SHORT PARTICULARS OF CASES

DECEMBER 2017

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BURNS v CORBETT & ORS (S183/2017)
BURNS v GAYNOR & ORS (S185/2017)
ATTORNEY GENERAL FOR NEW SOUTH WALES v BURNS & ORS (S186/2017)
ATTORNEY GENERAL FOR NEW SOUTH WALES v BURNS & ORS (S187/2017)
STATE OF NEW SOUTH WALES v BURNS & ORS (S188/2017)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 3

Date of judgment: 3 February 2017

Special leave granted: 22 June 2017

These appeals concern the issue of whether the Civil and Administrative Tribunal of New South Wales ("NCAT") has jurisdiction to resolve a complaint under the *Anti-Discrimination Act* 1977 (NSW) ("the Act") that involves a resident of New South Wales and a resident of another State.

In 2013 Mr Garry Burns, a resident of New South Wales, lodged a complaint with the New South Wales Anti-Discrimination Board ("the Board") about statements made by Ms Therese Corbett, a resident of Victoria, that had been published in a newspaper in Victoria and then online by several news providers (including the Sydney Morning Herald). Mr Burns contended that the statements were public acts of homosexual vilification, in contravention of s 49ZT of the Act. The Board referred that complaint to NCAT's predecessor, the Administrative Decisions Tribunal ("the ADT"). In 2014 Mr Burns made similar complaints about statements that had been published online by Mr Bernard Gaynor, who resided in Queensland. Those complaints were referred by the Board to NCAT.

The ADT found that Ms Corbett had contravened s 49ZT of the Act. It ordered her to make both a private apology to Mr Burns (by letter) and a public apology (by publication in the Sydney Morning Herald). After an unsuccessful appeal by Ms Corbett to the Appeal Panel of NCAT, Mr Burns registered the ADT's orders with the Supreme Court of New South Wales as a judgment of that Court, under s 114(3) of the Act. He later applied for orders that Ms Corbett was in contempt of court for having failed to make the apologies. On 26 July 2016 Campbell J ordered that certain questions be determined before further hearing of the contempt claim and that those questions be removed to the Court of Appeal for decision. The questions related to both the jurisdiction of the ADT (and NCAT) to determine the complaint and the enforceability of the ADT orders as registered with the Supreme Court.

In the meantime, NCAT dismissed the other complaints made by Mr Burns, upon finding that s 49ZT of the Act could not apply. This was on the basis that the relevant public acts, Mr Gaynor's posting of statements online, had been done in Queensland and not in New South Wales. Before NCAT's Appeal Panel had proceeded to hear an appeal filed by Mr Burns, Mr Gaynor applied to the Supreme Court for declarations that NCAT lacked jurisdiction to determine matters involving, or to make binding orders against, residents of States other

than New South Wales. That application was removed to the Court of Appeal. Mr Gaynor separately appealed to the Court of Appeal from costs orders that had been made by the Appeal Panel of NCAT.

The Court of Appeal (Bathurst CJ, Beazley P and Leeming JA) heard and determined the three proceedings together, and unanimously held that the ADT and NCAT did not have jurisdiction to resolve Mr Burns's complaints. Since the matters in dispute were between residents of different States, they came within s 75(iv) of the Constitution. Their Honours held that although State courts were invested with federal jurisdiction by s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), s 109 of the Constitution then operated, with the result that State jurisdiction was ousted. That ouster applied, in respect of the complaints made by Mr Burns, to the State judicial power that had been conferred on NCAT to resolve complaints made under the Act. The Court of Appeal therefore further held that neither the ADT orders registered as a Supreme Court judgment nor the NCAT Appeal Panel costs orders were enforceable.

In appeals S183/2017 and S185/2017, the grounds of appeal include:

- The Court of Appeal erred in failing to find the proper construction of the legislative scheme comprised of ss 75, 76, 77(ii) and 77(iii) of the Constitution and s 39 of the Judiciary Act was that State diversity jurisdiction was retained by State tribunals, including NCAT.

- The Court of Appeal erred in finding because s 39(2) of the Judiciary Act vests federal diversity jurisdiction in State courts only, that any State law purporting to vest diversity jurisdiction in a State tribunal is rendered inoperative by s 109 of the Constitution.

In appeals S186/2017, S187/2017 and S188/2017, the sole ground of appeal is:

- The Court of Appeal erred in concluding that a State tribunal which is not a "court of a State" is unable to exercise judicial power to determine matters between residents of different States, because the State law which purports to authorise the tribunal to do so is inconsistent with s 39(2) of the Judiciary Act and is therefore rendered inoperative by virtue of s 109 of the Constitution.

Notices of contention have been filed by Ms Corbett, Mr Gaynor and the Attorney-General of the Commonwealth, while notices of cross-appeal have been filed by Mr Gaynor.

Notices of a constitutional matter have been filed by all appellants and by Ms Corbett, Mr Gaynor and the Attorney-General of the Commonwealth. The Attorneys-General of Victoria, Queensland, Western Australia and Tasmania are intervening in all five appeals.

IRWIN v THE QUEEN (B48/2017)

Court appealed from: Queensland Court of Appeal
[2017] QCA 2

Date of judgment: 3 February 2017

Special leave granted: 18 August 2017

In May 2016 Mr Michael Irwin was tried before a jury on an indictment containing two counts, relating to a broken hip suffered by Mr Lloyd Ross after an altercation between the men. Count 1 was that Mr Irwin had inflicted grievous bodily harm on Mr Ross. Count 2 was that Mr Irwin had assaulted Mr Ross and caused him bodily harm.

The altercation occurred at a shopping centre in July 2012, when Mr Irwin pushed Mr Ross (and, on the latter's account, attempted to punch him), causing Mr Ross to fall to the ground. Mr Irwin then kicked Mr Ross at least twice, in or near his right hip. Mr Ross later required surgery on his right hip, which was broken in three places. The orthopaedic surgeon who had operated on Mr Ross testified that the factures had most likely been caused by Mr Ross's fall on to the shopping centre floor rather than by any kick he had received.

Section 23(1)(b) of the *Criminal Code* (Qld) ("the Code") relevantly provides that a person is not criminally responsible for an event (such as Mr Ross's broken hip) "*that an ordinary person would not reasonably foresee as a possible consequence.*"

The jury found Mr Irwin guilty of the Count 1 charge and not guilty of Count 2, whereupon Judge Reid sentenced him to a suspended sentence of 18 months' imprisonment.

An appeal by Mr Irwin against his conviction was unanimously dismissed by the Court of Appeal (Margaret McMurdo P, Gotterson JA & Mullins J), which found that the jury's verdict was not unreasonable. The President, with whom Justices Gotterson and Mullins agreed, found that although it was open to the jury to consider that a person in Mr Irwin's position could not reasonably have foreseen that Mr Ross might suffer a fractured hip, "*[i]t was equally open to the jury on the evidence to reach the contrary conclusion, that an ordinary person in the position of [Mr Irwin] could have foreseen that [Mr Ross] might suffer a serious injury such as a fractured hip from such a forceful push*." The President also referred to the surgeon's evidence having indicated that Mr Irwin had pushed Mr Ross "*with a considerable degree of force*".

The ground of appeal is:

- The Court of Appeal erred in finding that the verdict of guilty on Count 1 was not unreasonable.

PLAINTIFF M174/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M174/2016)

Date Special Case referred to Full Court: 17 May 2017

The plaintiff, a citizen of Iran, entered Australia on 11 October 2012. On 1 September 2015, he applied for a temporary protection visa on the basis (inter alia) that he feared persecution for reason of his conversion to Christianity. He provided a letter of support from Reverend Brown, the pastor at a church he attended. The Minister's delegate refused the visa on 15 April 2016. Prior to making that decision, the delegate conducted an interview with Reverend Brown in relation to the plaintiff's attendance at church. Reverend Brown provided information that suggested that the plaintiff had attended church less often than he claimed. The delegate did not inform the plaintiff of the information she received from Reverend Brown or invite him to comment on it. The delegate's decision was subsequently referred to the second respondent (the Immigration Assessment Authority) which affirmed the decision. The Authority had regard to the material that was before the delegate, but refused to have regard to certain additional information provided by Reverend Brown and others in relation to the plaintiff's church attendance, or to conduct interviews.

The plaintiff is seeking writs of certiorari directed to the Minister and to the Authority to quash their decisions, and a writ of mandamus to require the Minister to consider and determine his visa application according to law. He contends that the delegate's decision of 15 April 2016 is affected by jurisdictional error because the delegate failed to comply with s 57 of the *Migration Act* 1958 (Cth) ('the Act') which required the delegate to (a) give particulars of relevant information to the plaintiff; (b) ensure, as far as was reasonably practicable, that the plaintiff understood why it was relevant to consideration of the visa application; and (c) invite the plaintiff to comment on it.

On 17 May 2017 Nettle J referred the Special Case for consideration by the Full Court.

The questions in the Special Case include:

1. Did the Delegate fail to comply with section 57(2) of the Act?

2. If so, did the failure by the Delegate to comply with section 57(2) of the Act have the consequence that:

   (a) there is no 'fast track reviewable decision' capable of referral by the Minister (or his delegate) to the Authority under section 473CA of the Act; or

   (b) an essential precondition for the valid exercise of power by the Authority under section 473CC of the Act is not satisfied,

   with the result that the Authority has no jurisdiction to conduct a review under Part 7AA of the Act?

PIKE & ANOR v TIGHE & ORS (B33/2017)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2016] QCA 353

Date of judgment: 23 December 2016

Special leave granted: 16 June 2017

This appeal concerns the power of the Planning and Environment Court to make enforcement orders under s 604(1) of the *Sustainable Planning Act* 2009 (Qld) ("the Act") against a successor in title to the person who owned the land at the time a development approval for reconfiguration was granted, even though the successor in title played no role in carrying out the development. This in turn depends upon whether for the purposes of s 245 of the Act, a development approval for the reconfiguration of land can bind the purchaser of a lot created by that reconfiguration.

The Appellants are the owners of a land-locked residential lot (lot 2) which adjoins land owned by the First Respondents (lot 1) with a frontage to a public road. The Appellants have the benefit of an easement over the First Respondents' land for access, but as a consequence of the position adopted by the First Respondents, they are unable to construct and provide utility services to a house on their land. Both lots were created by a development approval for a reconfiguration of the parent parcel on 29 May 2009, issued by the Second Respondent, the Townsville City Council. That approval was subject to a condition (condition 2) that contemplated that the easement benefitting lot 2 would provide not only for access but also for "*on-site manoeuvring and connection of services and utilities*". The Appellants and the First Respondents later purchased their respective lots from the owner of the original lot.

The Appellants applied to the Planning and Environment Court to compel the First Respondents to comply with condition 2. On 9 March 2016 Judge Durward granted that application, on the basis that condition 2 had been contravened and therefore the First Respondents had committed a "development offence". His Honour then made an enforcement order under s 604(1) of the Act.

The First Respondents appealed to the Court of Appeal of the Supreme Court of Queensland. The Court of Appeal (Fraser, Morrison & Philippides JJA) unanimously allowed the appeal on the basis that the power to make an enforcement order under s 604(1) of the Act arose only upon the Court being satisfied that the First Respondents had committed the alleged development offence, and that since they were not parties to the reconfiguration of the original lot approved by the development approval, condition 2 did not impose any obligation upon them. This relied upon a conclusion that once the survey plan signed off by the Second Respondent was registered under the *Land Titles Act* 1994 (Qld), and lots 1 and 2 created, the development approval was spent.

The grounds of appeal include:

- The Court of Appeal erred in law in failing to conclude that the power of the Planning and Environment Court to make an enforcement order under s 604(1) arose upon that Court being satisfied that the alleged development offence had been committed, whether by the First Respondents or by some other person;

- The Court of Appeal erred in law in concluding that condition 2 of the development approval of May 2009 imposed an obligation only as a condition of completing a reconfiguration which was to be complied with only simultaneously with that event, and so in effectively concluding that s 245 of the Act was not capable of being engaged after the reconfiguration approval was effected by registration of a survey plan.

ALLEY v GILLESPIE (S190/2017)

Date writ of summons filed: 7 July 2017

Date questions referred to Full Court: 29 September 2017

Since 30 August 2016 the defendant, Dr David Gillespie, has sat as a Member of the House of Representatives of the Commonwealth Parliament for the seat of Lyne, having been declared elected to that role as a result of the general election held on 2 July 2016.

On 7 July 2017 the plaintiff, Mr Peter Alley, commenced proceedings in this Court under the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth) ("the Common Informers Act"), claiming that the defendant was liable to pay the penalties prescribed by s 3(1) of that Act because he was declared by the Constitution to be incapable of sitting as a Member of the House of Representatives. The basis of the claim is that the defendant is declared incapable by s 44(v) of the Constitution on account of his having a pecuniary interest in an agreement with the public service of the Commonwealth.

The alleged pecuniary interest is based on the following arrangements. The defendant is the majority shareholder in Goldenboot Pty Ltd ("Goldenboot"), which owns premises that it leases to a tenant in return for the payment of rent. The tenant, a Ms Humphreys, operates and manages a retail post office business at the premises. This is pursuant to a contract between Australia Post and Lighthouse Beach Post Stop Pty Ltd ("Lighthouse"), a company of which Ms Humphreys is one of two shareholders. Lighthouse receives revenue from Australia Post under the contract.

The defendant contends that Australia Post is a corporate entity that is not a part of the public service of the Commonwealth. He also challenges the High Court's power to impose the penalties prescribed in s 3(1) of the Common Informers Act, on the basis that the Court only has such power in respect of a Member of the House of Representatives once a determination has been made that the Member in question is not qualified to sit. The defendant contends that such a determination can be made only by the House of Representatives, under s 47 of the Constitution, or by the Court of Disputed Returns, upon a reference to it by the House of Representatives.

At the time of writing, the House of Representatives had not referred to the Court of Disputed Returns (under s 376 of the *Commonwealth Electoral Act* 1918 (Cth)) any question as to the defendant's qualification to be a Member of the House of Representatives, nor had the House made a negative determination under s 47 of the Constitution.

The defendant also opposes the issuance of subpoenas sought by the plaintiff.

On 29 September 2017 Justice Bell referred the following questions to the Full Court under s 18 of the *Judiciary Act* 1903 (Cth):

1. Can and should the High Court decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act?

2. If the answer to question 1 is yes, is it the policy of the law that the High Court should not issue subpoenas in this proceeding directed to a forensic purpose of assisting the plaintiff in his attempt to demonstrate that the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act?

Notices of a Constitutional Matter have been filed by the plaintiff and by the Attorney-General of the Commonwealth, who is intervening in the matter. At the time of writing, no Attorney-General of a State or a Territory had given notice of an intention to intervene in the matter.

CLONE PTY LTD v PLAYERS PTY LTD (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) & ORS (A22/2017 & A23/2017)

Court appealed from: Full Court of the Supreme Court of South Australia [2016] SASCFC 134

Date of judgment: 8 December 2016

Date special leave granted: 16 June 2017

The appellant ('Clone') was the owner of premises at Pirie Street, Adelaide which it leased to the 1st respondent ('Players'). Clone and Players entered into an agreement to lease the premises before ultimately executing a memorandum of lease. Clause 11(i) of the agreement to lease provided for transfer, on determination of the lease, by Players to Clone of any liquor and gaming machine licences in respect of the premises. A dispute later arose as to whether the word "NIL" in the phrase "for NIL consideration" in clause 11(i) had been struck through by Players prior to execution of the agreement.

In 2004, Clone instituted an action against Players and its directors seeking inter alia a declaration that they were obliged to deliver up the licences at the expiration of the lease. At trial, the original agreement to lease could not be located, but two photocopies were tendered. During evidence in chief of the 2nd respondent Mr Griffin, Clone's lawyers learnt that there was a photocopy of the agreement to lease (the third copy) in the possession of the 5th respondent, The Liquor and Gambling Commissioner ('the Commissioner'). Clone inspected the Commissioner's file containing that document at his premises, but did not discover or disclose the existence of the third copy. During cross-examination of Mr Griffin, Clone issued a notice to produce to the Commissioner, who delivered several files to the Court. Unbeknown to Clone, one of those files contained a fourth photocopy of the agreement to lease. Mr Griffin was cross-examined concerning plans in those files but the notice to produce was not called on and no explicit disclosure was made by Clone of its issue.

Vanstone J ('the trial Judge'), determined in favour of Clone, finding that the word "NIL" had not been struck through by Players. Players' appeal to the Full Court was dismissed in April 2006. Subsequently, in 2009, Players learnt of the existence of the third and fourth copies of the agreement to lease and applied to set aside the judgment (both by way of an interlocutory application in the original action and by way of a new action).

Hargrave AuxJ held that Clone breached an obligation to discover the third copy because it was in its power; this amounted to serious malpractice; absent the malpractice there was a reasonable possibility that there would have been a different result; and that the discretion should be exercised to set aside the judgment and order a new trial on the relevant issues.

Clone's appeal to the Full Court (Blue and Stanley JJ, Debelle AJ dissenting) was unsuccessful. The Full Court found Clone's conduct at trial had misled the trial Judge to believe that only two photocopies of the agreement to lease were available, when Clone knew that the third photocopy was available. Hargrave AuxJ did not err in concluding that there was a reasonable possibility

that absent the malpractice the result at trial would have been different. The Full Court held that on an application to set aside a perfected judgment, it is not essential for the applicant to demonstrate that it did not fail to exercise reasonable diligence or that the result would probably have been different but for the malpractice. Any failure to exercise reasonable diligence is a factor relevant to the exercise of the discretion. If the result was incapable of being affected by the malpractice, the judgment will not be set aside. In the present case, Hargrave AuxJ did not err in the exercise of his discretion to set aside the judgment.

Debelle AJ (dissenting) found that Clone's conduct was not misleading, and the trial judge erred in concluding that there was a reasonable possibility that absent the malpractice the result at trial would have been different.

The grounds of appeal include:

- The Court erred in that the Supreme Court's power to set aside perfected orders, in its equitable jurisdiction outside a statutory appeal, is limited to fraud and does not extend to forms of malpractice not amounting to fraud.

CRAIG v THE QUEEN (B24/2017)

Court appealed from: Queensland Court of Appeal
[2016] QCA 166

Date of judgment: 21 June 2016

Special leave granted: 7 April 2017

Mr Ronald Craig was charged with having murdered his partner, Ms Kylie Hitchen, in January 2011. Ms Hitchen died from multiple stab wounds to her upper body, wounds which Mr Craig claimed were the result of a drunken domestic dispute.

Mr Craig had initially sought to plead guilty to manslaughter, but that plea was rejected by the prosecutor. At his trial (at which Mr Craig did not testify), his counsel (Mr R Taylor) submitted that Mr Craig had neither intended to kill Ms Hitchen, nor to cause her grievous bodily harm. Allied to this issue was the contested issue of whether he was intoxicated at the time. A partial defence of provocation was raised which, if successful, would have required a verdict of manslaughter only. A jury later found Mr Craig guilty of murder and he was subsequently sentenced to life imprisonment.

The only ground of appeal common to both the Court of Appeal and to this Court is whether Mr Craig's trial miscarried due to his counsel's inaccurate advice. Relevantly, this concerned the issue of whether Mr Taylor had correctly advised Mr Craig not to give evidence due to the likelihood that this would lead to him being cross-examined as to his criminal history.

On 21 June 2016 the Court of Appeal (Fraser, Gotterson & Morrison JJA) unanimously held that, while it was correct for Mr Taylor to avert to the prospect of Mr Craig being cross-examined as to his previous criminal history if he testified, this was more of a *possibility* rather than a probability. The issue therefore was whether that error occasioned a substantial error of justice.

The Court of Appeal noted that Mr Craig had instructed Mr Taylor that he did not wish to be cross-examined about his previous criminal history *or* the sequence of events on the night in question. He gave those instructions after Mr Taylor had advised him with respect to the probability of his being cross-examined on both issues. That advice was not correct with respect to the former, but it was in relation to the latter. Had Mr Craig been cross-examined on his varying accounts of what happened on the night in question, it would have undoubtedly had an adverse impact on his credibility. It would have also severely undermined the scope for the defences of accident or self-defence.

The Court of Appeal held that there was a sound forensic reason for Mr Craig not to testify and that he was correctly advised by Mr Taylor accordingly. His decision not to testify, insofar as it was justified by that advice, was not therefore the consequence of having been misled by any incorrect advice. That he did not give evidence in these circumstances did not therefore result in a miscarriage of justice. The fact that he was given an additional, inaccurate, reason not to testify did not therefore, of itself, give rise to any miscarriage of justice.

The ground of appeal is:

- The Court of Appeal erred in finding that incorrect advice given by trial counsel to Mr Craig that he was likely to be cross-examined about his previous convictions if he gave evidence did not result in a miscarriage of justice.