

JUDICIAL IMMUNITY – MORAL RIGHTS: INTERFACE

Ogawa v Spender [2006] FCAFC 68

The appeal

This was an appeal against the decision of Mullins J of the Supreme Court of Queensland in this matter. Her Honour had dismissed an application by the appellant (Ms Ogawa), who claimed infringement of her moral rights and had applied for an injunction against the respondent (Spender J), pursuant to s 195AZA(1)(a) of the *Copyright Act 1968* (Cth) (the *Copyright Act*).

Her Honour also ordered costs against Ms Ogawa on an indemnity basis. An appeal to the Federal Court of Australia was provided for in s 195AZC(3)(a) of the *Copyright Act*.

The matter before the full court of the Federal Court was heard on the papers. Ms Ogawa had unsuccessfully sought to have the hearing adjourned on two occasions and did not attend the hearing nor did she file any written submissions on her own behalf.

The substantive claim

The appeal stemmed from a proceeding commenced in the Federal Court by Ms Ogawa against the Secretary of the Department of Education, Science and Training for relief pursuant to the *Administrative Decisions (Judicial Review) Act 1997* (Cth).

The proceeding was heard by Dowsett J who dismissed the application: See *Ogawa v Secretary, Department of Education, Science and Training* [2005] FCA 1472. Subsequently, Ms Ogawa filed a notice of motion in which she sought to *inter alia*, obtain leave to appeal the decision of Dowsett J. As Ms Ogawa did not appear on the return date allotted for the motion, Spender J dismissed it for non-prosecution: See *Ogawa v Secretary, Department of Education, Science and Training* [2005] FCA1650.

Ms Ogawa's emails

The essence of the injunctive relief sought by Ms Ogawa through the Supreme Court of Queensland, lay in respect of references, which Spender J made in his reasons for dismissing the motion, to certain emails sent by Ms Ogawa to the District Registrar of the Queensland Registry of the Federal Court and to the Chief Justice, respectively (See *Ogawa v Secretary, Department of Education, Science and Training* [2005] FCA1650 at [5]). The fact that Ms Ogawa authored the emails was not in issue.

The full court relevantly said at [5]:

In the course of his reasons Spender J set out the contents of two emails the appellant had sent to the Court. The first was to the District Registrar requesting an adjournment of her notice of motion on grounds which included the fact that

the Court had refused to provide her with an interpreter. The Registrar replied to the email, informing the appellant that her request had been referred to the Judge who was to hear the motion. The Registrar later advised her that she should apply for any adjournment on 15 November 2005, when the motion was listed for hearing. The second email was to the Chief Justice seeking a direction that the Queensland Registry arrange an interpreter for her.

The complaint

The full court identified that the basis of Ms Ogawa's claim for injunctive relief, was reflected in the material filed in support of her application for injunctive relief.

The basis for the appellant's claim to an injunction against the respondent does not appear from her originating application in the Supreme Court. However paragraph 24 of her affidavit in support states:

I request this Honourable Court to make an order that the Respondent be refrained from using my email to the Chief Justice. I wish my email to the Chief Justice to be removed from the Respondent's judgment, or if this is not possible, then access to and reproduction and publication of that part of the judgment ... which contains my email to the Chief Justice be prohibited. I wish this restriction to be applied to everyone including those who already have access to the judgment including the other side. ... If any of the abovementioned relief cannot be granted, I request, in the alternative, a declaration that the Respondent infringed my moral right.

Their Honours of the full court concluded:

It appears from the judgment of the primary judge that the appellant does not complain about the dismissal of her motion by Spender J. Rather her complaint is about his Honour's reproduction of the email to the Chief Justice. She wants it recalled from the Internet on the basis that it was irrelevant to the decision and a breach of her moral rights as an author.

Did protection for reproduction in litigation under the Copyright Act extend to moral rights?

The *Copyright Act* relevantly provides in Part III:

s 43(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.

Their Honours referred to Ms Ogawa's construction of the interphase between judicial immunity, s 43(1) of the *Copyright Act* and moral rights provided for in Part IX of the *Copyright Act* in the following terms:

The appellant contended that s 43(1) provides judicial immunity in respect of copyright under s 32 ("Original works in which copyright subsists"), but not in respect of moral rights under Part IX. Accordingly, judicial immunity was not available to the respondent as a defence to her proceeding.

The full court at [13], referred to the primary judgment rejecting that argument:

The primary judge did not accept the appellant's argument that because Part IX of the Act did not contain a provision equivalent to s 43(1), judicial immunity is not a defence to an action under that Part. Her Honour went on to uphold the defence:

I am satisfied that in dealing with the notice of motion ... Justice Spender ... was exercising jurisdiction vested in him as a Judge of the Federal Court. As a result of referring to the email correspondence that he referred to in the course of his reasons, he has the benefit of judicial immunity and cannot be pursued by Ms Ogawa for any infringement of moral rights under the Copyright Act.

The determination of the full court

The full court considered that there was no error by Mullins J in the rejection of Ms Ogawa's construction of the relevant provisions (or the omission thereof) in Part III and Part IX of the *Copyright Act*. The full court considered that immunity afforded by s 43(1) was one for the benefit of parties, their advisers and those associated with a proceeding, rather than for the decision maker:

In our view no error has been shown in the primary judge's rejection of the appellant's contention based on s 43(1). That sub-section does not purport to reflect the judicial immunity doctrine. So far as presently material, it affords protection to those who reproduce works for the purposes of a judicial proceeding. The expression "judicial proceeding" is defined in s 10 as "a proceeding before a court, tribunal or person having by law power to hear, receive and examine evidence on oath": (the reasons at [15]).

Basis of determination

The full court considered that the comments of their Honours of the High Court in *Re East: Ex parte Nguyen* (1998) 196 CLR 354, reflected a consideration which fortified their view. Specifically:

- Their Honours Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, in their joint reasons stated at [30]:

First, there is a well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity. There is nothing in the Act which suggests that it was the intention of the Parliament to override that immunity.

- his Kirby J at [80] observed in relation to the *Racial Discrimination Act 1975* (Cth):

when the Act was enacted the Parliament would have been well aware of the importance of the independence of judicial officers and of their immunity from personal suit or other proceedings in respect of conduct performed judicially. If it had been the object of the Parliament to render such conduct, in a particular case, unlawful, well established principle would require that the Parliament should say so expressly.

By analogy, the full court considered that if parliament sought to depart from that understanding, it would have in the case of Part IX of the *Copyright Act* made specific reference to the potential exposure of the court in the case of moral rights.

In further support of their decision, the full court referred to certain copyright texts and to UK legislation in determining, that there was nothing to indicate that s 43(1) of the *Copyright Act* (or its equivalents), were for, or included protection of the court itself.

The court referred to the statement of the common law principle of judicial immunity as recently stated by Gleeson CJ in *Fingleton v The Queen* (2005) 216 ALR 474 where the Chief Justice said at [38] – [39]:

*This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. ...
... the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.*

The full court then dealt with a number of Ms Ogawa's contentions that this immunity was not available to Spender J and concluded that appeal should be dismissed with costs.