SHORT PARTICULARS OF CASES
APPEALS

MAY 2025

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FARMER v MINISTER FOR HOME AFFAIRS & ANOR (S160/2024)

Date special case referred to Full Court: 13 March 2025

The plaintiff, who is a conservative political commentator and a citizen of the United States, had arranged a speaking tour of Australia where she intended to visit multiple cities in November 2024 to speak about political matters and share her perspectives on themes such as freedom of speech, government policy, and social dynamics.

On 12 September 2024, the plaintiff applied for a Temporary Activity (Class GG) visa. On 25 October 2024, the first defendant ("the Minister") made a decision under section 501(3)(a) of the *Migration Act 1958* (Cth) to refuse the plaintiff's visa, relying on s 501(6)(d)(iv) ("the Decision").

Section 501(3)(a) provides that the Minister may refuse to grant a visa to a person if the Minister reasonably suspects that the person does not pass "the character test" and the Minister is satisfied that the refusal is in the national interest. In the Decision, the Minister decided that the plaintiff did not pass the character test because he reasonably suspected that if the plaintiff was allowed to enter Australia, there was a risk that she would "*incite discord in the Australian community or in a segment of that community*" within the meaning of s 501(6)(d)(iv).

In making the Decision, the Minister considered that the plaintiff is known for controversial and conspiratorial views in relation to the Muslim, Black, Jewish, and LGBTQIA+ communities, and her use of online platforms to promote her right-wing extremist views and ideology to foster division and fear, noting in particular the fact that the plaintiff was mentioned in the manifesto of the man who claimed responsibility for a massacre at two mosques in New Zealand. The Minister determined that the plaintiff's presence in Australia may encourage extremist behaviour, risk vilifying a segment of the community, incite discord or civil unrest through promotion of disruptive and/or violent activities, and found that she presented an unacceptable risk to Australia's social cohesion and the personal safety of Australians with reference to her capacity to popularise or normalise undesirable behaviour.

This case raises the question of the meaning of s 501(6)(d)(iv) and whether it was correctly applied, as well as the question of whether this subsection infringes upon the implied freedom of political communication ("implied freedom") under the *Australian Constitution* and is therefore invalid. The implied freedom protects communication between people concerning government or politics from legislative and executive interference.

The plaintiff submits that in s 501(6)(d)(iv), "incite discord" includes the causing of, intentional or not, nothing more than disagreement or debate relying on the ordinary meaning of the words, and highlights that unlike s 501(6)(d)(v), there is no requirement for any risk of danger. She contends that this subsection limits political communication within the scope of the implied freedom and the burden is substantial, direct, and discriminatory, as by its nature it is more likely to exclude those with 'non-mainstream' political views. The plaintiff contends that it not only prevents political communication by a non-citizen who, but for this subsection, has a lawful right to be issued a visa, but also prevents political communication by citizens that would have occurred had the non-citizen been permitted to enter

Australia. Finally, the plaintiff says that even if the subsection is valid, the Minister did not properly construe it when applying it to her visa application.

The defendants (the Commonwealth of Australia being the second defendant) submit that the phrase "incite discord" is concerned with harmful discord and that it has a legitimate purpose to protect the Australian community from non-citizens whose presence in Australia would represent a danger to that community. They contend that s 501(6)(d)(iv) is valid and does not infringe the implied freedom as it does no more than condition the grant of a statutory privilege (a visa) to non-citizens who are seeking to enter Australia. The defendants further say that the implied freedom is a limit on legislative power, not a personal right, and that the subsection does not operate to limit any existing capacity to engage in political communication in Australia, nor does it directly prohibit political communication or 'non-mainstream' ideas; it is only that these ideas may attract the operation of the subsection because of their capacity to have harmful consequences. Alternatively, the defendants submit that even if the subsection is found to burden the implied freedom, it is indirect and insubstantial as it does not affect political communications by Australian citizens (as they do not require visas), and non-citizens who are denied visas remain free to communicate about political matters via a range of online channels as the plaintiff currently does. Finally, they reject the contention that the Minister incorrectly construed the subsection.

The plaintiff has filed a notice of a constitutional matter. Justice Jagot has ordered the following questions in the form of a Special Case be referred for the opinion of the Full Court:

(1) Is s 501(6)(d)(iv) of the *Migration Act 1958* (Cth) invalid because it unjustifiably burdens the implied freedom of political communication?

(2) If the answer to question 1 is "no", is the Decision invalid on the ground that the Minister adopted an incorrect construction of s 501(6)(d)(iv)?

(3) If the answer to question 1 or question 2 is "yes", what, if any, relief should be granted to the plaintiff?

(4) Who should pay the costs of the Special Case?

G GLOBAL 120E T2 PTY LTD AS TRUSTEE FOR THE G GLOBAL 120E AUT v COMMISSIONER OF STATE REVENUE (B48/2024);
G GLOBAL 180Q PTY LTD AS TRUSTEE FOR THE G GLOBAL 180Q AUT v COMMISSIONER OF STATE REVENUE (B49/2024 & B50/2024)

Court from which causes removed: Supreme Court of Queensland

Date causes removed: 26 August 2024

Date amended special case referred to Full Court: 25 February 2025

The Appellants are companies incorporated in Australia that are trustees of unit trusts governed by the law of New South Wales. The units in the unit trusts and the shares in the Appellants are owned and controlled (through interposed entities) by DWS Grundbesitz GmbH, a German company which is also a resident of Germany for the purposes of German tax law. The Appellants are the registered proprietors of land in Brisbane City.

Each of the Appellants is both a "foreign company" and the trustee of a "foreign trust" within the meaning of the *Land Tax Act 2010* (Qld) ("the LTA"). As such, they are subject to the imposition of land tax not only at rates prescribed for companies and trustees generally but also, under section 32(b)(ii) and Schedule 2 Part 2 of the LTA, to a surcharge rate of land tax. For the financial years ending 30 June 2021 and 30 June 2022, the Respondent issued assessment notices to the Appellants that included land tax surcharge ("LTS") in amounts ranging from $144,499.99 to $473,000.00.

The Appellants paid all the land tax levied, including LTS, but also objected to the assessments under s 63 of the *Taxation Administration Act 2001* (Qld) ("the QAA"). The basis of each objection was that the laws of Queensland under which LTS was imposed were inconsistent with s 5(1) of the *International Tax Agreements Act 1953* (Cth) ("the Agreements Act") and therefore were invalid under s 109 of the *Constitution*, which provides that Commonwealth law prevails over any inconsistent law of a State. This was in view of Article 24 of the Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance ("the German Agreement"), which has the force of law in Australia pursuant to s 5(1) of the Agreements Act. Art 24(4) of the German Agreement essentially provides that where the capital of an enterprise of one country is partly owned or controlled by a resident of the other country, the enterprise will not be subjected to taxation in the first country which is more burdensome than that to which similar enterprises of that country would be subjected. Art 24(5) provides that Art 24 applies to taxes of every kind.

The Respondent (Commissioner of State Revenue) disallowed the Appellants' objections, whereupon the Appellants appealed to the Supreme Court of Queensland under ss 69(2) and 70 of the QAA ("the Supreme Court proceedings").

On 8 April 2024, the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) ("the Cth Amendment Act") commenced. The Cth Amendment Act, by s 1 of Sch 1, inserted s 5(3) into the Agreements Act. The Cth Amendment Act also

provides, in s 2 of Sch 1, that the new subsection applies in relation to taxes payable on or after 1 January 2018. The relevant Explanatory Memorandum indicates that s 5(3) is intended to have the effect that State and Territory laws that impose tax will prevail over inconsistent provisions of any double tax agreement (such as the German Agreement) given the force of law by s 5(1). Section 5(3) provides as follows:

> *The operation of a provision of an agreement provided for by subsection (1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law.*

Upon applications to the High Court made by the Attorney-General for the State of Queensland, Justice Jagot ordered the removal of the Supreme Court proceedings into the High Court under s 40(1) of the *Judiciary Act 1903* (Cth).

On 19 December 2024, questions of law stated by the parties in a joint special case were referred by Justice Jagot for consideration by a Full Court. That referral was subsequently vacated, upon the filing of an amended special case. The parties amended the special case to address certain legislative amendments which would be made upon the commencement of Parts 2A and 5 of the *Revenue Legislation Amendment Act 2025* (Qld). Those amendments, which came into effect on 28 February 2025, were the insertion of s 104 into the LTA and s 189 into the QAA. The newly inserted provisions essentially provide that the imposition, assessment and payment of LTS purportedly payable on or after 30 June 2018 in circumstances such as those of the Appellants are all taken to have been valid, despite invalidity at the time by reason of s 109 of the *Constitution*.

The following questions of law, stated by the parties in the amended special case, were referred by Justice Jagot for consideration by a Full Court:

(1) Prior to the commencement of the Cth Amendment Act, was s 32(1)(b)(ii) of the LTA invalid in its application to the Appellants, by force of s 109 of the *Constitution*, by reason of its inconsistency with s 5(1) of the Agreements Act?

(2) If the answer to Question 1 is "yes", is s 5(3) of the Agreements Act (alternatively, cl 1 of Sch 1 to the Cth Amendment Act), in so far as it operates by reference to a provision contained in a law of a State, supported by any head of Commonwealth legislative power?

(3) If the answer to Question 2 is "yes", is s 5(3) of the Agreements Act (alternatively, cl 1 of Sch 1 to the Cth Amendment Act), when read with cl 2 of Sch 1 to the Cth Amendment Act, effective from 1 January 2018 to remove the inconsistency between s 32(1)(b)(ii) of the LTA and s 5(1) of the Agreements Act and any consequent invalidity?

(4) If the answer to Question 2 is “yes”, is s 5(3) of the Agreements Act (alternatively, cl 1 of Sch 1 to the Cth Amendment Act), when read with cl 2 of Sch 1 to the Cth Amendment Act, invalid (in whole or in part) because it effected an acquisition of the property of the Appellants, within the meaning of s 51(xxxi) of the *Constitution*, otherwise than on just terms?

(4A) On their proper construction, do s 104 of the LTA and/or s 189 of the QAA have the effect of requiring the Appellants’ appeals to be disallowed?

(4B) If the answer to Question 4A is "yes", are s 104 of the LTA and/or s 189 QAA inconsistent with s 5(1) of the Agreements Act and therefore invalid to that extent by force of s 109 of the *Constitution*?

(5) What, if any, relief should be granted to the Appellants?

(6) Who should pay the costs of the special case?

The Appellants have filed three notices of a constitutional matter (the second notice following the filing of the amended special case). The Attorneys-General of the Commonwealth, New South Wales, South Australia, Western Australia and Victoria are intervening in the proceedings.

STOTT v THE COMMONWEALTH OF AUSTRALIA & ANOR (M60/2024)

Date writ of summons filed: 18 July 2024

Date special case referred to Full Court: 18 December 2024

For each of the years ending 31 December 2016 to 31 December 2024, land tax was paid by the Plaintiff, a citizen of New Zealand who is ordinarily resident in that country, in respect of two home units that he owns in Melbourne. This was upon assessments made by the Second Defendant (the State of Victoria, through the Commissioner of State Revenue) under the *Land Tax Act 2005* (Vic) ("the LTA") and the *Taxation Administration Act 1997* (Vic). As an "absentee owner" under the LTA, the Plaintiff faced higher rates of tax compared with the rates applied to landowners who were Australian citizens or residents, due to the inclusion of an absentee owner land tax surcharge ("LTS"). The land tax paid by the Plaintiff for each of the nine years therefore included a higher amount, ranging from $2,365.00 for 2016 to $31,200.00 for 2024 (all nine payments together, "the LTS Payments").

Throughout at least most of the period when LTS was levied on the Plaintiff, the relevant provisions of the LTA (sections 7, 8, 35 and 104B, and clauses 4.1 to 4.5 of Schedule 1) were inoperative by force of s 109 of the *Constitution*, which provides that Commonwealth law prevails over any inconsistent law of a State. This was due to the LTA provisions' inconsistency with s 5(1) of the *International Tax Agreements Act 1953* (Cth) ("the Agreements Act"), in its giving force to Article 24 of the Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion ("the NZ Convention"). Art 24(1) of the NZ Convention relevantly provides that nationals of one country shall not be subjected to taxation in the other country which would be more burdensome than the taxation to which local nationals would be subjected in the same circumstances, particularly with respect to residence. Art 24(7) of the NZ Convention provides that Art 24's provisions apply to taxes of every kind, including those imposed by the political subdivisions of each country.

On 20 February 2024, the Plaintiff (and another) commenced a representative proceeding in the Federal Court of Australia, the claims in which include restitution of the payments of LTS made by the Plaintiff and other absentee owners for 2018 and subsequent years ("the Restitution Claim").

On 8 April 2024, the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) ("the Cth Amendment Act") commenced. The Cth Amendment Act inserted s 5(3) into the Agreements Act and provides, in s 2 of Sch 1, that the new subsection applies in relation to taxes payable on or after 1 January 2018. Section 5(3) provides as follows:

> *The operation of a provision of an agreement provided for by subsection (1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law.*

LTS is not an "Australian tax" within the meaning of the Agreements Act.

On 4 December 2024, the *State Taxation Further Amendment Act 2024* (Vic) ("the Victoria Amendment Act") effected amendments which included the insertion of s 106A into the LTA and the insertion of s 135A into the *Taxation Administration Act 1997* (Vic). Those new provisions essentially provide that the imposition, assessment and payment of land tax purportedly payable on or after 1 January 2018 in circumstances such as those of the Plaintiff are all taken to have been valid, despite invalidity at the time by reason of s 109 of the *Constitution*.

In his present proceeding in this Court, the Plaintiff challenges the validity of s 2 of Sch 1 of the Cth Amendment Act and, alternatively, s 5(3) of the Agreements Act. This is on the grounds that the provisions impermissibly attempt to control the operation of s 109 of the *Constitution* and that they are beyond the legislative power prescribed in s 51(xxxi) of the *Constitution* (making laws for the acquisition of property on just terms) because, if valid, they would extinguish the Restitution Claim. The Plaintiff also challenges the validity of s 106A of the LTA on the ground of s 109 inconsistency, on the basis that s 5(1) of the Agreements Act operates unaffected by s 5(3), since the latter subsection is invalid.

In a special case, the parties have stated the following questions of law, which Justice Jagot referred for consideration by a Full Court:

(1) Prior to the commencement of the Cth Amendment Act on 8 April 2024, were the following provisions invalid or inoperative in their application to the Plaintiff, by force of s 109 of the *Constitution*, by reason of their inconsistency with Art 24(1) of the NZ Convention (to the extent that Art 24(1) is given legislative force by s 5(1) of the Agreements Act):

    a. ss 7, 8, 35 and cll 4.1 through 4.5 of Sch 1 to the LTA, to the extent that they imposed a legal liability or obligation on the Plaintiff to make the LTS Payments; or

    b. s 104B, to the extent that it required the Plaintiff to lodge the notice and documents referred to therein?

(2) If the answer to Question 1 is "yes", is s 5(3) of the Agreements Act (in its operation with cl 2 of Sch 1 to the Cth Amendment Act) valid or effective to remove that inconsistency and any consequent invalidity in relation to LTS Payments payable on or after 1 January 2018, having regard to *University of Wollongong v Metwally* (1984) 158 CLR 447?

(3) Is s 5(3) of the Agreements Act (in its operation with cl 2 of Sch 1 to the Cth Amendment Act) invalid in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, on the ground that it is a law with respect to the acquisition of the property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*?

(4) If the answer to Question 3 is "yes" or if Question 3 is unnecessary to answer, is s 106A of the LTA invalid or inoperative in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, by force of s 109 of the *Constitution*, by reason of its inconsistency with Art 24(1) of the NZ Convention (to the extent that Art 24(1) is given legislative force by s 5(1) of the Agreements Act)?

(5) What relief, if any, should be granted to the Plaintiff?

(6) Who should pay the costs of the special case?

The Plaintiff has filed a notice of a constitutional matter (and an amended notice, following an amended statement of claim). The Attorneys-General of New South Wales, South Australia and Western Australia are intervening in the proceedings.

CD & ANOR v DIRECTOR OF PUBLIC PROSECUTIONS (SA) & ANOR (A24/2024)

Court appealed from: Supreme Court of South Australia Court of Appeal [2024] SASCA 82

Date of judgment: 27 June 2024

Special leave granted: 7 November 2024

In November 2021, the appellants were jointly charged with participating in a criminal organisation contrary to section 83E(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") (Count 1), and with various firearms offences contrary to the *Firearms Act 2015* (SA) (Counts 2-5 and 8-15). The prosecution alleges that the appellants were senior members of the Comancheros Motorcycle Club, and also seeks a declaration under s 83G of the CLCA that the Comancheros Motorcycle Club is a criminal organisation for the purposes of s 83E. The issues in this appeal relate to the admissibility of evidence obtained by the Australian Federal Police ("AFP") of communications made through the use of an encrypted communications application called "AN0M" that had been installed on a number of mobile devices. The prosecution seeks to rely on the evidence of these communications.

An investigation named "Operation Ironside" was conducted by the AFP (together with overseas law enforcement authorities and later state police). The AFP received some twenty-eight million messages sent by users of mobile phones between October 2018 and June 2021, sent via the mobile phone application known as "AN0M". The AFP facilitated the development of the AN0M application and organised for phones enabled with AN0M to be distributed as part of Operation Ironside. The workings of AN0M were described by the Court of Appeal as follows:

"By way of overview, the AN0M platform operated so that, unbeknown to the users of the AN0M application, and without their consent, communications sent from AN0M-enabled devices were copied and sent to the servers able to be accessed by the AFP.

More particularly, the AN0M application installed on the AN0M-enabled devices operated so that when a user (User A) composed a message (or attached a photo or voice memo) in the AN0M application, and pressed the 'send' icon, or activated the 'trigger', for the message to be transmitted to the recipient user (User B), a separate second message was created in the AN0M application. The second message included a copy of the message from User A to User B, as well as some additional data retrieved from User A's device for law enforcement purposes.

Both messages were then encrypted and sent as separate messages over the telecommunications system via a server using the Extensible Messaging and Presence Protocol (XMPP). As User A intended, the first message would be sent, via an XMPP server, to User B. However, without the knowledge of Users A or B, the second message (a copy of the first message with the additional data) would be sent, via an XMPP server, to a server with the username 'bot@AN0M.one' (the iBot server).

The messages received by the iBot server were then re-transmitted to the servers in Sydney that were able to be accessed by the AFP. The AFP obtained these messages using retrieval software."

The appellants applied to the Supreme Court of South Australia, inter alia, to have the evidence of the communications excluded, as the evidence was obtained in breach of the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the TIAA") and no warrants under the TIAA had been obtained. Kimber J dismissed that application, finding that the AN0M application did not amount to an interception in breach of the TIAA. Kimber J later reserved a number of questions of law for consideration by the Court of Appeal. The Attorney-General of the Commonwealth (the second respondent) intervened before the Court of Appeal. The Court of Appeal held that that the use of the AN0M application and platform did not involve an interception of the AN0M communications in contravention of the TIAA and answered the questions accordingly.

Subsequent to the grant of special leave, the filing of the notice of appeal and the notice of contention by the second respondent, the *Surveillance Legislation (Confirmation of Application) Act 2024 (Cth)* received the Royal Assent on 10 December 2024. The validity of ss 5, 6 and 7 of that legislation is the subject of the related original jurisdiction matter *CD & Anor v. The Commonwealth of Australia* (A2/2025). In that matter, the parties have agreed a special case which has been referred to the Full Court for hearing together with this appeal. In this appeal, both respondents submit that as a result of the passing of this legislation special leave should be revoked. In any event, the respondents each contend that both Kimber J and the Court of Appeal were correct in their conclusion that the AN0M application did not intercept communications passing over a telecommunications system within the meaning of s 7(1) of the TIAA.

The grounds of appeal are:

1. The Court of Appeal erred in failing to find that:

    1.1 consistent with the requirements of s 5F(a) of the TIAA, having composed a text message and pressing "send" on a mobile phone (which is connected to a telecommunications system) is the start of the process for sending that message over that system;

    1.2 the covert copying of a text message and the covert transmission of that message upon the pressing of "send" on a mobile phone was an unlawful interception under ss 6(1) and 7(1) of the TIAA.

2. The Court of Appeal erred in its construction of the term "intended recipient" by finding that the AFP-designated recipient of the copy message, a computer or server identified as the "iBot", was an intended recipient within the terms of ss 5F(b) and 5G of the TIAA.

CD & ANOR v THE COMMONWEALTH OF AUSTRALIA (A2/2025)

Date Special Case referred to Full Court: 18 March 2025

The plaintiffs (who are the appellants in the related appeal A24/2024) were jointly charged in November 2021 with participating in a criminal organisation contrary to section 83E(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") (Count 1), and with various firearms offences contrary to the *Firearms Act 2015* (SA) (Counts 2-5 and 8-15). The prosecution seeks to rely on the evidence of certain communications collected by the Australian Federal Police ("AFP") during an investigation named "Operation Ironside".

The plaintiffs' application to the Supreme Court of South Australia, inter alia, to have the evidence of the communications excluded as the evidence was obtained in breach of the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the TIAA") was dismissed by Kimber J. Subsequently, Kimber J reserved a number of questions of law for consideration by the Court of Appeal. The Court of Appeal held that that the use of the "AN0M" application and platform did not involve an interception of the AN0M communications in contravention of the TIAA. The plaintiffs were granted special leave to appeal on 7 November 2024 and that appeal is the subject of the related matter *CD & Anor v. Director of Public Prosecutions (SA) & Anor* (A24/2024).

On 10 December 2024, the *Surveillance Legislation (Confirmation of Application) Act 2024 (Cth)* ("the Confirmation Act") received the Royal Assent. The intention of this legislation was in effect to confirm the conclusion and decision of the Court of Appeal. The plaintiffs then commenced proceedings in this Court, seeking to challenge the validity of ss 5, 6 and 7 of that legislation. The plaintiffs contend that the legislative declaration of fact in s 5(1) of the Confirmation Act, operating as it does as a new fact for the purposes of any proceeding, including extant proceedings where the facts in issue concern whether the elements of an interception under the TIAA are satisfied, removes the essential fact-finding function of the courts and is a legislative declaration quelling factual controversies, which is the hallmark of an exercise of judicial power. Consequently, it is an invalid exercise of legislative power.

The defendant submits that ss 5 and 6 do not declare any facts, nor direct the courts to find any fact; those sections ensure that particular legal grounds on which it could be argued that information or records are inadmissible do not apply. They are concerned with the legal characterisation of facts and they do not involve a purported exercise of judicial power.

The parties have agreed a special case and on 18 March 2025, Chief Justice Gageler referred the special case to the Full Court for hearing together with the related appeal.

The plaintiffs have filed a notice of a constitutional matter. The Attorneys-General for New South Wales, Western Australia and Victoria are intervening in this proceeding. The Director of Public Prosecutions (SA) also seeks leave to intervene. The questions referred in the special case are:

(1) Is the Confirmation Act invalid, either in whole or in part, because:

(a) it is an impermissible exercise by the Parliament of the judicial power of the Commonwealth; or

(b) it impermissibly interferes with and undermines the institutional integrity of courts vested with federal jurisdiction?

(2) Who should pay the costs of the Special Case?

HUNT LEATHER PTY LTD ACN 000745960 & ANOR v TRANSPORT FOR NSW (S20/2025)
HUNT LEATHER PTY LTD ABN 46000745960 & ORS v TRANSPORT FOR NSW ABN 18804239602 (S21/2025)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2024] NSWCA 227

Date of judgment: 18 September 2024

Special leave granted: 6 February 2025

Two related appeals have been brought against the judgment of the Court of Appeal of the Supreme Court of New South Wales, arising out of representative proceedings pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW). The proceedings were commenced on behalf of persons said to be affected by the construction of the Sydney Light Rail ("SLR") between Circular Quay and Randwick/Kingsford. The four lead plaintiffs are a luxury retail leather goods business and its CEO, and the trustee of a unit trust that operates a restaurant business and its sole director. The group members were defined by reference to causes of action in private and public nuisance. The action for public nuisance failed and there is no appeal from that part of the judgment.

The respondent is a statutory corporation responsible for planning the construction of the SLR. The respondent engaged a contractor to commence construction under a Project Deed, which was divided into stages, or "fee zones", to be completed by agreed times as set out in an Initial Delivery Program ("IDP", which was later amended) to minimise disruption. Construction for each fee zone took longer than expected and the appellants' use of the land was impacted.

The primary judge (Cavanagh J) upheld the claims in private nuisance and found that the construction of the light rail was not a common and ordinary use of land, and caused a substantial interference with the amenity and use of the land. The primary judge also found that the respondent's occupation of the rail corridor was not tortious from the outset, but became a nuisance at the point at which delays in the project meant that the interference ceased to be reasonable. The primary judge awarded damages for a lesser period consistent with the amended IDP and reflected the point when it was no longer reasonable to expect the appellants as adjoining business operators to put up with the construction activity. Separately, the primary judge dismissed the appellants' claim that the damages should include the 40% commission they were liable to pay to a litigation funder, holding that the commission was not recoverable as damages.

The respondent challenged the finding that the appellants suffered an interference which was both substantial and unreasonable to the Court of Appeal. By cross-appeal, the appellants sought to establish that the litigation funder's commission was a loss to the appellants for which damages for nuisance should account. The Court of Appeal unanimously allowed the appeal and overturned the decision at first instance, while dismissing the cross-appeal. Although the Court of Appeal confirmed the primary judge's findings that the light rail construction was not a common and ordinary use of the land, and that the respondent failed to prove either inevitable consequence or that it acted with reasonable care, the Court of Appeal found that: 1) no actionable nuisance had been established

because there was insufficient evidence to show that there was a form of pre-construction investigation which would have temporarily reduced the interference with the appellants' enjoyment of their land; and 2) the 40% commission is a fee not to be regarded as a foreseeable loss caused by the nuisance, but instead as a voluntary act of the appellants.

The appellants appeal to this Court, submitting that the Court of Appeal has departed from long established principles and settled authority that set out private nuisance as being substantial interference with a party's enjoyment of land caused by a use of the land by another party which is neither common nor ordinary; where there is no separate onus on a party to demonstrate that the use of the land by the other party is unreasonable. To introduce a free-standing generalised requirement of "unreasonableness" to the law of private nuisance is to apply a new test of uncertain scope blurring the boundaries between nuisance and negligence. The appellants submit that having found that the respondent had not established that it had taken all reasonable precautions to minimise interference with businesses and residents, the Court of Appeal should have found actionable nuisance for the entire construction period. Separately, the appellants entered into litigation funding agreements by which they assigned 40% of the proceeds of any judgment in their favour to a litigation funder. The appellants contend that the purpose of an award of damages in tort is to compensate a party for the loss suffered by reason of the tort, and where a party suffers loss from a nuisance, that party is entitled to full restitution for the loss. Applying these basic principles, the appellants' reasonable litigation funding costs ought to have been held to be recoverable damages, as anything less would significantly undercompensate the appellants for the wrongs they have suffered.

The respondent rejects the appellants' submissions, relying on the planning law scheme that regulated construction of the SLR, and submits that the central problem with the appellants' claims is that they "failed to prove a critical integer of their case" in that they did not provide a factual basis to conclude when, if ever, a prima facie legitimate activity such as construction of the SLR, began to give rise to an unreasonable interference with the use and enjoyment of their land. The respondent has filed a notice of contention submitting that the construction of the SLR and the resulting interference amounted to a common and ordinary use of the land duly authorised by statute and development approvals.

The grounds of appeal are that the Court of Appeal erred:

(1) In holding that the substantial interference to the appellants caused by the respondent's uncommon and extraordinary use of land along the light rail route was not sufficient to establish actionable private nuisance.

(2) In the alternative to ground 1, in holding that the appellants had not established that the respondent's use of the land was unreasonable.

(3) In holding that the appellants were not entitled to recover by way of damages an amount of reasonable commission payable to their litigation funder.