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Lawyers acting for government not potentially liable for misfeasance in public office

This *Express Law* considers the recent decision of the New South Wales Court of Appeal in *Leerdam v Noori* [2009] NSWCA 90 (1 May 2009). The case has resolved some uncertainties in relation to the tort of misfeasance in public office and abuse of process committed during an administrative review, and, in particular, the potential liability of lawyers acting for government.

These issues will be relevant to Australian Government departments and agencies involved in administrative review proceedings and to in-house and external lawyers who act in such proceedings.

Background

The plaintiff applied for a protection visa under the *Migration Act 1958* (Cth), but his application was denied. He was informed that his application was denied because there were serious reasons for considering that he had engaged in disentitling conduct within the meaning of Article 1F of the 1951 *Convention Relating to the Status of Refugees*.

The plaintiff applied to the Administrative Appeals Tribunal (AAT) to have the decision reviewed.

Before the Administrative Appeals Tribunal

In the course of the proceedings the AAT made an order that the Minister provide full particulars of the precise conduct relied upon as disentitling conduct. These particulars were not provided prior to the hearing.

Further, when the issue of the particulars was addressed at the hearing, the plaintiff and his lawyer were asked to remain outside the hearing room without, the plaintiff alleged, the steps set out in s 35 of the *Administrative Appeals Tribunal Act 1975* (concerning a hearing at which neither the plaintiff nor his solicitor are present) being taken.

The order requiring the provision of full particulars of the alleged disentitling conduct was not vacated or varied, but the plaintiff was not provided with any further details of the alleged disentitling conduct or a summary of what had occurred whilst he was excluded from the hearing. The plaintiff claimed this prevented him from being able to answer the case against him. The AAT affirmed the decision of the Minister to refuse the protection visa. The plaintiff appealed the decision to the Federal Court.

Before the Federal Court

The Federal Court quashed the decision of the AAT on the basis that the plaintiff had been denied procedural fairness, and remitted the matter to the AAT for rehearing.

Rehearing before the Administrative Appeals Tribunal

During the rehearing, adequate particulars were provided to the plaintiff and he was able to respond to these allegations.

On 14 October 2005 the AAT concluded that there were no serious reasons for considering that the plaintiff had engaged in any disentitling conduct. The plaintiff was released, six years after initially being detained, on 31 January 2006.

Common law proceedings in NSW Supreme Court

The plaintiff then commenced common law proceedings in the NSW Supreme Court against the Minister, the Commonwealth and the Minister's legal representatives in the AAT proceedings (the Minister's previous lawyers) alleging, amongst other things, that the tort of misfeasance in public office and abuse of process had been committed.

The plaintiff claimed that, if he had not been denied natural justice, his application to the AAT would have succeeded. He also claimed that the failure to accord him natural justice caused him to remain in immigration detention from 2001 to the time of the award of the protection visa in 2006.

The Minister's previous lawyers sought to strike out the claim against them. But, in an interlocutory judgement of the New South Wales Supreme Court, Smart AJ found that the plaintiff had advanced a reasonably arguable case of misfeasance in public office and abuse of process against the lawyer from a private law firm representing the then Minister for Immigration (see [2008] NSWSC 515). The Minister's previous lawyers appealed from this decision.

The decision of the NSW Court of Appeal

Misfeasance in public office

The central issue relating to the misfeasance in public office claim raised by the strike-out application was whether or not the lawyer could be deemed to be a public officer.

The Minister's previous lawyers argued that the lawyer was only discharging his duty as a legal representative of the Minister and that simply receiving instructions from a public officer does not make the recipient of such instructions a public officer. Smart AJ had refused to strike out the assertion in the pleading of the claim that the solicitor was exercising a public office.

The Court of Appeal disagreed, holding that the Minister's previous lawyers, in representing the Minister before the AAT, were only assisting the Minister as a respondent to the review being conducted by the AAT. This did not involve doing anything in the occupation of a public office. Spigelman CJ said at para [21]:

> The [Immigration] Minister played no role in the proceedings before this Court and it would be inappropriate to determine if the Minister owed a public duty of the character for which the [plaintiff] contends ... Assuming that there was such a duty, in my opinion, the legal representative held no 'public office' for the purpose of the tort of misfeasance in public office because this role was not, of itself, the performance of a public function, ie, it involved neither the exercise of a public function nor the discharge of a public duty. The position of the solicitor or his firm could not be characterised as a 'public office'.

The Court of Appeal held that the fact that the Minister's previous lawyers bore public duties in representing the Minister did not render their role in effect as one of occupying a public office. Spigelman CJ said at paras [25] and [26]:

> In any event, it is not appropriate to describe the duties of a solicitor representing a party as 'public duties' for the purpose of characterisation of the position held by the solicitor as a 'public office'. Similarly, the existence of a power, albeit not an express power but a power in the sense of a capacity to act relevantly with respect to the answer for particulars etc, does not involve a capacity or authority of any character capable of characterising the position of the person as a 'public office'.
>
> In my opinion, a solicitor acting in proceedings, albeit proceedings concerned with the exercise of a public power or the discharge of public duty, does not occupy a position within the scope of the tort of misfeasance of public office.

Allsop P said, with respect to the professional and ethical duties borne by a solicitor representing a party to proceedings, at para [53]:

> Without limiting the importance of these duties, it is, however, a misapprehension of their character to say that they are transmogrified into governmental or executive or public duties if the lawyer is retained to act for the Executive in one of its manifestations.

Abuse of process

The second cause of action relied upon by the plaintiff was abuse of process. Abuse of process is concerned with the use of the process of the court for a dominant purpose which is illegitimate. The criterion is whether the improper purpose is the predominant purpose of the moving party.

The Minister's previous lawyers submitted that they could not be liable for an abuse of process because the tort only applied to parties to a litigation. Smart AJ had held that it is possible for an action for abuse of process to be available against a non-party to proceedings but acknowledged that these instances will be rare.

Smart AJ also rejected submissions put forward by the Minister's previous lawyers that there was no case against them because the plaintiff had failed to identify any advantage they would gain as a result of his alleged conduct. His Honour suggested that it was sufficient that they were advantaged by preventing the applicant from mounting an effective defence to the Minister's case.

The Court of Appeal disagreed, following the decision of the Full Court of the Federal Court in *Emanuele v Hedley* [1998] FCA 709 (19 June 1998), in which it was held that only the person who had instituted the proceeding could be liable under the tort. Here, neither the Minister nor his previous lawyers had instituted any relevant proceeding. Accordingly, the claim was dismissed.

Obligations of the Commonwealth to assist the AAT

Allsop P also made some comments on the position of the Minister which strongly underscore the foundation of the model litigation obligation under the *Legal Services Directions 2005* (see para 4.2 and Appendix B), particularly with respect to Ministers and agencies functioning as respondents in judicial review and merits review proceedings. His Honour said in this connection at paras [62] and [63]:

> It suffices to say that it is highly debatable whether the Minister owed a duty to afford procedural fairness to the applicant in a review of his decision that had been instituted under the AAT Act and was under the control of the Tribunal.
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> This is not to say that inhering in the Executive power in conducting him or herself in the review a Minister would not have duties of a kind as was discussed by Mahoney J (as he then was) in *P & C Cantarella Pty Ltd v State Egg Marketing Board of New South Wales* [1972] NSWLR 366 at 383-384. The duty of the

Executive to assist a court to 'arrive at the proper and just result', might be seen to be mirrored by a duty to assist another agent of the Executive with statutory powers of review to reach the proper and just result. This may be seen as part of the duty of every Minister of the Crown to the Sovereign to perform his or her functions honestly and fairly and to best of his or her ability: Lord Greene MR in *B. Johnson and Company (Builders) Limited v Minister for Health* [1947] 177 TLR 444 at 449 cited by Williams J in *Australian Communist Party v Commonwealth* [1951] HCA 5 (1951) 83 CLR 1 at 221-222.

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