that they did not have his consent to enter. The appeal should be allowed

22. The purported justification for the first and second respondents' entry onto the appellant's land has failed. The first and second respondents were trespassers. Judgment in favour of the respondents should be set aside and judgment entered for the appellant against all respondents on the claim of trespass, since the parties seemed to have accepted that the third and fourth respondents were vicariously responsible for the acts of the first and second respondents in entering the appellant's land.

23. The matter must be remitted to the Supreme Court for the purpose of assessing the appellant's damages.

24. In his judgment, the learned trial judge said that, even if a trespass had occurred, it was "of such a trifling nature as not to found (sic) in damages". However, once a plaintiff obtains a verdict in an action of trespass, he or she is entitled to an award of damages. In addition, we would unhesitatingly reject the suggestion that this trespass was of a trifling nature. The first and second respondents deliberately entered the appellant's land against his express wish. True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. Although the first and second respondents were acting honestly in the supposed execution of their duty, their entry was attended by circumstances of aggravation. They entered as police officers with all the power of the State behind them, knowing that their entry was against the wish of the appellant and in circumstances likely to cause him distress. It is not to the point that the appellant was unco-operative or even unreasonable. The first and second respondents had no right to enter his land. The appellant was entitled to resist their entry. If the occupier of property has a right not to be unlawfully invaded, then, as Mr Geoffrey Samuel has pointed out in another context, the "right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric": "The Right Approach?" (1980) 96 Law Quarterly Review 12, at p 14, cited by Lord Edmund-Davies in Morris v. Beardmore, at p 461. If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages.

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25. Subject to the above, we agree with the orders proposed by Mason C.J., Brennan and Toohey JJ.

Orders

Appeal allowed with costs.

Set aside the order of the Full Court of the Supreme Court of South Australia so far as it dismisses the appeal against the dismissal of the plaintiff's claim in trespass to land. In lieu thereof order that the appeal to that Court be allowed in part and that the judgment of Mohr J. dismissing te plaintiff's claim in trespass to land be set aside and in lieu thereof judgment for damages to be assessed be entered for the plaintiff against the first and second defendants and such other defendants as the Supreme Court may hold to beliable in trespass to land.

Remit the matter to the Full Court of the Supreme Court of South Australia to:
(a) determine whether judgment for damages for trespass to

land should be entered against the third and fourth defendants or either of them;

(b) assess the plaintiff's damages against the first and

second defendants and against such other defendants as the Supreme Court shall determine; and

(c) determine what costs, if any, of the proceedings in the

Supreme Court, including the Full Court, the defendants or any of them should pay to the plaintiff;

or to direct the manner in which these questions shall be determined.

Cited by:

Criminal Charge Book [2023] JCV Criminal_Charges_Book (09 September 2025)

> Similarly, police officers are subject to the law regarding trespass to land and require authority or consent to enter private premises (Mackay v Abrahams [1916] VLR 681, 684 ; Plenty v Dillon (1991) 171 CLR 635, [4]).

J O, S L B v Chief Executive of Department for Child Protection [2025] SASC 150 -
J O, S L B v Chief Executive of Department for Child Protection [2025] SASC 150 -
J O, S L B v Chief Executive of Department for Child Protection [2025] SASC 150 -
21 Broadbeach Blvd Pty Ltd v Body Corporate for Oceana on Broadbeach [2025] QSC 186 -
21 Broadbeach Blvd Pty Ltd v Body Corporate for Oceana on Broadbeach [2025] QSC 186 -
Page v Long [2025] VCC 868 -
Page v Long [2025] VCC 868 -
Brown v Etna Developments Pty Ltd [2025] NSWSC 358 -
Insurance Australia Limited t/as CGU Insurance v Capral Limited [2025] FCAFC 46 -
The Returned & Services League of Australia WA Branch Incorporated v Vietnam Veterans and Veterans Motorcycle Club WA Chapter (Inc) [2025] WASC 64 -
The Returned & Services League of Australia WA Branch Incorporated v Vietnam Veterans and Veterans Motorcycle Club WA Chapter (Inc) [2025] WASC 64 -

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The Game Meats Company of Australia v Farm Transparency International Ltd [2024] FCA 1455 -
Tasmanian Ports Corporation Pty Ltd v Resources Australasia Pty Ltd [2024] TASSC 72 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
Smit v State of Victoria [2024] VCC 1411 (12 September 2024) (Tran J)

> Cases Cited: *Coco v R* [1994] HCA 15; *Christie v Leachinsky* [1947] A.C. 573; *Trobridge v Hardy* (1955) 94 CLR 147; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *Donald son v Broomby* (1982) 40 ALR 525; *De Moor v Davies* [1999] VSC 416; *George v Rockett* (1990) 170 CLR 104 ; *Ruddock v Taylor* (2005) 222 CLR 612; *Hyder v Commonwealth* (2012) 217 A Crim R 571; *DPP v Farmer* [2 010] VSC 343; *Loughnan v Magistrates' Court of Victoria Sitting at Melbourne & Anor* [1993] 1 VR 685 at 6 92 ; *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286; *Carrie Peters (a Pseudonym) v State of Victoria* [2023] VCC 1791 *; State of New South Wales v Smith* (2017) 95 NSWLR 662; *Slaveski v State of Victoria* [2010] VSC 441; *Hogan v Australian Crime Commission* (2010) 240 CLR 651; *Australian Competition and Consumer Commission v BlueScope Steel Limited* [2019] FCA 1532; *DPP v Carr* [2002] NSWSC 194; *R v Officer A (No 2)* [[2022] NSWSC 1381 ; *Plenty v Dillon* (1991) 171 CLR 635

Smit v State of Victoria [2024] VCC 1411 -
Smit v State of Victoria [2024] VCC 1411 -
Cosenza v State of South Australia [2024] SASC 97 (07 August 2024) (McDonald J)

31. The next significant development in the applicant's life was in 2008, when he commenced a law degree. Prior to that, subsequent to completing his prison sentence, the applicant had undertaken a double degree in economics and international finance. The applicant graduated from law school in 2011. It was whilst undertaking the law degree that the applicant first became aware of the High Court's decision in *Plenty v Dillon* . [7] He described that moment as something of a revelation:[8]

> I was sitting in my torts law class and Professor Julia Davis walked in, and she walked in with a little sign which said, 'No trespassing, Plenty v Dillon', and she put it on the top of her desk and she sort of made a little bit of a joke about it as to how the law can be expressed in this type of signage, and she just wanted to express that to the students, and we also had a bit of a laugh, and then Professor Davis and I built a very good relationship and we both had a similar interest in this area of the law and ultimately it was like knowing that law, I found it as being a - I don't know how to explain it - a light bulb that just came up in my mind, and I went, 'Wow, this can change my life with respect to being able to be left alone in your own home.'

via

[7] (1991) 171 CLR 635 .

Cosenza v State of South Australia [2024] SASC 97 (07 August 2024) (McDonald J)

611. The question that then arises is whether the steps undertaken by the applicant were sufficient to amount to an adequate communication for a successful revocation of access to SAPOL. There is limited assistance on this question, as the majority of the authorities have proceeded on the basis that the implied licence had been revoked without considering what is necessary to constitute a revocation. For example, in the seminal decision of *Plenty v Dillon* ,[520] the appeal to the High Court was argued on the basis that it was accepted that Mr Plenty had expressly revoked any implied consent given to any police constable to enter upon his farm to serve a summons. It followed that the issue for determination was simply whether a police officer, who is charged with the duty of serving a summons is authorised, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go upon the land in order to serve the summons. The Court was not required to consider what is necessary for an effective revocation of the implied licence to enter the property.

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via

[520] [1995] HCA 1 ; (1991) 171 CLR 635 .

Cosenza v State of South Australia [2024] SASC 97 -
Cosenza v State of South Australia [2024] SASC 97 -
Cosenza v State of South Australia [2024] SASC 97 -
Rainbow v The King [2024] NSWDC 632 (06 August 2024) (D Barrow SC DCJ)

36. In *Plenty v Dylan* [1991] HCA 5, 171 CLR 635 the High Court considered whether a police officer, without the consent of an occupier, could enter private property so as to serve a summons. The facts of the matter are different to the situation here. The case involved civil litigation arising in South Australia. Justices Gaudron and McHugh observed:

> "The common law has a number of exceptions to the general rule that a person is a trespasser unless that person enters premises with the consent, express or implied, of the occupier. Thus, a constable or a citizen can enter premises for the purpose of making an arrest if a felony has been committed and the felon has been followed to the premises. A constable or citizen can also enter premises to prevent the commission of a felony, and a constable can enter premises to arrest an offender running away from an affray. Moreover, a constable or citizen can enter premises to prevent a murder occurring. In these cases there is power not only to enter premises but, where necessary, to break into the premises however, it is a condition of any lawful breaking of premises that the person seeking entry has demanded and been refused entry by the occupier....." [5]

Eedra Zey (formerly using the pseudonym Eva Williams) v State of New South Wales (No 2) [2024] NSWDC 289 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 (21 June 2024) (M Hanna M)
Plenty v Dillon [1991] HCA 5
Proudman v Allen

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Cosenza v Denisoff, @Realty Pty Ltd [2024] SADC 42 (17 April 2024) (Chivell AJ)

Blue J. referred to *Plenty v Dillon,* [6] the case referred to on Mr Cosenza's sign. His Honour quoted the joint judgment of Gaudron and McHugh JJ: [7]

Cosenza v Denisoff, @Realty Pty Ltd [2024] SADC 42 -
Cosenza v Denisoff, @Realty Pty Ltd [2024] SADC 42 -
Cosenza v Denisoff, @Realty Pty Ltd [2024] SADC 42 -
Wood v State of Queensland [2024] QSC 32 -
Wood v State of Queensland [2024] QSC 32 -
Wood v State of Queensland [2024] QSC 32 -
Wood v State of Queensland [2024] QSC 32 -
Glavinic v Commonwealth [2023] ACTSC 361 (01 December 2023) (Mossop J)

217 The fundamental starting point is that unless authorised by law, the entry by police onto the dwelling of a citizen is unlawful and constitutes a trespass: *Plenty v Dillon* (1991) 171 CLR 635 at 639. The defendants contend that ss 188 and 190 of the *Crimes Act* provide legal authorisation for the entry made by the police officers in the circumstances that existed.

Glavinic v Commonwealth [2023] ACTSC 361 -
Natural Resources Access Regulator v Lidokew Pty Ltd [2023] NSWLEC 130 -

O.R. Smee Pty Ltd (in liquidation) v Calkin [2023] NSWSC 1306 -
Jeffrey v Adams [2023] NSWSC 1270 -
HYYL and Privacy Commissioner [2023] AATA 2961 -
Lewis v De Silva [2023] NTSC 77 -
Lewis v De Silva [2023] NTSC 77 -
National Heavy Vehicle Regulator v Giannopoulos Pty Ltd [2023] SASC 101 (18 July 2023) (McIntyre J)

8. The Information and Summons was issued under ss 49, 57 and 57A of the *Criminal Procedure Act (SA) 1921*. It is well established that the effect of a summons to appear before a court of summary jurisdiction to answer an information or complaint does not itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. [1] The respondent appeared in answer to the Information and Summons. If a defendant attends at court in answer to a summons, the Court has jurisdiction to deal with the matter unless the complaint was invalid. [2]

via

[1] *Plenty v Dillon* [1991] 171 CLR 635 .

National Heavy Vehicle Regulator v Giannopoulos Pty Ltd [2023] SASC 101 -
Care A2 Plus Pty Ltd v GI 305 Pty Ltd [2023] VSC 394 (12 July 2023) (M Osborne J)

92. The submission that the Court should still award substantial damages for trespass, notwithstanding the absence of evidence of loss, is said to be supported by the proposition that a plaintiff in such circumstances is entitled to substantial damages in vindication of the right to exclude a defendant from property of the plaintiff, notwithstanding the absence of establishment of actual loss. [28]

via

[28] *Plenty v Dillon* (1991) 171 CLR 635, 639 , 645 (Mason CJ, Brennan and Toohey JJ) ; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 365 [178] (Spigelman CJ).

Carter v Mackey Motels Pty Ltd [2023] QSC 128 -
Carter v Mackey Motels Pty Ltd [2023] QSC 128 -
Nicholson v Carborough Downs Coal Management Pty Ltd (No 4) [2023] ICQ 005 -
Nicholson v Carborough Downs Coal Management Pty Ltd (No 4) [2023] ICQ 005 -
Nicholson v Carborough Downs Coal Management Pty Ltd (No 4) [2023] ICQ 005 -
Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd [2023] NTSC 36 (20 April 2023) (Barr J)

35. I would make an observation of my own at this point. The "lawful rights" referred to in the s 58(j) exploration permit condition must mean the lawful rights such as they are after the grant of the exploration permit. This is made clear by the fact that s 58 sets out the conditions of an exploration permit *granted* under the Act. Moreover, the original, pre-permit, "lawful rights" or "lawful activities" of an owner/occupier of land may be further affected as a result of the provisions of an access agreement. For example, it is a fundamental common law right of a person in possession or entitled to possession of private property to exclude others from such property or premises. [39] Yet the holder of an exploration permit has the right, inter alia, to enter and remain in the exploration permit area (with vehicles, machinery etc.) to carry out a technical works program or other exploration of the permit area. [40] It would be wrong to confine consideration of the concept of "lawful rights or activities" to the position under the common law, unaffected by the grant of an exploration permit or the approval of

an access agreement. I include reference to the access agreement because Rallen could not enter onto Tanumbirini, and be in a position to carry out its operations and activities, if an access agreement were not in place.

via

[39] *Coco v The Queen* (1993-1994) 179 CLR 427 at 435.9, citing *Plenty v Dillon* (1991) 171 CLR 651 CLR 635, at 639.

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 (24 March 2023) (Williams J)

19. The authorities cited by his Honour in the passage immediately above include the statement by Gaudron and McHugh JJ in *Plenty v Dillon* (1991) 171 CLR 635; (1991) 65 ALJR 231; (1991) 98 ALR 353; [1991] HCA 5 (***Plenty v Dillon***) (at 171 CLR 654-655) that:

> "[T]he purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation or his or her land."

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Nicholson v Carborough Downs Coal Management Pty Ltd (No 2) [2023] ICQ 3 -
Romani v State of New South Wales [2023] NSWSC 49 (07 February 2023) (Wright J)

39. In *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15, Mason CJ, Brennan, Gaudron and McHugh JJ held, at 435-6 :

> "Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [*Entick v. Carrington* (1765) 2 Wils KB 275 at 291 (95 ER 807 at 817); *Halliday v. Nevill* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ See also *Colet v. The Queen* (1981) 119 DLR (3d) 521 at 526.]. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law [*Halliday v. Nevill* (1984) 155 CLR at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ]."

Romani v State of New South Wales [2023] NSWSC 49 (07 February 2023) (Wright J)

39. In *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15, Mason CJ, Brennan, Gaudron and McHugh JJ held, at 435-6 :

> "Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [*Entick v. Carrington* (1765) 2 Wils KB 275 at 291 (95 ER 807 at 817); *Halliday v. Nevill* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ See also *Colet v. The Queen* (1981) 119 DLR (3d) 521 at 526.]. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is

authorized or excused by law [*Halliday v. Nevill* (1984) 155 CLR at 10 per Brennan J; *Pl enty v. Dillon* (1991) 171 CLR at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ]."

Romani v State of New South Wales [2023] NSWSC 49 -
Romani v State of New South Wales [2023] NSWSC 49 -
Romani v State of New South Wales [2023] NSWSC 49 -
Nicholson v Carborough Downs Coal Management Pty Ltd & Ors [2022] ICQ 34 (23 December 2022)
Plenty v Dillon (1991) 171 CLR 635 , cited

Nicholson v Carborough Downs Coal Management Pty Ltd & Ors [2022] ICQ 34 -
Fawaz v Commissioner of Police, New South Wales Police Force [2022] NSWCATAD 317 -
Owners Corporation No. 1 PS644619K v Sofy Pty Ltd [2022] VCC 1408 (31 August 2022) (His Honour Judge Woodward)

Cases Cited: *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201; *Aventus Cranbourne Thompsons Road Pty Ltd v Home Consortium Leasehold Pty Ltd* [2020] VSCA 199; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Avranik Pty Ltd v Lloyd* [2013] VSCA 244; *Tratt v Somersault Network Pty Ltd* [2015] VCAT 691; *Yango Pastoral Co Pty Ltd v First Chicago Australia Pty Ltd* (1978) 139 CLR 410; *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] 20 VR 311; *Plenty v Dillon* (1991) 171 CLR 635 ; *Shelfer v City of London Electric Lighting Co* (1895) 1 Ch 287; *Lewis v Australian Capital Territory* (2020) 271 CLR 192; *Sydney Local Health District v. Macquarie International Health Clinic Pty Ltd* [2020] NSWCA 274; *Body Corporate No 413424R v Sheppard* [2008] VSCA 118; *Owners Corporation PS507084R v Marley* [2020] VSC 95; *Traffic Technique* Pty *Ltd v Burgmann & Anor* [2020] VSCA 319; *Ao n Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175

Owners Corporation No. 1 PS644619K v Sofy Pty Ltd [2022] VCC 1408 (31 August 2022) (His Honour Judge Woodward)

73 Further, according to Mr Best, the injury to the OC can be estimated by money. He adds that a party subject to a trespass is entitled to damages, but if the plaintiff does not suffer damage or injury as a consequence of the trespass, then the damages awarded are trifling, citing *Plenty v Dillon* . [13] Mr Best submits that in this case the notional injury can be adequately compensated by a payment of $1.00.

Owners Corporation No. 1 PS644619K v Sofy Pty Ltd [2022] VCC 1408 -
NQCYC Marina Assc Inc v Dolkens [2022] QDC 178 (30 August 2022) (Coker DCJ)
Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287, considered.
Plenty v Dillon [1991] 171 CLR 635 , cited.

NQCYC Marina Assc Inc v Dolkens [2022] QDC 178 (30 August 2022) (Coker DCJ)

30. Insofar as trespass was concerned, I was referred specifically to the decision in *Plenty v Dillon* [1991] 171 CLR 635 , where the High Court quoted from *Entick v Carrington* [1765] 19 STTR 1029 at 1066. There the High Court said:

The starting point is the judgment of *Camden LCJ* in *Entick v Carrington*:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

NQCYC Marina Assc Inc v Dolkens [2022] QDC 178 -
Farm Transparency International Ltd v New South Wales [2022] HCA 23 -
Farm Transparency International Ltd v New South Wales [2022] HCA 23 -

Director of Public Prosecutions, Emily McGregor, Adrian Holt v JULIE McEwan [2022] QCA 142 -
Norkin v University of New England [2022] NSWSC 819 -
Norkin v University of New England [2022] NSWSC 819 -
Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union [2021] ICQ 15 -
Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union [2021] ICQ 15 -
MZZHL v Commonwealth of Australia [2021] FCA 600 (07 June 2021) (Flick J)

81. Similarly, in *Commonwealth of Australia v Fernando* [2012] FCAFC 18, (2012) 200 FCR 1 at 19 to 20, Gray, Rares and Tracey JJ observed:

> [87] By prescribing conditions governing the circumstances in which an officer can exercise the power to detain an unlawful non-citizen in s 189(1) the Parliament struck a balance between the effective administration of the Act and the need to protect individuals from arbitrary deprivation of their liberty: ...
>
> ...
>
> [89] ...No-one can be deprived of his or her liberty in this nation unless the deprivation is authorised by law: ... Here the power to cause the administrative detention of an individual under ss 189 and 196 of the Act is extraordinary. It is a power that invades an interest, liberty of the person, that the common law has valued highly and has gone to great lengths to protect through the writ of *habeas corpus*, and the torts of false arrest and false imprisonment.
>
> [90] The Court should be slow to condone significant failures by officials to comply with the requirements mandated by the Parliament in order for persons lawfully to exercise power under s 189(1) to deprive a person of his or her liberty.
>
> [91] In *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635 at 654 Gaudron and McHugh JJ said, in a passage cited with approval by Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* (1994) 179 CLR 427 at 436, that:
>
> > [I]nconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights.
>
> ...
>
> (some citations omitted)

Steepe v The Commonwealth of Australia [2021] NSWSC 368 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 -
Ben-Pelech v Royle [2020] WASCA 168 -
Ben-Pelech v Royle [2020] WASCA 168 -
The Owners - Strata Plan 85044 v Murrell; Murrell v The Owners - Strata Plan 85044 [2020] NSWSC 20 -
The Owners - Strata Plan 85044 v Murrell; Murrell v The Owners - Strata Plan 85044 [2020] NSWSC 20 -
The Owners - Strata Plan 85044 v Murrell; Murrell v The Owners - Strata Plan 85044 [2020] NSWSC 20 -
Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

161. Nothing in either set of reasons in *Plenty v Dillon* required that the substantial damages to which Mr Plenty was entitled should be an amount which was fixed for the violation of his rights without reference to any of the consequences of the trespass. To the contrary, the reference by Gaudron and McHugh JJ to the sense of injustice felt by plaintiffs such as Mr Plenty was to the consequences of the tort to Mr Plenty and within the community. Indeed, after the case was remitted to the Supreme Court of South Australia the damages were assessed at $122,000, which was comprised of $100,000 for a depressive illness suffered

by Mr Plenty as a consequence of the trespass, together with other consequential awards including aggravated damages, for the distress and humiliation Mr Plenty suffered, and exemplary damages, for the "contumelious disregard" of the right held by Mr Plenty and the "sense of injustice" to which Gaudron and McHugh JJ referred [261] .

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

160. The issue in this Court in *Plenty v Dillon* [258] concerned whether police officers were liable for the tort of trespass to land when, without authority to do so, they entered Mr Plenty's land to serve a summons upon his daughter despite Mr Plenty having expressly revoked any consent for police to enter his land. This Court held that the police officers had committed a trespass. Although the quantum of damages was not an issue before the Court, Mason CJ, Brennan and Toohey JJ said that "the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm" [259] . Similar remarks were made by Gaudron and McHugh JJ, who also referred to the "sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official". They said that Mr Plenty was entitled to "have his right of property vindicated by a substantial award of damages" [260] .

via

[259] (1991) 171 CLR 635 at 645.

Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Natural Resources Access Regulator v Harris; Natural Resources Access Regulator v Timmins [2020] NSWLEC 104 (31 July 2020) (Pain J)

100. In construing such provisions, the convenience in carrying out an object authorised by the legislation is not a ground for eroding fundamental common law rights: *Coco* at 436 (quoting with approval *Plenty v Dillon* (1991) 171 CLR 635; [1991] HCA 5 at 654).

Lewis v The Australian Capital Territory [2020] HCATrans 67 (02 June 2020) (Kiefel CJ; Gageler, Keane, Gordon and Edelman JJ)

Can I seek to develop how that is consistent with authority? Could your Honours go to this Court's decision in *Plenty v Dillon* 171 CLR 635 , please. Your Honours will find that in volume 3 of the joint book of authorities at tab 13, page 796. As your Honours will know, the case concerned trespass to land by a police constable seeking to serve a summons. Your Honours can see from the summary of

the facts down the bottom of CLR page 638 that before this Court the facts were of an alleged unlawful entry with no further damage to land, injury to person.

Lewis v The Australian Capital Territory [2020] HCATrans 67 (02 June 2020) (Kiefel CJ; Gageler, Keane, Gordon and Edelman JJ)

GAGELER J: In *Plenty v Dillon* and in *Inverugie* the plaintiff would have had exclusive possession but for the tortious invasion of the proprietary right. So, there is a "but for" analysis, at least implicit, in both of those cases.

Lewis v The Australian Capital Territory [2020] HCATrans 67 (02 June 2020) (Kiefel CJ; Gageler, Keane, Gordon and Edelman JJ)

MR HERZFELD: Undoubtedly that would feed into the substantial award of damages but, in our submission, their Honours' reasons are not limited to that. Their Honours reasons, when read fairly, in our submission, do accept substantial compensation to vindicate the right for infringement of the right. In our submission *Plenty v Dillon* is not alone in that respect. We have sought to identify in paragraph 35 of our written submissions various other cases which can be understood as providing compensation for infringement of a right and which, therefore, eschew any kind of counterfactual analysis of the kind adopted in the courts below. Can I elaborate on

Lewis v The Australian Capital Territory [2020] HCATrans 67 (02 June 2020) (Kiefel CJ; Gageler, Keane, Gordon and Edelman JJ)

MR HERZFELD: Well, with respect, we submit that cases like *Inverugie* and *Plenty v Dillon* show that there is accepted, within the notion of loss, the infringement of a right. So my answer to your Honour Justice Gageler, in what sense is it compensatory, is it is compensating for that infringement in the same way that we submit the Court in *Plenty v Dillon* accepted and, we submit, is the explanation of *Inverugie* and the goods cases as well.

Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Lewis v The Australian Capital Territory [2020] HCATrans 67 -
Burgess v Commonwealth of Australia [2020] FCA 670 (20 May 2020) (Besanko J)

197. Although it cannot affect the force of what the High Court said in *Plenty v Dillon* , it is perhaps worth noting that on the remitter as to damages, a master of the Supreme Court awarded Mr and Mrs Plenty damages of $167,000 comprised of the following: (1) Aggravated damages of $15,000; (2) Exemplary damages of $5,000; (3) Injury to pre-existing back condition of $2,000; (4) Depressive illness of $100,000; and (5) Interest of $45,000 (*Plenty v Dillon* [1997] SASC 6372).

Burgess v Commonwealth of Australia [2020] FCA 670 -
Burgess v Commonwealth of Australia [2020] FCA 670 -
Burgess v Commonwealth of Australia [2020] FCA 670 -
Burgess v Commonwealth of Australia [2020] FCA 670 -
Burgess v Commonwealth of Australia [2020] FCA 670 -
Rossiter v Adelaide City Council [2020] SASC 61 (23 April 2020) (Livesey J)

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29. As may be obvious to some, there has been a tendency in recent times to try and exploit the proposition that, where there has been a revocation by written notice of the implied licence to enter a property, if that property is then entered, there is a trespass which can be made the subject of an action for damages. [20] It is not necessary for the purposes of these reasons to determine whether that proposition is correct, or indeed what notice by words or conduct is effective to revoke the implied licence to enter property. [21]

via

[21] In *Plenty v Dillon* (1991) 171 CLR 635 the High Court stated that a majority of the Full Court of the Supreme Court of South Australia had found on the facts that "Mr. Plenty had expressly revoked any implied consent given to any police constable to enter upon his farm" (638). The decision of the High Court is therefore authority for the proposition that, assuming a common law trespass, the service by the police of a summons to appear was not justified at common law or by any of the legislation considered. The High Court did not address, because it was not relevant, what words or conduct comprised an effective revocation.

Rossiter v Adelaide City Council [2020] SASC 61 -
Rossiter v Adelaide City Council [2020] SASC 61 -
Rossiter v Adelaide City Council [2020] SASC 61 -
Cosenza v Roy Morgan Interviewing Services Pty Ltd [2020] SASC 65 -
Cosenza v Roy Morgan Interviewing Services Pty Ltd [2020] SASC 65 -
Cosenza v Roy Morgan Interviewing Services Pty Ltd [2020] SASC 65 -
Cosenza v Roy Morgan Interviewing Services Pty Ltd [2020] SASC 65 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

148. Where, however, a thing is seized purportedly, but not lawfully, under Pt IAA of the *Crimes Act* , ss 3ZQU and 3ZQX of the Act have no application. In such a case, just as the unlawful execution of a warrant, including an otherwise apparently valid execution of an invalid warrant, may amount to trespass to land [182] , trespass to chattels, conversion and detinue [183] , so, too, may the retention and use of what has been unlawfully seized amount to a tort [184] , and, if the thing seized contains confidential or proprietary information, its retention and use may amount to a breach of confidence [185] or infringement of copyright [186] . It would not be a defence to such a claim, whether at law or in equity or under statute, that the only use that was made of the thing was one that would have been lawful if the thing had been lawfully seized under Pt IAA.

via

[182] See *Halliday v Nevill* (1984) 155 CLR 1 at 10, 20 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 639640 per Mason CJ, Brennan and Toohey JJ, 647648 per Gaudron and McHugh JJ ; *Kuru v New South Wales* (2008) 236 CLR 1 at 1415 [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

246. The plaintiffs are correct that the Australian Federal Police committed the tort of trespass to goods. The tort of trespass to goods, like that of trespass to land, protects property from interference by any intended act: unless legally authorised, no person can set "foot upon my ground without my licence" [349] . Although the consent, licence or waiver of the owner is sometimes said to deny an element of the cause of action[350], the better view is that the consent, licence or waiver operates as a justification for conduct that would otherwise be

wrongful. Likewise, a statutory authorisation to interfere with the goods or land of another is also a justification.

via

[349] *Entick v Carrington* (1765) 19 St Tr 1029 at 1066, quoted in *Plenty v Dillon* (1991) 171 CLR 635 at 639.

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Commissioner of Police v Seiffert [2020] QDC 50 (14 April 2020) (Judge AJ Rafter SC)

67. The fact that the respondents may be inconvenienced by having to take steps to enforce their rights pursuant to s 142 WHS Act is not a reason for extending the scope of operation of the right of entry. In *Plenty v Dillon* [66] police officers had entered the appellant's farm for the purpose of serving a summons on his daughter pursuant to the *Juvenile Courts Act* 1971 (SA). The relevant provision of the *Justices Act* 1921 to 1975 (SA) provided that a summons could be served personally or by leaving it at the person's last or most usual place of abode. The police officers had no express or implied consent to go on to the appellant's property. The appellant sued for trespass to land. Gaudron and McHugh JJ said:

> "A person who enters or remains on property after the withdrawal of the licence is a trespasser. In *Davis v Lisle*, police officers who had lawfully entered a garage for the purpose of making inquiries were held to have become trespassers by remaining in the garage after they were told by the proprietor to 'get outside'." [67]
>
> ....
>
> "A number of statutes also confer power to enter land or premises without the consent of the occupier. But the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise be tortious conduct. [68]
>
> ...
>
> "Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights. [69]

via

[67] [1991] HCA 5 at [4] ; (1991) 171 CLR 635 at 647.

Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
Haggar v Qld Metal Recyclers Pty Ltd [2019] QDC 263 -
Haggar v Qld Metal Recyclers Pty Ltd [2019] QDC 263 -
Haggar v Qld Metal Recyclers Pty Ltd [2019] QDC 263 -
Haggar v Qld Metal Recyclers Pty Ltd [2019] QDC 263 -
Haggar v Qld Metal Recyclers Pty Ltd [2019] QDC 263 -
Annan v Harris [2019] WADC 157 -
Annan v Harris [2019] WADC 157 -
Bobolas v Waverley Council (No 4) [2019] NSWLEC 163 -
Carina James v North Star Pastoral Pty Ltd [2019] NTSC 72 (18 September 2019) (Barr J)

> [14] In *Plenty v Dillon* [8] , Gaudron and McHugh JJ characterised an award of general damages, for a serious trespass to land, as also fulfilling vindicatory purposes:
>
> > True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. The appellant is entitled to have his right of property vindicated by a substantial award of damages ... If the occupier of property has a right not to be unlawfully invaded, then ... the 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric'.

via

[8] *Plenty v Dillon* (1991) 171 CLR 635 at 654-655 .

Carina James v North Star Pastoral Pty Ltd [2019] NTSC 72 -
Carina James v North Star Pastoral Pty Ltd [2019] NTSC 72 -
Slatcher v Globex Shipping S.A [2019] QCA 167 -
Slatcher v Globex Shipping S.A [2019] QCA 167 -
Slatcher v Globex Shipping S.A [2019] QCA 167 -
Slatcher v Globex Shipping S.A [2019] QCA 167 -
Slatcher v Globex Shipping S.A [2019] QCA 167 -
R v Armistead [2019] SASCFC 85 -
Davies v Smith [2019] NSWSC 700 -
Cosenza v Roy Morgan Interviewing Services Pty Ltd [2019] SASC 95 -
R v Tipping [2019] SASCFC 41 -
Penno v Body Corporate for the Oasis Dunmore CTS 29301 [2019] QCATA 65 (18 April 2019) (Aughterson SM; Kanowski M)

12. Reasonableness should not be assessed in a vacuum, but in the context of the nature and impact of the conduct involved. In the present case, the conduct involved entering a person's home without their consent. Whether or not that entry is reasonable needs to be assessed in the context of the law's strong protection of the inviolability of a person's home. [5] In *Plenty v Dillon* ,[6] Gaudron and McHugh JJ note that the 'policy of the law is to protect the

possession of property and the privacy and security of its occupier', [7] while Mason CJ and Brennan and Toohey JJ refer to a long line of authority in support of that proposition, including note of 'the great regard the law has to every man's safety and quiet' and that 'every man's house is called his castle'. [8]

via

[8] Ibid , p 640.

Penno v Body Corporate for the Oasis Dunmore CTS 29301 [2019] QCATA 65 -
Penno v Body Corporate for the Oasis Dunmore CTS 29301 [2019] QCATA 65 -
Penno v Body Corporate for the Oasis Dunmore CTS 29301 [2019] QCATA 65 -
Penno v Body Corporate for the Oasis Dunmore CTS 29301 [2019] QCATA 65 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
Romark Design Constructions Pty Ltd v Queensland Building and Construction Commission [2018] QCAT 455 -
Romark Design Constructions Pty Ltd v Queensland Building and Construction Commission [2018] QCAT 455 -
Woodley v Woodley [2018] WASC 333 (02 November 2018) (Tottle J)

71. Amongst other circumstances, a trespass to land occurs when a person intentionally or negligently enters into or remains on land which is in the possession of another. [46] Unless a person who enters the property of another can justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises, that person commits an act of trespass. [47] Every unauthorised entry upon private property is a trespass. [48]

via

[47] ***Plenty v Dillon*** [1991] HCA 5; (1991) 171 CLR 635, 647 (Gaudron and McHugh JJ) ; ***Barker v The Queen*** [1983] HCA 18; (1983) 153 CLR 338, 356 (Brennan and Deane JJ).

Woodley v Woodley [2018] WASC 333 -
Waverley Council v Bobolas [2018] NSWLEC 116 (27 August 2018) (Pain J)

76. The Respondents submitted that the service by Mr Bricknell of the summons commencing these proceedings was unlawful as he was not entitled to enter the Property and serve documents at all and/or not after he was told to leave by Ms Elena Bobolas. The Respondents relied on *Plenty v Dillon* (1991) 171 CLR 635; [1991] HCA 5 (*Plenty*). In that case two police officers entered land to serve a summons and were sued for trespass, having no express or implied consent to go onto the relevant land. Mason CJ, Brennan and Toohey JJ held at 645 th at the police officers had trespassed and that the plaintiff was entitled to damages. The High Court was silent on whether service was effected in that instance. It cannot be concluded from *Plenty* that service will be ineffective if a trespass is committed in effecting service. I should state that I make no finding that Mr Bricknell did trespass.

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Waverley Council v Bobolas [2018] NSWLEC 116 -
Waverley Council v Bobolas [2018] NSWLEC 116 -
R v King [2019] SADC 107 -
Armidale Local Aboriginal Lands Council v Moran [2018] NSWSC 1133 -
R v C, CJ [2018] SADC 76 (17 July 2018) (Reasons For Ruling Of Beazley J)

> *Coco v The Queen* (1994) 179 CLR 427; *Halliday v Nevill* (1984) 155 CLR 1; *Kuru v New South Wales* (2008) 236 CLR 1; *Bennett v Police* [2016] SASC 139; *R v Golja* [2017] SASCFC 61; *Pollard v The Queen* (1992) 176 CLR 177; *R v Rockford* [2015] SASCFC 51; *R v Nguyen* [2013] 117 SASR 432; *Bunning v Cross* (1978) 141 CLR 54; *R v White* [2014] SADC 33; *R v Turner & Williams* (1987) unrep. Cox J; *R v Armistead* [2017] SADC 63; *R v Webb & Hay* (1992) 59 SASR 563; *New South Wales v Riley* [2003] NSWCA 208; *Coleman v Zanker* (1992) 58 SASR 7; *Police v Williams* [2014] SASC 117; *R v Willingham (No.2)* [2012] SASCFC 104 ; *George v Rockett* (1990) 170 CLR 104; *Wilson & Morrison v R* [1994] SASC 5 4554; *R v Rogers* [2011] 109 SASR 307; *R v Frantzis* (1996) 66 SASR 558; *Ridgeway v The Queen* [1995] HCA 66; *Christie v Leachinski* [1947] AC 573; *Plenty v Dillon* [1991] HCA 5 ; *Police v Dafov* [2008] 102 SASR 8; *Police v Moukachar* [2010] 107 SASR 540 at [13]-[15] ; *R v Fazio* (1997) 69 SASR 54; *Bain v The Police* [2011] 112 SASR 10 at [26]-[31] ; *Ercegovic v Higgins* (1987) 45 SASR 189; *R v Nguyen* [2016] SASCFC 96; *Police v Edwards* [2017] SASC 289; *R v Dolan* (1992) 58 SASR 501; *R v Rondo* [2011] NSWCAA 540; *R v Hunt* [2014] NTSC 19; *R v Chapman* [2001] 79 SASR 342 ; *R v White* [2016] SASC 33; *R v Eggen & Eggen-Zeytoun* [2016] SASC 26; *Michaelis v Police* (1999) SASC 102, considered.

ARJ17 v Minister for Immigration and Border Protection [2018] FCAFC 98 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 (14 June 2018) (Davis J)

84. *Plenty v Dillon* [88] was cited in the second respondent's outline of argument before me in the following passage:

> "67. Section 53(1) of the JA provides that when a complaint is made a justice may issue a summons. In this way, the JA contemplates that a proceeding can properly continue without the issue of a summons and - by necessary implication - the service of a summons.
>
> 68. This highlights the point that service of process in a criminal case is not an end in itself. The purpose is procedural fairness by ensuring that a person is aware of charges laid against him or her and how and when it is intended that they proceed.
>
> 69. Support for that proposition can be found in *Plenty v Dillon* ((1991) 171 CLR 635 , as extracted in Outline of Submissions (applicant) dated 8 November 2017, [39],) where Mason CJ, Brennan and Toohey JJ said 'the essential nature of a summons as the means of according natural justice has been established by long practice.' ((1991) 171 CLR 635, 641)." [89]

Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Globex Shipping S.A. v Magistrate Mack [2018] QSC 138 -
Minerva (Aust) Pty Ltd v Suburban Land Agency [2018] ACTSC 103 (20 April 2018) (McWilliam AsJ)

29. While that may be a legal argument for the context of a substantive trial, it does not defeat at this preliminary stage the possible existence of a claim in trespass. There may well be a live issue, for example, that the second defendant entered the affected land for a purpose that

was outside the scope of any implied licence, as can be seen from cases such as *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584; *Plenty v Dillon* (1991) 171 CLR 635 ; *Halliday v Nevill;* and *Barker v The Queen* (1983) 153 CLR 338, especially at 364-365 .

Minerva (Aust) Pty Ltd v Suburban Land Agency [2018] ACTSC 103 -
Roxburgh v Pyrenees Shire Council (Review [2018] VCAT 512 -
Blythe v Willis [2018] NSWSC 131 -
Rasco Pty Ltd v Lucas [2017] VSC 703 -
Rasco Pty Ltd v Lucas [2017] VSC 703 -
Rasco Pty Ltd v Lucas [2017] VSC 703 -
Rasco Pty Ltd v Lucas [2017] VSC 703 -
Jenkings v Northern Territory of Australia [2017] FCA 1263 (27 October 2017) (White J)

84. In support of this submission, counsel relied on passages in the judgment of Mortimer J in *W otton v State of Queensland (No 5)* [2016] FCA 1457 in which her Honour adverted to the possibility that damages may be awarded for infringements of s 9 of the RD Act even though those infringements did not result in loss. The relevant passages are as follows:

> [1625] The applicants did not seek orders other than the kind usually sought under s 46PO : that is, compensation for actual loss and damage proven to have been suffered by an individual. In that sense, the applicants' case treated proof of non-economic or economic loss or damage as an integral element in securing an order for compensation under s 46PO(4) .
>
> [1626] In my opinion, it was possible for orders to be sought under s 46 PO on a different basis. In his recent text on *Damages and Human Rights* (Hart Publishing, 2016), Jason Varuhas draws a distinction (see p 25) between what he calls the "vindicatory torts" (trespass to land or goods, battery, assault, false imprisonment, defamation) and the "compensatory torts" (negligence being the principal example he gives). In the former category, Varuhas contends, correctly in my respectful opinion, that what is being vindicated by an award of damages is the infringement of a right itself, rather than compensation for actual loss or damage. He refers (at p 54) to false imprisonment cases where compensation is expressed as given for loss of liberty itself: see, eg, *R v Governor of Brockhill Prison; Ex parte Evans (No. 2)* [1999] QB 1043 at 1060 (L ord Woolf MR). So too (although less frequently, he concedes) for assault, where the infringement of personal bodily integrity can lead to compensation: see, eg, *Forde v Skinner* (1830) 4 Car & P 239; 172 ER 687 (in which parish officers cut off a woman's hair by force and without her consent); *Loudon v Ryder* [1953] 2 QB 202 (in which the defendant broke into the plaintiff's flat and assaulted her); and *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (in which the claimant was given invasive artificial ventilation without her consent, leading to declarations and a nominal award of damages). Trespass to land is, Varuhas contends, in the same category: damages are given for the interference with exclusive possession, whether or not damage is caused to the land: *Plenty v Dillon* [1 991] HCA 5; 171 CLR 635 at 647. In *Plenty* at 654-55, Gaudron and McHugh JJ said:
>
> > True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. ... The appellant is entitled to have his *right of property* vindicated by a substantial award of damages.

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(Emphasis added.)

[1627] Eschewing any bright lines between human rights law as "public law" and torts as "private law", Varuhas criticises developments in United Kingdom law which diminish the role and importance of damages in human rights cases. He criticises cases such as *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; [2004] QB 1124 and *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 47; [2013] 2 AC 254 which characterise damages as a remedy of last resort in human rights cases because "public law" remedies – bringing the breach of rights to an end for example – are the remedies which it is said should be given prominence. Varuhas instead contends that a "vindicatory" approach should be taken, by analogy with those torts which recognise the need to vindicate the importance of basic and fundamental rights by an award of damages for the infringement of the right itself.

[1628] It should be said at once that Varuhas' text is concerned principally with human rights law in jurisdictions with bills of rights, whether statutory or constitutionally entrenched. It should also be said that, as the authorities to which I refer at [1613] demonstrate (*Richardson* in particular), it is not the case that damages for breaches of statutory equality rights (as a subset of human rights) are approached by Australian courts from any secondary perspective, as if monetary compensation is less important than other remedies. Quite the opposite. In that sense, Varuhas' concerns may not be apparent in Australian cases. Further, Varuhas criticises courts in the United Kingdom for tying the "quantum of awards for non-pecuniary loss to Strasbourg levels of awards, which are far lower than domestic scales for equivalent losses" (at p 95). The case law of the European Court of Human Rights, to which Varuhas refers, is far less of an influence on Australia law.

[1629] However, his emphasis on the origins of many torts in the vindication of a fundamental right is not without significance for the grant of relief under statutory provisions such as s 46PO , especially read with prohibitions such as those in s 9 . If s 9 is, as the authorities emphatically state, concerned with the protection of equality before the law, and concerned to prohibit the nullification or impairment of the enjoyment of human rights on an equal footing, then why would it not be the case that compensation could be ordered to vindicate such a right, without proof of actual damage? I do no more than ask the question, because in this case, the applicants have not sought to develop such an argument. Had they done so, interesting questions might have arisen about what compensation could be ordered for the first five contraventions of s 9 that I have found proven – including whether such orders could be made in a class action of this kind, equally in favour of each class member, where the right infringed was a community's right to have policing services following a death in custody provided to that community in an independent and impartial way.

Jenkings v Northern Territory of Australia [2017] FCA 1263 -
Brown v Tasmania [2017] HCA 43 -
Cosenza v Origin Energy Ltd [2017] SASC 145 (12 October 2017) (Blue J)

47 In *Plenty v Dillon* , [20] the High Court held that a police officer did not have an implied licence to enter residential land to serve a summons on the occupier. Gaudron and McHugh JJ said:

Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Woolnough v Isaac Regional Council [2017] QCA 219 -

R v Rebecca Cook [2017] NSWLC 24 -
R v Rebecca Cook [2017] NSWLC 24 -
Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia [2017] FCA 803 -
Australian Building and Construction Commissioner v McDermott (No 2) [2017] FCA 797 -
Australian Building and Construction Commissioner v McDermott (No 2) [2017] FCA 797 -
Arman v Nationwide News Pty Limited [2017] NSWDC 151 -
LDF Enterprise Pty Ltd v State of New South Wales [2017] NSWCA 89 -
LDF Enterprise Pty Ltd v State of New South Wales [2017] NSWCA 89 -
LDF Enterprise Pty Ltd v State of New South Wales [2017] NSWCA 89 -
Emprja Pty Ltd v Red Engine Group Pty Ltd [2017] QSC 33 -
Emprja Pty Ltd v Red Engine Group Pty Ltd [2017] QSC 33 -
Emprja Pty Ltd v Red Engine Group Pty Ltd [2017] QSC 33 -
Emprja Pty Ltd v Red Engine Group Pty Ltd [2017] QSC 33 -
Strano v Yates [2016] ACTSC 363 (14 December 2016) (Burns J)

16. It is convenient to consider these grounds together. The Magistrate, the appellant submitted, made an error of law in finding that the shutting of the wooden door constituted obstruction of Senior Constable Yates after correctly determining that the appellant had no obligation to open the closed screen door when called upon to do so by police. The appellant submitted that he was entitled to bar the door to the police, citing *Semayne's Case* (1604) 5 Co Rep 91 a; 77 ER 194 (*Semayne's Case*), *Halliday v Nevill* [1984] HCA 80; 155 CLR 1 (*Halliday v Nevill*) and *Plenty v Dillon* [1991] HCA 5; 171 CLR 635 (*Plenty v Dillon)*.

Strano v Yates [2016] ACTSC 363 -
Mohamed Siddique v Michael Martin and Magistrates' Court of Victoria [No 2] [2016] VSCA 310 -
Wotton v State of Queensland (No 5) [2016] FCA 1457 -
Wotton v State of Queensland (No 5) [2016] FCA 1457 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Kaney v Rushton [2017] ACTSC 11 -
Kaney v Rushton [2017] ACTSC 11 -
Siddique v Martin [2016] VSCA 274 (18 November 2016) (Tate, Ferguson JJA and Cavanough AJA)

20. The context of the word 'under' here is a statutory provision (s 78(6)) which sets up a convenient, summary method for citizens to obtain the return of their own property after it has been taken from them against their will or without their consent by agents of the State invading their private homes or private business premises. It is important to keep this purpose of the provision, namely, to facilitate the *recovery* of a person's property, at the forefront of one's mind in the task of construction. The provision serves to lessen the effect of interference by the State. In *Southam v Smout* , [26] Lord Denning MR said, adopting a quotation from the Earl of Chatham:

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement'. So be it—unless he has justification by law.

In *Tran Nominees Pty Ltd v Scheffler* ,[27] Jacobs J said:

> There is, I think, no doubt about the guiding principles. The issue and execution of a warrant to enter, or to search and seize, or both, represents an invasion of the liberty of the subject, which was jealously protected by the common law, and the need for protection against abuse or unauthorised invasion is still a guiding principle when the authority to enter or search or seize is derived from statute: the court will construe

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> such statutes strictly, resolving any ambiguity in favour of the subject, and insist upon strict compliance with the statute and the conditions upon which the warrant is authorised (*Inland Revenue Commissioners v Rossminster Ltd* ;[28] *Crowley v Murphy* [29]).

In *New South Wales v Corbett* ,[30] Callinan and Crennan JJ referred to the:

> established principle that strict compliance with statutory conditions governing the issue of search warrants is required as explained in the judgment of this Court in *George v Rocket* ,[31] which concerned s 679 of the *Criminal Code* (Qld) :[32]
>
> > [I]n construing and applying such statutes, it needs to be kept in mind that they authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

Given these observations and given what was said in the passage from *R v McNamara* [33] set out above, there is no reason to read s 78(6) strictly or narrowly. Quite the opposite. While a strict construction may be mandated with respect to the authorisation of State interference with private property, a broad construction is to be preferred with respect to a statutory provision that alleviates that interference. Nor does there seem to be any reason why Parliament would have intended to distinguish between seized items that had been named and described in the relevant warrant and other items seized in the course of executing the self-same warrant. We note again that, initially at least, the police officers responsible for the search and seizure saw no reason to draw any such distinction.

via

[26] [1964] 1 QB 308, 320, cited with approval in *Plenty v Dillon* (1991) 171 CLR 635, 639. It is true that *Southam v Smout* was itself a case relating to the service of civil process, not criminal process, and that *Plenty v Dillon* was a case relating to the service of a mere summons (ie, non-compulsory process), albeit in a criminal proceeding. However, in cases relating to criminal search warrants and the like, also, the courts have 'stated in unequivocal terms the sanctity and inviolability of the home and person from executive interference without proper authority conferred by law': *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157, 162 (Hill J). See also *Coco v The Queen* (1994) 179 CLR 427, 435–7 ; *George v Rockett* (1990) 170 CLR 104, 1101 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *New South Wales v Corbett* (2007) 230 CLR 606, 627–8 [87] (Callinan and Crennan JJ).

Siddique v Martin [2016] VSCA 274 -
Siddique v Martin [2016] VSCA 274 -
R v Hronopoulos [2016] SADC 134 -
R v Hronopoulos [2016] SADC 134 -
Harrison v Fournier [2016] QMC 19 -
Harrison v Fournier [2016] QMC 19 -
Harrison v Fournier [2016] QMC 19 -
Willogistics Pty Ltd v Cut Fresh Salads Pty Ltd (Review and Regulation) [2016] VCAT 1668 -

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Cleret v Sunshine Coast Regional Council [2016] QSC 208 -
Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 (01 September 2016) (Hall J)
Plenty v Dillon (1991) 171 CLR 635 ; HCA 5

Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 (01 September 2016) (Hall J)

84. Reference was made to relevant authorities (and extracts provided) in relation to the common law right of entry and the policy of the law which was to protect the possession of property and the privacy and security of its occupier: *Plenty v Dillon* , supra, at 649 and reference therein to *Semayne's case* (1604) 5 Co. Rep. 91a at p 91B; 77 ER 194 at 195.

Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 -
Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 -
Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 -
Bennett v Police [2016] SASC 139 (25 August 2016) (Doyle J)

79. Gray J also referred to the reasons of the High Court in *Plenty v Dillon* . [55] In that case the Court was concerned with the right to access premises for the purposes of serving a summons. Mason CJ, together with Brennan and Toohey JJ, referred to *Dinan v Brereton* with apparent approval, going on to observe: [56]

> Some statutes which confer a power to arrest have not been construed as carrying a right to enter on private property (see per Lord Keith of Kinkel in *Clowser v Chaplin*) although, in other cases, a statutory power of arrest has been held to carry a qualified right to enter: see *Eccles v Bourque* ; *Hal liday v Nevill* . But a statute which confers a power to arrest is of a different order from a statute which prescribes the manner of service of a summons and which confers no power on a person to do a thing that that person is not free to do at common law.

via

[55] *Plenty v Dillon* (1991) 171 CLR 635 .

Bennett v Police [2016] SASC 139 (25 August 2016) (Doyle J)

35. In addition to authority at common law, a person might be authorised by statute to enter and remain on private property for a particular purpose. However, there is a rebuttable presumption that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise have been tortious conduct. [6]

via

[6] *Coco v The Queen* (1994) 179 CLR 427 at 436 ; *Plenty v Dillon* (1991) 171 CLR 635 at 648.

Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
West Coolgardie Holdings Pty Ltd v Mercanti [No 2] [2016] WADC 123 -
West Coolgardie Holdings Pty Ltd v Mercanti [No 2] [2016] WADC 123 -
Andressen v Bendigo and Adelaide Bank Ltd [2016] SASC 111 (28 July 2016) (Parker J)

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89. The Second Reading speech by the Attorney-General,[51] the Hon CJ Sumner MLC, indicated that the immediate reason for the introduction of s 50A was the problem with effecting personal service identified by the High Court in *Plenty v Dillon* in circumstances where a householder does not permit entry on to land. [52] The Attorney-General stated that s 50A would also enable the courts to make appropriate provision for some other form of service in cases where personal service was impracticable.

via

[52] (1991) 171 CLR 635 .

Director, Fair Work Building Industry Inspectorate v Bolton (No 2) [2016] FCA 817 -
Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd [2016] FWC 3829 -
Wilkinson v Neumann (Civil Claims) [2016] VCAT 813 -
Wilkinson v Neumann (Civil Claims) [2016] VCAT 813 -
Wilkinson v Neumann (Civil Claims) [2016] VCAT 813 -
West Coolgardie Holdings Pty Ltd v Mercanti [2016] WADC 46 -
West Coolgardie Holdings Pty Ltd v Mercanti [2016] WADC 46 -
West Coolgardie Holdings Pty Ltd v Mercanti [2016] WADC 46 -
The Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FWC 6889 -
Sahade v Bischoff [2015] NSWCA 418 -
Sahade v Bischoff [2015] NSWCA 418 -
Sahade v Bischoff [2015] NSWCA 418 -
Lord v McMahon [2015] NSWSC 1619 -
Nyoni v Shire of Kellerberrin (No 6) [2015] FCA 1294 (23 November 2015) (Siopis J)
Plenty v Dillon (1991) 171 CLR 635
New South Wales v Ibbett

Nyoni v Shire of Kellerberrin (No 6) [2015] FCA 1294 -
Balven v Thurston [2015] NSWSC 1103 -
Gazebo Penthouse PL v Owners SP 73943 [2015] NSWCATCD 93 -
BPL Adelaide Pty Ltd v National Union of Workers [2015] FWC 3905 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

63. Mrs Slaveska submitted that underlying the tort of false imprisonment is protection against unjustified deprivation of liberty and loss of dignity; [46] that the underlying interest protected by the tort of trespass to land is the right of exclusive possession; [47] that the underlying interest protected by the tort of trespass to goods is the right to undisturbed actual possession of goods; [48] and that the underlying interest protected by the tort of assault is the right to be free from the apprehension of imminent harmful or offensive contact. [49]

via

[47] Relying on *Plenty v Dillon* (1991) 171 CLR 635, 645 (Mason CJ, Brennan and Toohey JJ) as approved in *New South Wales v Ibbett* (2006) 229 CLR 638, 646 [29]–[30] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

Rook v State of New South Wales (No 3) [2015] NSWDC 154 -
Shannon v State of New South Wales [2015] NSWDC 69 -
Shannon v State of New South Wales [2015] NSWDC 69 -
Shannon v State of New South Wales [2015] NSWDC 69 -
Henderson v McSharer [2015] FCA 396 -

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NBN Co Limited v Pipe Networks Pty Ltd [2015] NSWSC 475 -
NBN Co Limited v Pipe Networks Pty Ltd [2015] NSWSC 475 -
R v N [2015] QSC 91 -
Aero-Care Flight Support Pty Limited [2015] FWC 1783 -
R v Pelly [2015] SASCFC 25 -
R v Pelly [2015] SASCFC 25 -
Drage v State of Western Australia [2015] WADC 20 -
Drage v State of Western Australia [2015] WADC 20 -
Drage v State of Western Australia [2015] WADC 20 -
White v Johnston [2015] NSWCA 18 -
Kazas-Rogaris v Gaddam [2014] NSWSC 1465 -
Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)

291. This power is consistent with the "following" power of arrest, it being recognised over the years that offenders may be "followed" to premises by various means without maintaining visual contact[95] and that offenders may be positively ascertained to be within particular premises by a variety of sources of reliable information without any "following" at all in the traditional sense. In short, the modern test to be applied is one of "positive belief" that the offender is inside the premises, rather than absolute knowledge.[96] The formulation of the common law test by the Supreme Court of Canada in *Eccles v Bourque* [97] has come to be widely accepted and adopted. [98] As there expressed by Dickson J: [99]

> I would wish to make it clear, however, that there is no question of an unrestricted right to enter in search of a fugitive. Entry can be made against the will of the householder only if (a) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry.
>
> ...
>
> If the police officer has reasonable and probable cause to believe that the person named in the warrant for arrest is in the home of a stranger he has the right, after proper demand, to enter the home forcibly, to search and to arrest.

via

[98] *Lippl v Haines* (1989) 18 NSWLR 620; *Halliday v Nevill* (1984) 155 CLR 1; *Plenty v Dillon* (1991) 171 CLR 635 ; *Kuru v State Of New South Wales* (2008) 236 CLR 1, 15.

Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)

248. First, as I expand upon below, Stevenson's entering into, and remaining in, the rear yard at 10 Clarence Street was unlawful and therefore his actions while on the property were not in the lawful execution of duty. As Brennan J said in *Halliday v Nevill* [67] (a passage later approved by the High Court in *Plenty v Dillon* [68]):

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.

Stevenson did not perform a lawful "act of arrest" and also failed to conform with the precepts of Christie v Leachinsky

via

[68] *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ) .

Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Sherman v Condon [2014] QDC 189 -
Sherman v Condon [2014] QDC 189 -
Marksman Training Systems Pty Ltd v The Registrar of Firearms [2014] SADC 150 -
Marksman Training Systems Pty Ltd v The Registrar of Firearms [2014] SADC 150 -
Marksman Training Systems Pty Ltd v The Registrar of Firearms [2014] SADC 150 -
Armidale Dumaresq Council v Vorhauer (No 3) [2014] NSWLEC 50 (30 April 2014) (Pepper J)

26. By way of reply generally, and to the specific question of whether the Court had the power to make the orders sought by the council, Mrs Vorhauer raised the following arguments in her initial, further and supplementary written submissions (in response to the council's further and supplementary written submissions) and during oral argument:

(a) first, that the matter raised several constitutional issues that the Court did not have jurisdiction to determine;

(b) second, that the council had no status or authority because it was not recognised under the Constitution . In particular, Mrs Vorhauer relied upon the asserted fact that the attempted constitutional recognition of local councils had failed in the 1988 referendum;

(c) third, that the State Parliament was without constitutional authority because it did not have a representative of the Queen;

(d) fourth, reference was made to *University of Wollongong v Metwally* [1984] HCA 74; (1984) 158 CLR 447 and to the Constitution being "self-executing". That is to say, it does not require a judicial order to be given effect to;

(e) sixth, that the orders sought by the council amounted either to an acquisition of property under s 51(xxxi) of the Constitution and/or an act of theft by the council;

(f) seventh, that entry onto the property by the council would constitute a trespass and would be contrary to cl 5 and s 76(i) of the Constitution . In support of this submission, Mrs Vorhauer relied upon the decisions in *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635 and *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427;

(g) eighth, that the orders sought by the council were contrary to, amongst other provisions, ss 71, 76, 108 and 114 of the Constitution;

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(h) ninth, that because the council was a business, as evidenced by the ABN it provided on the proposed short minutes of order, the summons commencing the proceedings and the notice of appearance, the *Local Government Act 1993* could not apply to it, because a business was not democratically elected and, therefore, could not constitute a council. Furthermore, a business had no rights on private property, and therefore, the council could not enter onto the property to remove the items;

(i) tenth, that the summons and the notice of appearance only stated the council's ABN on the last page of the initiating process and not on the first page. This meant that the applicant that was stated on the first page was not the same entity as that stated on the last page insofar as one was a council and one was a business. Therefore, both the summons and the notice of appearance were "false instruments" which was a breach of the criminal law;

(j) eleventh, that the council was not a 'person' and therefore any proceedings instituted by it, including the notice of motion, were invalid and "false instruments" because only a person could commence an action against her;

(k) twelfth, that the short minutes of order and the notice of motion were signed by a solicitor on behalf of the council and not a person from the council, and were thus invalid;

(l) thirteenth, that there was no environmental harm being caused by the occupation of the shipping container and the sheds and that the proceedings were malicious;

(m) fourteenth, that I was biased; and

(n) fifteenth, that the shipping container and the sheds were the property of her daughter, Ms Lisa Vorhauer, who was not a party to the proceedings.

Willoughby City Council v Roads and Maritime Services [2014] NSWLEC 6 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 (20 January 2014) (McLure P, Pullin JA, Murphy JA)

126. Intentional invasions of land, whether resulting in harm or not, without the consent, leave or licence of the person in possession or entitled to possession, are actionable in trespass: ***Plenty v Dillon*** [1991] HCA 5; (1991) 171 CLR 635, 639. The policy of the law is to protect the possession of property: ***Plenty v Dillon*** (647).

Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Paul James McCarthy v State of New South Wales [2013] NSWDC 247 -
Paul James McCarthy v State of New South Wales [2013] NSWDC 247 -

Palmer v City of Gosnells [2013] WASC 446 (16 December 2013) (Edelman J)

86. The submissions by counsel for the Palmers in support of this ground of appeal also allege that the learned Magistrate 'ignored' and 'rejected without consideration' relevant authorities that the Palmers had tried to bring to his attention which related to the property rights of the Palmers. This submission appears to relate to the two cases mentioned by Mrs Palmer in closing submissions:[91] ***Plenty v Dillon*** [92] and ***Commonwealth v New South Wales*** . [93] Neit her of these two cases is concerned with the scope or lawful authority of a town planning compliance officer to exercise a right, delegated under state legislation, to enter private property.

via

[92] ***Plenty v Dillon*** [1991] HCA 5; (1991) 171 CLR 635 .

Palmer v City of Gosnells [2013] WASC 446 -
Palmer v City of Gosnells [2013] WASC 446 -
Palmer v City of Gosnells [2013] WASC 446 -
Palmer v City of Gosnells [2013] WASC 446 -
SSYBA Pty Ltd v Lane [2013] WASC 445 -
SSYBA Pty Ltd v Lane [2013] WASC 445 -
Greene v McInnes [2013] QDC 207 -
Greene v McInnes [2013] QDC 207 -
Moore v Devanjul Pty Ltd (No 5) [2013] QSC 323 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 (30 October 2013) (J Forrest J)

130. In *Plenty* , Gaudron and McHugh JJ said:

> The policy of the law is to protect the possession of property and the privacy and security of its occupier. A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises. [175]

Their Honours went on to say the following of an implied licence to enter property:

> Consent to an entry is implied if the person enters for a lawful purpose. In *Robson v Hallett*, Lord CJ said:
>
> > "the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps and knock on the door of the house"
>
> ... the licence may be withdrawn by giving notice of its withdrawal. A person who enters or remains on property after the withdrawal of the licence is the trespasser. [176]

via

[175] (1991) 171 CLR 635 , 647 (citations omitted).

Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
Matthews v SPI Electricity Pty Ltd (Ruling No 31) [2013] VSC 575 -
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69 The law in relation to trespass to land was comprehensively summarised by Pritchard J in ***Hardie Finance Corporation Pty Ltd v***
(Page 26)

Ahern [No 3] [2010] WASC 403 , which I respectfully adopt [222] - [234]:

222 A trespass to land occurs (amongst other things) when a person intentionally or negligently enters into, or remains on, land which is in the possession of another. The emphasis of the tort is on physical interference with possession: see generally Balkin & Davis, *Law of Torts* (4 th ed) [5.1]. Accordingly, it is the person with the exclusive possession of the land, rather than the owner of the land, who may sue in trespass: see ***Barker v The Queen*** (1983) 153 CLR 338, 341 - 342 (Mason J). It is well established that the tort protects the interest of the plaintiff in maintaining the right to exclusive possession of the property, rather than to protect title in the sense of ownership (although the party in possession may often also be the owner): ***The State of New South Wales v Ibbett*** (2006) 229 CLR 638 [29] (the Court).

223 Entry onto another person's land without the permission of the occupier, or otherwise with lawful authority, will constitute a trespass: ***Kuru v The State of New South Wales*** (2008) 236 CLR 1 [43] (Gleeson CJ, Gummow, Kirby & Hayne JJ); ***Plenty v Dillon*** (1991) 171 CLR 635, 639 (Mason CJ, Brennan & Toohey JJ), 647 (Gaudron & McHugh JJ); ***Coco v The Queen*** (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron & McHugh JJ). Whether an occupier has granted a licence to another person to enter on the land is a question of fact: ***Halliday v Nevill*** (1984) 155 CLR 1, 6 - 7 (Gibbs CJ, Mason, Wilson & Deane JJ).

224 Justification or authority to enter land may take a variety of forms including a paramount right to possession, some other statutory or common law right of entry, the authority or permission of the person in possession and, in the absence of negligence, involuntary and inevitable accident: ***Barker v The Queen*** (356 - 357) (Brennan & Deane JJ).

225 The permission of the occupier may be given expressly, or implied from the circumstances. A licence to enter will be implied in certain circumstances, unless something in the facts is capable of founding the conclusion that any such implied licence was negated or revoked: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ). Consent to an entry will be implied if the person entering on the land does so for a lawful purpose: ***Plenty v Dillon*** (647) (Gaudron & McHugh JJ); ***Robson v Hallett*** [1967] 2 QB 939, 951 (Lord Parker CJ). The implication of a licence will be precluded by an express or implied refusal of it, and an implied licence may be revoked at any time by an express or implied withdrawal of it: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ).

(Page 27)

226 The occupier's authority to enter may be subject to express or implied limitations regarding the time, place, manner or purpose of entry, and if it is so limited, it will operate only to authorise an entry which comes within

the scope of its limited terms: ***Barker v The Queen*** (357) (Brennan & Deane JJ) and the authorities cited therein. If, on the facts, the right or authority to enter onto land is limited in scope then an entry which is unrelated to the right or authority will amount to a trespass. Accordingly a person who has permission to enter onto land for a specific purpose commits a trespass if he enters onto land for any other purpose, especially if that other purpose is an unlawful purpose. That person will stand in no better position than a person who enters with no authority at all: ***Barker v The Queen*** (342, 346) (Mason J), (357) (Brennan & Deane JJ).

227 However, an authority to enter need not be limited. As Brennan and Deane JJ observed in ***Barker v The Queen*** , the authority to enter onto land need not be limited (in its character as an authority to enter land) by reference to the things which the person whose entry is permitted may legitimately do after he has entered or to the range of purposes which were or might have been in the contemplation of the grantor of the permission. If it is a general permission to enter in the sense that it is not limited, either expressly or by necessary implication, by reference to the purpose for which entry may be effected, it is not legitimate to cut back the generality of the permission to enter merely because it is probable that the grantor would, if the matter had been raised, have qualified it by excluding from its scope any entry for the purpose of committing an unauthorised act. When the permission is not in fact so limited, an unanticipated or illegitimate purpose on the part of the entrant does not, at common law, affect the status of his entry or make him a common law trespasser (357 - 358).

228 Their Honours went on to observe that if the authority to enter onto land is not limited by reference to the things the invitee may do once he or she has entered:

> [A] purpose of subsequently doing an unlawful act will not, under the common law, convert entry which was otherwise within the permission into entry as a trespasser. In particular, to take the example on which most reliance was placed, the implied invitation to enter which a shopkeeper extends to the public may ordinarily be limited to public areas of the shop and to hours in which the shop is open for business: it is not, however, ordinarily limited or confined by reference to purpose. Indeed, in the context of the importance of 'impulse buying', the mere presence of the prospective customer upon the premises is itself likely to be an object of the invitation and a person will be within the invitation if he enters for no particular

> purpose at all. The fact that a person enters with the purpose or some thought of possibly stealing an item of merchandise or of otherwise behaving in a manner which is beyond what he is authorised to do while on the premises does not, in the ordinary case where the invitation to enter

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is not confined by reference to purpose, result in the actual entry being outside the scope of the invitation and being trespassory (361 - 362).

229 Difficult questions can arise when the authority or permission to enter onto the land is limited to a particular purpose and a person enters onto the land for that purpose and for some other purpose: ***TCN Channel Nine Pty Ltd v Anning*** (2002) 54 NSWLR 333 [30] (Spigelman CJ, Mason P & Grove J agreeing). Whether the entry will constitute a trespass on the land is an issue which has not been finally resolved in the authorities: see ***Barker v The Queen*** (345 - 347) (Mason J), cf (365) (Brennan & Deane JJ); cf ***Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*** (1968) 121 CLR 584, 599 (Barwick CJ & Menzies J), cf 606 (Kitto J); ***TCN Channel Nine v Anning*** [32] - [37] (Spigelman CJ, Mason P & Grove J agreeing) and the cases discussed therein; ***Byrne v Kinematograph Renters Society Ltd*** [1958] 1 WLR 762, 776 (Harman J).

230 A common example of the implication of a licence to enter relates to private homes, where a licence will ordinarily be implied in favour of any member of the public to go upon the path or driveway to the entrance of the home for the purpose of lawful communication with, or delivery to, any person in the house. The path or driveway will be viewed as having been held out by the occupier of the house as the link from the street to his or her home upon which members of the public may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ). However, a licence will not be implied in such a case if the path or driveway leading to the entrance of the house is obstructed or the gate locked: ***Halliday v Nevill*** (7 - 8) (Gibbs CJ, Mason, Wilson & Deane JJ).

231 The same principles apply in relation to the implication of a licence to enter business premises. In TCN Channel Nine v Anning the question was whether employees of the appellant, a television reporter and cameraman, had trespassed on business premises when they entered the premises and attempted to film an interview with a view to broadcasting it. At trial, the appellant was found to have committed a trespass. On appeal, the appellant submitted that the entry of its employees occurred pursuant to an implied licence because the use of the land as a business (either as a tyre dump or as a race track) necessarily involved permission for members of the

(Page 29)

public to enter, or on the basis that any member of the public has a right to enter a property in an attempt to lawfully communicate with the occupier, and specifically to do so for the purpose of requesting an interview. The evidence was that the gate to the property was unlocked at the time of the entry and that some form of implied licence to enter the property existed.

232 In determining whether the entry occurred pursuant to such licence, Spigelman CJ (with whom Mason P and Groves JA agreed) found that the purpose of the entry onto the land was a material consideration. His Honour held that:

Whatever may have been the scope of a permission for entry with respect to the conduct of the used tyre business or the

> conduct of a race track, nothing the appellant did was referable to any such purpose. If there was an implied licence to enter for any such purpose, the appellant did not avail itself of such a licence [43].

233 His Honour also rejected a general submission by the appellant that by virtue of the unlocked gate to the property, there was an implied licence which was not limited in any way by what could be done by persons entering onto the property [46] - [49]. He held that most implied invitations will be for limited purposes, and that:

> Persons conducting business on private property are entitled to do so without others intruding for purposes unrelated to the business activities they are conducting. This includes those who wish to enter with a view to publicly exposing aspects of their business [58].

Accordingly, he concluded that there was no implied licence for the appellant's employees to film on the property.

234 Similarly, an implied licence for members of the public to enter onto business premises was held, prima facie, to exist in ***Lincoln Hunt Australia Pty Ltd v Willesee*** (1986) 4 NSWLR 457 in the course of an application for an injunction based, in part, on an alleged trespass. However, that implied licence was held not to authorise entry for the purpose of a journalist and film crew filming a dissatisfied customer when she attended at the premises. Young J held that the evidence suggested that the implied invitation by the plaintiff for the public to visit its premises was limited to members of the public bona fide seeking information or business with it or to clients of the firm, but not to people, for instance, who wished to enter to hold up the premises and rob them or even to people whose motives were to go onto the premises with video cameras and associated equipment or a reporter to harass the inhabitants by asking questions which would be televised throughout the State (460).

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Fazio v The City of Melville [No 2] [2013] WADC 147 -
KY Enterprises Pty Ltd v Darby [2013] VSC 484 -
KY Enterprises Pty Ltd v Darby [2013] VSC 484 -
KY Enterprises Pty Ltd v Darby [2013] VSC 484 -
Bilic and Bilic v Nicholls [2013] QDC 110 -
Attorney-General of Victoria v Gargan [2013] VSC 222 -
Attorney-General of Victoria v Gargan [2013] VSC 222 -
Palfrey v South Penrith Sand and Soil Pty Ltd [2013] NSWCA 99 -
R v Sorensen [2013] WASC 135 (18 April 2013) (Hall J)
Plenty v Dillon [1991] HCA 5 ; (1991) 171 CLR 635
Price v Elder

R v Sorensen [2013] WASC 135 -
R v Sorensen [2013] WASC 135 -
Balven v Thurston [2013] NSWSC 210 (20 March 2013) (Latham J)

31. Ground 5.1 is misconceived. The magistrate found that the plaintiff deliberately drove his motor vehicle into the garage door. It is clear from the evidence that the plaintiff's motor vehicle intruded into the defendant's garage, albeit slightly. It has never been doubted that "every invasion of private property, be it ever so minute, is a trespass." : *Entick v Carrington* (1765) 19 St. Tr. 1029 at 1066 ; *Plenty v Dillon* (1990 -1991) 171 CLR 635 at 639.

Balven v Thurston [2013] NSWSC 210 -

City of Mount Gambier v Waye [2012] SAERDC 66 (13 December 2012) (Costello J)

25. The High Court [12] has recognised that a number of statutes confer power on individuals to enter the land without the consent of the occupier. S 19 of the *Act* expressly confers on Council officers a power to enter land to, inter alia, inspect buildings and makes it an offence for a person to obstruct such an officer in the execution of his duties. I am satisfied that on the occasions when the Council officers attended the subject land they were doing so in the execution of their duties under the *Act* . Accordingly, they did not require his permission to enter his land.

via

[12] *Plenty v Dillon and Others* (1991) 171 CLR 635 .

City of Mount Gambier v Waye [2012] SAERDC 66 -
AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4) [2012] FCA 1268 (21 November 2012) (Bennett J)

475. The Ngarla contend for the second possibility. The Ngarla say that there is no evidence to establish the first possibility and they deny that the third possibility is correct. The Ngarla submit that the existence of an implied licence is consistent with the observations of Selway J in *Gumana (2005)* at [211]:

> *The evidence given by the Yolngu witnesses and the anthropologists in this regard* [that the relevant clans have a right to exclude others, whether Aboriginal or not, from their land] *is not inherently unlikely. It is not inherently unlikely that a person may have a legal right to exclude, but that others are entitled to assume that they have permission to enter and use the land in the absence of any express exclusion. For example, a person holding the fee simple title and in occupation of land undoubtedly has the right to exclude others from it: see* Plenty v Dillon *(1991) 171 CLR 635 at 647. However, in the ordinary course most entrants onto that land have an implied licence to do so at least for the purpose of seeking permission to stay on it or otherwise to engage in their lawful business. Even if it were established that the land owner had never actually refused access to anyone seeking it, this still would not deny the existence of the landowner's legal right to refuse access. Even if evidence was given that neighbours regularly entered onto the land without seeking express permission (eg in order to recover tennis balls, etc) that plainly would not have the consequence that the landowner did not have the right to exclude. It would not occur to anyone to argue that the failure to exercise the right to exclude meant that it did not exist. I can think of no reason why the same should not apply in respect of land held under Aboriginal tradition. The evidence in this case shows that it does, at least in relation to the claim area.*

Shoalhaven City Council v Ellis [2012] NSWLEC 225 (27 September 2012) (Biscoe J)

14. Fifthly, the respondents referred fleetingly in oral submissions to *Plenty v Dillon* [1991] HCA 5, 171 CLR 635 and trespass. I assume that this is intended to be a submission to the same effect as the submission I rejected in *Armidale Dumaresq Council v Vorhauer* at [35] - [38] , namely, that entry by council officers would constitute trespass. *Plenty v Dillon* is irrelevant. It was an action in trespass to land against police officers who entered private property without proper authority.

Evidence

Shoalhaven City Council v Ellis [2012] NSWLEC 225 -
Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 (13 July 2012) (Biscoe J)

38. The decisions in *Plenty v Dillon* and *Coco v The Queen* are not relevant. The latter was concerned with authorisation to use a listening device under the *Invasion of Privacy Act* 1971 (Qld) . The High Court held that the relevant provision in that Act did not confer power on a judge to authorise entry onto premises for the purpose of installing a listening device in circumstances where the entry onto the premises would have constituted trespass. In *Plenty v Dillon* the High Court held that (a) at common law, a police officer charged with the duty of serving a summons is not authorised, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go on the land in order to serve the summons, and (b) s 27 of the *Justices Act* 1921-1975 (SA) did not authorise entry onto private premises in order to effect service of the summons. These issues do not arise here. See, further, *Vorhauer* 2002 at [10] where Spigelman CJ said:

> In the alternative, the applicant relied on some "combination" of s 73 of the Constitution and the High Court judgment in *Plenty v Dillon* (1991) 171 CLR 635. This appears to be the basis of a submission that the criminal proceedings against her were invalid because the police officers were trespassers. *Plenty v Dillon* was an action in trespass to land against police officers who entered private property without proper authority. It has no relevance to the validity of the criminal proceedings against the Applicant or of any of the judicial orders made in the proceedings. It may have some implication for the admissibility of evidence in those proceedings, but that is not before this Court. Section 73 has nothing to say with respect to any of the conduct complained of by the Applicant.

Acquisition of property under s 51(xxxi) of the Constitution

Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 (13 July 2012) (Biscoe J)

38. The decisions in *Plenty v Dillon* and *Coco v The Queen* are not relevant. The latter was concerned with authorisation to use a listening device under the *Invasion of Privacy Act* 1971 (Qld) . The High Court held that the relevant provision in that Act did not confer power on a judge to authorise entry onto premises for the purpose of installing a listening device in circumstances where the entry onto the premises would have constituted trespass. In *Plenty v Dillon* the High Court held that (a) at common law, a police officer charged with the duty of serving a summons is not authorised, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go on the land in order to serve the summons, and (b) s 27 of the *Justices Act* 1921-1975 (SA) did not authorise entry onto private premises in order to effect service of the summons. These issues do not arise here. See, further, *Vorhauer* 2002 at [10] where Spigelman CJ said:

> In the alternative, the applicant relied on some "combination" of s 73 of the Constitution and the High Court judgment in *Plenty v Dillon* (1991) 171 CLR 635. This appears to be the basis of a submission that the criminal proceedings against her were invalid because the police officers were trespassers. *Plenty v Dillon* was an action in trespass to land against police officers who entered private property without proper authority. It has no relevance to the validity of the criminal proceedings against the Applicant or of any of the judicial orders made in the proceedings. It may have some implication for the admissibility of evidence in those proceedings, but that is not before this Court. Section 73 has nothing to say with respect to any of the conduct complained of by the Applicant.

Acquisition of property under s 51(xxxi) of the Constitution

Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 -
Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 -
Armidale Dumaresq Council v Vorhauer [2012] NSWLEC 154 -
Lee and Robert Rumble v Liverpool Plains Shire Council [2012] NSWDC 95 -
National Australia Bank Ltd v Joyce [2012] WASC 224 (22 June 2012) (Edelman J)

> 69 On 4 May 2012, Mr Ryan Joyce sent an email to one of the Bank's Receiver's and Agents, Mr Thackray, and copied to Mr Trail, a director in

the strategic services division of the Bank. In the email, Mr Ryan Joyce said:

> We have locked and sign posted all gates to the property and any attempt to access the site without invitation or prior appointment will be deemed as trespassing and those person/s will be forcibly removed and prosecuted accordingly. AUTHORITY High Court of Australia, Plenty v. Dillon (1991) 171 CLR 635 F.C. 91/004
>
> Please inform all agents for the bank of the dispute so they may act accordingly.
>
> Kind Regards
>
> Ryan Joyce

National Australia Bank Ltd v Joyce [2012] WASC 224 -
National Australia Bank Ltd v Joyce [2012] WASC 224 -
National Australia Bank Ltd v Joyce [2012] WASC 224 -
National Australia Bank Ltd v Joyce [2012] WASC 224 -
Australasian Meat Industry Employees' Union v Fair Work Australia [2012] FCAFC 85 -
Australasian Meat Industry Employees' Union v Fair Work Australia [2012] FCAFC 85 -
Harden Shire Council v Richardson [2012] NSWSC 622 -
Harden Shire Council v Richardson [2012] NSWSC 622 -
Johnson v Buchanan [2012] VSC 195 (11 May 2012) (Bell J)

61. The discussion of trespass in *Plenty* is extensive. Mason CJ, Brennan and Toohey JJ also approved [35] the statement in *Entick* that even a minute unauthorised invasion of private property was a trespass. Their Honours referred to the various forms of legal authority which might justify such an intrusion, including statutory permission and implied licence. [36] Gaudron and McHugh JJ also approved [37] *Semayne's Case* and *Entick* . Citing these and other authorities, their Honours said the 'policy of the law is to protect the possession of property and the privacy and security of its occupier'. [38] This draws attention to the point made by Lord Scarman in *Morris v Beardmore* [39] that the law of trespass has a human rights dimension. It protects the right to privacy of the home which is specified in art 8(1) of the *Eur opean Convention for the Protection of Human Rights and Fundamental Freedoms*.[40] In this State, that right is protected by s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) . [41] Reflecting the same policy, in *Coco v The Queen* [42] the High Court acknowledged the right of a person to exclude others from their property was a fundamental right or freedom which, therefore, could only be abrogated by legislation clearly and unmistakably evincing that intention. [43] In *New South Wales v Ibbett* ,[44] Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ approved the judgments of Mason CJ, Brennan and Toohey JJ and of Gaudron and McHugh JJ in *Plenty* , as well as the judgment of Lord Scarman in *Morris* , and joined in 'emphasising the fundamental importance attached by the common law to the privacy of the home'. [45]

via

[37] Ibid 647.

Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -

Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
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Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
YOUNG & HAMMOND (Civil Dispute) [2012] ACAT 30 -
YOUNG & HAMMOND (Civil Dispute) [2012] ACAT 30 -
Hill v Higgins [2012] NSWSC 270 -
Hill v Higgins [2012] NSWSC 270 -
Hill v Higgins [2012] NSWSC 270 -
Glew v White [2012] WASC 100 (26 March 2012) (Hall J)

29. The appellant's arguments are simply wrong. ***Plenty v Dillon*** was, of course, a case regarding trespass. It was held that service of a summons did not afford the police officers in that case with a right of entry onto private land. That was because they had neither a warrant to enter the land nor was there any statutory right of entry. However in ***Plenty v Dillon*** , and in numerous other cases, it has been recognised that a warrant is not the only possible source of authority for public officials to enter private land. Such officials may also derive authority from a statute. That is the case here.

Glew v White [2012] WASC 100 -
Glew v White [2012] WASC 100 -
Glew v White [2012] WASC 100 -
Glew v White [2012] WASC 100 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
Commonwealth v Fernando [2012] FCAFC 18 -
Commonwealth v Fernando [2012] FCAFC 18 -
Fuller v Toms [2012] FCA 27 -
R v Houssaini [2011] SADC 164 -
R v Houssaini [2011] SADC 164 -
R v Houssaini [2011] SADC 164 -
Udowenko and Ors v Chief Executive Officer and Board of Directors of St George Bank - A Division of Westpac Banking Corporation and Ors (No. 2) [2011] NSWSC 1122 (15 September 2011) (Johnson J)

50. There is then, in paragraph 16, reference to factual matters, intermixed with a reference to the facts in *Bennie v State of New South Wales* and then a further quote from the decision of the High Court in *Plenty v Dillon* [1990-1991] 171 CLR 635 .

State of New South Wales v Williamson [2011] NSWCA 183 (05 July 2011) (Hodgson, Campbell and Macfarlan JJA)
Plenty v Dillon (1991) 171 CLR 635
Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW)

State of New South Wales v Williamson [2011] NSWCA 183 -
Maynes v Casey [2011] NSWCA 156 -
Maynes v Casey [2011] NSWCA 156 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 (11 May 2011) (Macaulay J)

26. In *Plenty v Dillon* [16] the High Court approved what had been said by Brennan J in *Halliday v Nevill [17]* in respect of the principle that every invasion of private property is a trespass, namely:

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorised or excused by law. [18]

via

[16] (1991) 171 CLR 635 , 639.

Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Nguyen & Le v Davies [2011] SADC 63 (06 May 2011) (Beazley J)

72. The applicants assert their entitlement to recover damages for the painting of the wall even though on Her Honour's findings, the wall has been improved by the work of the respondent. In *Plenty v Dillon,* [13] the High Court held that a party may, in certain circumstances be entitled to have his right of property vindicated by a substantial award of damages even if there is no proof of damage.

via

[13] (1991) 171 CLR 635 at 654-5

Nguyen & Le v Davies [2011] SADC 63 (06 May 2011) (Beazley J)

76. However, as the High court had said in *Plenty v Dillon* , prima facie a trespass had occurred, and it is no answer to say that the applicants or the public were better off. It is necessary to consider whether there were any defences open to the respondent.

Nguyen & Le v Davies [2011] SADC 63 -
Nguyen & Le v Davies [2011] SADC 63 -
Windridge Farm Pty Limited v Grassi [2011] NSWSC 196 -
Windridge Farm Pty Limited v Grassi [2011] NSWSC 196 -
Fazio (Executor) v Passmore [2011] FCA 273 (25 March 2011) (Siopis J)

53. At 641 in *Plenty* , Mason CJ, Brennan and Toohey JJ observed:

> A summons to appear before a court of summary jurisdiction to answer an information or complaint does not of itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard.

Fazio (Executor) v Passmore [2011] FCA 273 -
Fazio (Executor) v Passmore [2011] FCA 273 -
Fazio (Executor) v Passmore [2011] FCA 273 -
Fazio (Executor) v Passmore [2011] FCA 273 -
Fazio (Executor) v Passmore [2011] FCA 273 -
Fazio (Executor) v Passmore [2011] FCA 273 -
R v CAVALLARO [2011] SADC 15 -
R v CAVALLARO [2011] SADC 15 -

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Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
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Maynes v Casey [2010] NSWDC 285 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Wilson v State of New South Wales [2010] NSWCA 333 -
Sultana v Vumbaca [2010] NSWDDT 17 -
Sultana v Vumbaca [2010] NSWDDT 17 -
Slaveski v State of Victoria [2010] VSC 441 (01 October 2010) (Kyrou J)

281. This statement of the law remains true today. [243] It was echoed by Lord Denning MR in *Southam v Smout* ,[244] in the following passage that has been cited with approval by the High Court: [245]

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.' So be it – unless he has justification by law. [246]

via

[243] *Plenty v Dillon* (1991) 171 CLR 635, 639 ('*Plenty*'); *Halliday v Nevill* (1984) 155 CLR 1, 10.

Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Stageman v St John Ambulance Association in Western Australia Incorporated [2010] WASC 203 -
Stageman v St John Ambulance Association in Western Australia Incorporated [2010] WASC 203 -
Mastwyk v DPP [2010] VSCA 111 (11 May 2010) (Maxwell P, Nettle and Redlich JJA)

61. The right to liberty is 'the most elementary and important of all common law rights'. [51] Statutory authority to engage in conduct infringing such a right must be expressed in unmistakeable and unambiguous language. The common law insists upon the necessity for a clear and express statutory authorization of any abrogation or curtailment of such rights. In the absence of such words it is presumed that the legislature did not intend such a consequence. [52] Accordingly, inconvenience in carrying out an object authorized by the legislation does not provide a basis for the erosion of fundamental common law rights. [53]

via

[53] *Plenty v Dillon* (1991) 171 CLR 635 (Gaudron, McHugh JJ) .

Stereff v Rycen [2010] QDC 117 -
Stereff v Rycen [2010] QDC 117 -
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Stereff v Rycen [2010] QDC 117 -
Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2] [2009] WASC 404 -
Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2] [2009] WASC 404 -
Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2] [2009] WASC 404 -
Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2] [2009] WASC 404 -
Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2] [2009] WASC 404 -
Bennett v Boyd [2009] TASSC 104 -
Bennett v Boyd [2009] TASSC 104 -
Bennett v Boyd [2009] TASSC 104 -
Morro v Australian Capital Territory [2009] ACTSC 118 -
Dean Cameron Smith v Cheeky Monkeys Restaurant [2009] NSWDC 257 -
Dean Cameron Smith v Cheeky Monkeys Restaurant [2009] NSWDC 257 -
East v The Queen [2009] HCATrans 157 (25 June 2009) (Kiefel and Bell JJ)

> **MR STUBBINS:** Your Honour, that refers to "serve a document". Your Honour would note the facts in *Plenty v Dillon* were specifically in relation to authority under the *Justices Act* in that case, where they were able to serve a document. It was held, your Honour, there was no dispute that to serve a document did not entitle police officers to enter property. They entered property under an implied licence, to go there until such time as the owner of the property told them that they could not stay and from that point in time, your Honour, if they remained on the property they were trespassers. So in respect of section 19 of the *Police Powers and Responsibilities Act*, your Honour, that refers only and gives police officers only the right to serve a document. Your Honour, the original Act only gave the AFP a right to give written notice

East v The Queen [2009] HCATrans 157 (25 June 2009) (Kiefel and Bell JJ)

> **BELL J:** I think, Mr Stubbins, your difficulty is that in *Plenty v Dillon* in the joint reasons of Justices Gaudron and McHugh, it was pointed out that police officers have no greater power than anyone else to enter upon land or premises without consent, absent a statutory foundation. So some years after the decision in *Plenty v Dillon* the Queensland Parliament legislated to provide that statutory foundation, making clear in subsection (1) that the purpose of the section was to ensure a police officer performing a function of the police service may enter and stay on a place in circumstances that may otherwise be trespass. That was the intention of the provision.

East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
East v The Queen [2009] HCATrans 157 -
Police v Dafov [2008] SASC 247 (17 September 2008) (Gray, Vanstone and White JJ)

16. In *Halliday v Nevill* ,[5] *Plenty v Dillon* , [6] and *Coco* ,[7] the High Court had occasion to consider this fundamental principle. The position was summarised in *Coco* : [8]

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [9] . In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law [10] . Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize

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what would otherwise have been tortious conduct [11] . But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* : [12]

> "[I]nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights."

In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required [13] . That approach is consistent with statements of principle made by this Court, to which we shall shortly refer. An insistence on the necessity for express words is in conformity with earlier judicial statements in England which call for express authorization by statute of any abrogation or curtailment of the citizen's common law rights or immunities. ...

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights [14] .

via

[6] *Plenty v Dillon* (1991) 171 CLR 635 .

Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCATrans 152 (17 April 2008) (Gleeson CJ; Gummow, Kirby, Hayne and Heydon JJ)

MR WALKER: Your Honours, the no doubt nonexhaustive summary by Justices Gaudron and McHugh in *Plenty v Dillon* 171 CLR 635 at 647 , to which reference has been made by my learned friend and me, is nonexhaustive at least because of the absence of discussion of the breach of peace

exception. We accept that there is such an exception. We have made observation of that in our written submissions. The Chief Justice asked my learned friend, as he had asked me, about whether those matters of common law power are restricted or have been expressed or reasoned to be restricted to police officers.

Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Kuru v State of New South Wales [2008] HCATrans 152 -
Proprietors of SP 20297 v G & S Developments Pty Limited [2008] NSWSC 257 -
Proprietors of SP 20297 v G & S Developments Pty Limited [2008] NSWSC 257 -
Wheare v Police [2008] SASC 13 (01 February 2008) (Gray J)

18. In *Halliday v Nevill* ,[8] *Plenty v Dillon* ,[9] and *Coco* ,[10] the High Court had occasion to consider this fundamental principle. The position was reviewed in *Coco* [11] :

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [12] . In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law [13] . Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct [14] . But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* : [15]
>
> > "[I]nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights."
> >
> > In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required [16] . That approach is consistent with statements of principle made by this Court, to which we shall shortly refer. An insistence on the necessity for express words is in conformity with earlier judicial statements in England which call for express authorization by statute of any abrogation or curtailment of the citizen's common law rights or immunities. ...
>
> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights,

freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights [17] .

via

[14] *Plenty v Dillon* (1991), 171, CLR, at p. 648 , per Gaudron and McHugh JJ ; *Morris v Beardmore* , [1981] AC 446, at pp. 455, 463 ; *Colet* , [1981] 1 SCR, at pp. 9-10 ; (1981) 119 DLR (ed), at pp. 527-528.

Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Bade v Rural City of Murray Bridge [2008] SASC 9 -
Bade v Rural City of Murray Bridge [2008] SASC 9 -
Police v DAFOV [2007] SASC 451 (18 December 2007) (David J)
Coco v The Queen (1994) 179 CLR 427; *Plenty v Dillon* (1991) 171 CLR 635 , applied.

Police v DAFOV [2007] SASC 451 (18 December 2007) (David J)

8. Generally speaking, a person entering private property without the owner's consent is trespassing. With respect to police entry onto private property, the law was set out in *Coco v The Queen* ,[1] where Mason CJ, Brennan, Gaudron and McHugh JJ said:

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law. Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* :
>
> > "[I]nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights." [2]

Police v DAFOV [2007] SASC 451 -
Police v DAFOV [2007] SASC 451 -
Sims v Thomas [2007] TASSC 106 -
Sims v Thomas [2007] TASSC 106 -
Sims v Thomas [2007] TASSC 106 -

State of New South Wales v Delly [2007] NSWCA 303 -
State of New South Wales v Delly [2007] NSWCA 303 -
Kaldon Karout v Constable Mathew Stratton & Ors [2007] NSWSC 1034 -
Drage v Pitts [2007] WASC 203 (31 August 2007) (Simmonds J)

> 37 The starting point is that a person who enters property "without the leave or licence" of the person in possession commits a trespass unless the entrant has some other lawful authority to enter: ***Halliday v Nevill*** (1984) 155 CLR 1, per Brennan J, at 10, a passage quoted with approval in ***Plenty v Dillon*** (1991) 171 CLR 635, per Mason CJ, Brennan and Toohey JJ, at 639.
>
> (Page 10)

Drage v Pitts [2007] WASC 203 -
Drage v Pitts [2007] WASC 203 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
Ballis v Randall [2007] NSWSC 422 (07 May 2007) (Hall J at 1)
Plenty v Dillon (1991) 171 CLR 654
Project Blue Sky Inc v Australian Broadcasting Authority

Ballis v Randall [2007] NSWSC 422 -
Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd [2007] FCAFC 52 -
Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd [2007] FCAFC 52 -
PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd [2007] VSC 87 (02 April 2007) (Smith J)

> 49. The law places great importance on the right of owners of freehold land to control its use. [18] A statement often cited is that of A L Smith, LJ in *Shelfer v City of London Electric Lighting Co* [19]:
>
> > "Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.
> >
> > In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *pri ma facie* entitled to an injunction.
> >
> > There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section.
> >
> > In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case may be for a

mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that –

(1.) If the injury to the plaintiff's legal rights is small,
(2.) And is one which is capable of being estimated in money,
(3.) And is one which can be adequately compensated by a small
money payment,

(4.) And the case is one in which it would oppressive to the defendant to grant an injunction:-

then damages in substitution for an injunction may be given.

There may also be cases in which, although the four above-mentioned requirements exist, the defendant by its conduct, as, for instance, hurrying up his building so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down the rule as to what, under different circumstances in each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication ... Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception."

via

[18] *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464, 467-9 ; *Plenty v Dillon* (1991) 171 CLR 635 and cases in fn 12 above.

Brock v United States of America [2007] FCAFC 3 -
New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
Murdoch v Smith [2006] VSC 468 -
R v Reid, Reid and Dasborough [2006] SADC 132 -
Murdoch v Smith [2006] VSC 468 -
R v Reid, Reid and Dasborough [2006] SADC 132 -
Samir Tarjali Diab v The State of NSW [2006] NSWDC 66 -
Samir Tarjali Diab v The State of NSW [2006] NSWDC 66 -
Samir Tarjali Diab v The State of NSW [2006] NSWDC 66 -
Samir Tarjali Diab v The State of NSW [2006] NSWDC 66 -
Plenty & Plenty v Seventh-Day Adventist Church of Port Pirie; Plenty & Plenty v Dickson [2006] SASC 361 -
Plenty & Plenty v Seventh-Day Adventist Church of Port Pirie; Plenty & Plenty v Dickson [2006] SASC 361 -
Booth v Yardley [2006] QPEC 119 -

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Plenty & Plenty v Seventh-Day Adventist Church of Port Pirie; Plenty & Plenty v Dickson [2006] SASC 361 -
Plenty & Plenty v Seventh-Day Adventist Church of Port Pirie; Plenty & Plenty v Dickson [2006] SASC 361 -
Plenty & Plenty v Seventh-Day Adventist Church of Port Pirie; Plenty & Plenty v Dickson [2006] SASC 361 -
Craftsman Homes Australia P/Ltd v Channel Nine P/Ltd - Costs [2006] NSWSC 1297 -
Pringle v Everingham [2006] NSWCA 195 (27 September 2006) (Mason P at [1]; Santow JA at [2]; Hunt AJA at [3])

> *Plenty v Dillon* (1991) 171 CLR 635 ; *Coco v The Queen* (1994) 179 CLR 427 considered.

Pringle v Everingham [2006] NSWCA 195 -
State of New South Wales v Ibbett [2006] HCATrans 463 -
William Todd and Another v Adam Todd and Another, Adam Todd and Another v Eddie Temurcuoglu OBO Office of the Sheriff of New South Wales and 3 Others [2006] NSWSC 864 -
Craftsman Homes Australia Pty Limited & 3 Ors v TCN Channel Nine Pty Limited & 2 Ors [2006] NSWSC 519 -
R v PJ [2006] ACTSC 37 -
R v PJ [2006] ACTSC 37 -
S, P v Guardianship Board [2006] SADC 38 -
S, P v Guardianship Board [2006] SADC 38 -
S, P v Guardianship Board [2006] SADC 38 -
S, P v Guardianship Board [2006] SADC 38 -
Filipowski v Frey [2004] NSWLEC 182 (04 March 2006) (McClellan CJ)

> 24 The word "summons" is commonly understood as a document which requires a person to attend court to answer a claim (see Butterworths' Australian *Legal Dictionary* and the discussion in Plenty v Dillon (1991) 171 CLR 635). Although not used in this Court where the title "application" is used instead, proceedings in the Supreme Court may be commenced by taking out a summons. Such a summons does not require the defendant to attend but serves to give the defendant notice of the matter and when it will be listed for consideration by the Court.

Filipowski v Frey [2004] NSWLEC 182 -
Pitt v Baxter [2006] WASC 4 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
Smith v Milmerran Shire Council [2005] QDC 372 -
Candy v Thompson [2005] QCA 382 -
Candy v Thompson [2005] QCA 382 -
Candy v Thompson [2005] QCA 382 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
Kumer v Suncorp Metway Insurance Ltd [2005] QCA 254 -
Thompson v Vincent [2005] NSWCA 219 -
Thompson v Vincent [2005] NSWCA 219 -
R v Conway [2005] QCA 194 (10 June 2005) (McMurdo P, Atkinson and Mullins JJ,)
Plenty v Dillon (1991) 171 CLR 635 , considered

R v Conway [2005] QCA 194 -
R v Conway [2005] QCA 194 -

Warwick Credit Union Ltd v McCarthy [2005] QDC 92 -
Gumana v Northern Territory [2005] FCA 50 -
Gumana v Northern Territory [2005] FCA 50 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
Torney v Wimmera Mallee Rural Water Authority [2004] VCAT 1828 (15 September 2004) (Mr R C Horsfall, Senior Member)

33. Various decision of the High Court of Australia were referred to

· Commonwealth of Australia against NSW and others, 33 CLR 1 ;

· Plenty against Dillon (1991) 171 CLR 635 .

Coleman v Power [2004] HCA 39 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 (02 April 2004) (Gleeson CJ; Heydon J)

I would add, to vindicate the plaintiff's right from unlawful intrusions like that that happened in this case when the Council, with respect, took rather drastic action and flattened the property. So we submit, your Honours, in the first place then, there is an error in the failure to apply the plain doctrine handed down in *Plenty v Dillon* . Nominal damages was not appropriate on the finding of trespass. Even accepting there was no property damage, there were other heads of damage to consider. The second error which we submit justifies the grant of special leave, as I have said, is either equating or conflating knowledge of illegality with the requirement of conscious wrongdoing, which are rather different matters, in our submission.

Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 (02 April 2004) (Gleeson CJ; Heydon J)

GLEESON CJ: I think we understand. We just wanted to hear what you had to say about *Plenty v Dillon* .

Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 (02 April 2004) (Gleeson CJ; Heydon J)

Your Honours, it was the plaintiff's home in *Plenty v Dillon* , it was an officer of the law asserting legal authority in what was plainly a hostile and resistant situation. The occupants were present on the premises and, your Honours, the events were such as were likely to cause distress.

Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
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Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Grant v Brewarrina Shire Council {S456-03) [2004] HCATrans 94 -
Arnold v Police No. Scciv-04-118 [2004] SASC 74 (25 March 2004)

15. In the reasons he gave, the learned Magistrate set out the conversation between Constable Broad and the appellant which was said to vitiate what followed. The Magistrate found that Constable Broad was "incorrect in categorising the defendant's language as an offence" and said: "Nevertheless, effectively she drew his attention to his language, asking him to refrain from using it and to lower his voice". Plainly he did not consider that the officer's error rendered unlawful what followed. His Honour dealt with the contention that the police were, or became, trespassers upon the premises. He referred to *Plenty v Dillon* (supra) and he found that the police had an implied licence to enter the premises which was not revoked. He found that the arrest was based on proper grounds. In my view the reasons

given cannot be said to be other than adequate. It was not as if the appellant could point to any authority which directly supported him; nor could it be said, in my view, that the position was finely balanced. This ground of appeal must also fail.

Arnold v Police No. Scciv-04-118 [2004] SASC 74 -
R v Bunting & Wagner (No 4) No. Sccrm-01-205 [2003] SASC 252 -
Director of Housing v Hutchison 3G Australia Pty Ltd [2003] VSC 310 -
Perrett v Williams [2003] NSWSC 381 -
Perrett v Williams [2003] NSWSC 381 -
Perrett v Williams [2003] NSWSC 381 -
Pietruszkiewicz v Whitfort (No 1) [2003] QDC 577 -
Pietruszkiewicz v Whitfort (No 1) [2003] QDC 577 -
Grant v Brewarrina Shire Council [No. 2] [2003] NSWLEC 54 (06 March 2003) (Lloyd J)

42 Nominal Damages are awarded as a demonstrable mark or vindication of the plaintiff's rights in a situation in which the plaintiff cannot establish substantial loss: *Baume v Commonwealth* (1906) 4 CLR 97 at 116; 13 ALR 22 per Griffith CJ. In a tort actionable *per se* the defendant breaches the plaintiff's absolute rights: *Plenty v Dillon* (1991) 171 CLR 635 at 645 per Mason CJ, Brennan and Toohey JJ at 654-5 per Gaudron and McHugh JJ ; *Gazzard v Hutchesson* (1995) Aust Torts Reports 81-337 at 62, 360. However, if the plaintiff fails to satisfy the court that substantial damage has been suffered, the plaintiff runs the risk of an award of nominal damages: *Waters v Maynard* (1924) SR (NSW) 618, or of no damages: *Battiato v Lagana* [1992] 2 Qd R 234. It is clear that in cases of action in tort, plaintiffs who fail to establish substantial loss run the risk of small but not nominal awards: *Baume v Commonwealth* (1906) 4 CLR 97 at 116-7; 13 ALR 22 per Griffith CJ.

Grant v Brewarrina Shire Council [No. 2] [2003] NSWLEC 54 -
Korber v Police No. Scciv-02-588 [2002] SASC 441 -
Capebay Holdings Pty Ltd v Sands [2002] WASC 287 -
Capebay Holdings Pty Ltd v Sands [2002] WASC 287 -
R v Vorhauer [2002] NSWCCA 483 -
R v Vorhauer [2002] NSWCCA 483 -
R v Vorhauer [2002] NSWCCA 483 -
Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1099 -
Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1099 -
R v Merritt [2002] NSWCCA 368 -
Laurens v Willers [2002] WASCA 183 (28 June 2002) (EM Heenan J)

40 In a case dealing with attempts by police officers to effect service of a summons on private property where the owners had ordered them off, it was held that the police officers were liable in damages for trespass – ***Plenty v Dillon*** (1991) 171 CLR 635. In that case, at pages 638 and 639 Mason CJ, Brennan and Toohey JJ said:

"Thus the issue for determination is simply whether a police officer who is charged with the duty of serving a summons is authorized, without the consent of the person in possession or entitled to possession of land and without any implied leave or licence, to go upon the land in order to serve the summons.

The starting point is the judgment of Lord Camden L.C.J. in *Entick v. Carrington* (1765) 19 St Tr 1029, at p 1066 :

'By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he

> admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.'

And see *Great Central Railway Co. v. Bates* (1921) 3 KB 578, at p 582 ; *Morris v. Beardmore* [1981] AC 446, at p 464. The principle applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons. As Lord Denning M.R. said in *Southam v. Smout* [1964] 1 QB 308, at p 320, adopting a quotation from the Earl of Chatham:

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.' So be it - unless he has justification by law.'

And in *Halliday v. Nevill* (1984) 155 CLR 1 Brennan J. said (at p 10):

> 'The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.'

The proposition that any person who 'set(s) his foot upon my ground without my licence ... is liable to an action' in trespass is qualified by exceptions both at common law and by statute."

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which was referred to by this Court in *Plenty v*

Coco v The Queen [1993] HCATrans 351 (17 November 1993)
Dillon and the earlier observations of

Coco v The Queen [1993] HCATrans 351 (17 November 1993)
Plenty v Dillon, 171 CLR 635 , the passage to which

Coco v The Queen [1993] HCATrans 351 (17 November 1993)
Plenty v
words of· the minority of the Court in authorizes - - -

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Coco v The Queen [1993] HCATrans 138 (02 June 1993)

> in this Court in *Plenty v Dillon,* 171 CLR 635 , when

R v Coco [1993] QCA 185 (27 May 1993) (Macrossan CJ. Pincus JA. Derrington J.)

> Even if under the Act it were to be held that a judge is given certain authority to authorise incidental actions which would otherwise be unlawful or illegal, it could be expected that there would exist a distinct limit on the extent of the authorisation which could be given. While the granting of any approval in respect of incidental actions otherwise unlawful would be a discretionary matter for judgment by the judge, if he has such a power at all, the limit to that discretion would necessarily be reached at the point of what was not only necessary to overhear conversations but also was reasonable to that end. While relevant conversations might take place in a variety of circumstances, the limits upon the judge's authority might be found in what was both reasonable and necessary in terms of the object of the statute. The intention of the statute is to preserve the opportunity in appropriate circumstances for conversations to be overheard by law enforcement officers and minimal activity of a kind which would otherwise amount to trespass or damage to property might be considered reasonable and necessary but it could hardly be suggested that injury to persons or serious damage to property would fall within that category and so be capable of authorisation by a judge. However, nothing in the nature of a definite conclusion calls to be expressed on this occasion and the matter can be left without attempting to reach one. A salutary reminder of the presumption against a construction giving implied authorisation of an illegality is to be found in Plenty v. Dillon (1991) 171 C.L.R. 635 and in considering whether an implication arises, it has to be conceded that s. 43(2)(c) would not be deprived of all application if it were to be held that it does not authorise the commission of what would otherwise be a trespass. In some circumstances, e.g. when the conversation occurs in a public place, a "private conversation" may be overheard by the use of a "listening device" without any trespass being committed, although to limit the application of the subsection to situations not involving entry on private premises would be to limit it very much indeed.

Secretary, Department of Health and Community Services v JWB and SMB [1992] HCA 15 -
Bendal Pty Ltd v Mirvac Project Pty Ltd 23 NSWLR 464 -
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