

Cake making and religious freedom

By Todd Marskell

Introduction

Over a four month period in 2018 the Supreme Courts of both the United States and the United Kingdom delivered judgments dealing with issues said to arise from an incompatibility between anti-discrimination legislation and genuinely held religious beliefs.

The Supreme Court of the United Kingdom delivered its judgment in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 on 10 October 2018, the case having been heard on 1 and 2 May 2018.

The Supreme Court of the United States issued its opinion in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 138 S. Ct. 1719 (2018) on 4 June 2018, the case having been argued on 5 December 2017.

Both cases arose from similar circumstances, namely the refusal by cake makers in Northern Ireland and Colorado to supply cakes to their respective customers. In the UK, the reason for refusing to make the cake was the request that it contain a statement in support of gay marriage and, in the US, the reason was that the cake had been made known to be for consumption at a gay marriage ceremony.

The facts of both cases are uncomplicated.

The decision in the US involved a bakery called the Masterpiece Cakeshop located in Colorado. In 2012, a same sex couple (Craig and Mullins) and the mother of Craig entered the shop seeking to purchase a cake with Craig and Mullins informing the owner (Mr Phillips) it was for 'their wedding'. The owner informed the couple he would make other forms of baked goods for them but not a cake for a same sex wedding.

The mother of Craig spoke with Mr Phillips by telephone the next day asking why he would not provide a wedding cake and Mr Phillips explained his opposition was on religious grounds and also because, at that time, Colorado did not recognise same sex marriage.

The decision in the UK involved Ashers Baking Company Limited (Ashers) which was owned and operated by the McArthur



family in Belfast, Northern Ireland.

On 8 or 9 May 2014, Mr Lee, who as a gay man, sought to purchase a cake from Ashers which was iced with images of Bert and Ernie from *Sesame Street*, the logo of an organisation called 'QueerSpace' and the words 'Support Gay Marriage'. Mr Lee was to attend an event organised by QueerSpace to mark the end of anti-homophobia week in Northern Ireland and the political momentum gathering towards same sex marriage and wished to take a cake along.

Mrs McArthur said nothing at the time but later spoke with Mr Lee by telephone and informed him that his order could not be met, apologised and provided a full refund while also returning the image to be iced on the cake.

The legislation

The *Colorado Anti-Discrimination Act* (CADA) provided:

It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from or deny to an individual or group, because of disability, race creed, color sex, sexual orientation, marital status, national origin or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

The term 'public accommodation' was defined to include a place of business engaged in sales to the public.

It will be observed that no reference is

made in the CADA to religion. This is because the First Amendment to the US Constitution (the Bill of Rights is contained in the first ten amendments), also referred to as the 'free exercise clause' provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The CADA was subject to the First Amendment by reason of section 1 of the Fourteenth Amendment (also called the 'equal protection' clause) which relevantly provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The decision of the US Supreme Court turned on the conflict between the First Amendment and the CADA.

In Northern Ireland, the *Fair Employment and Treatment (Northern Ireland) Order 1998* was made under the *Northern Ireland Act 1974* and prohibited discrimination in the provision of goods, facilities or services on the ground of religious belief or political opinion. The *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* was made under the *Equality Act 2006* and prohibited the discrimination in the provision of goods, facilities or services on grounds of sexual orientation.

Articles 9(1) and (2) European Conven-

tion on Human Rights were also considered by the Supreme Court of the United Kingdom, with article 9(1) providing:

Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in the community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9(2) allowed limitations to the freedom to manifest one's religions or beliefs but not on the freedom to hold them.

The course of the litigation

In the US, the procedural history involved the following:

- (a) a complaint was made to Colorado Civil Rights Division which proceeded to investigate the matter;
- (b) having investigated and found probable cause, the Colorado Civil Rights Division referred the matter to the Colorado Civil Rights Commission;
- (c) the Colorado Civil Rights Commission then initiated a formal hearing before an Administrative Law Judge who issued a decision; and
- (d) this decision was then appealed to a seven member body constituting the full Colorado Civil Rights Commission with a public hearing and deliberative session held followed by a vote.

It was before the Administrative Law Judge that Mr Phillips first raised the constitutional point argued before the Supreme Court. The Administrative Law Judge ruled that Mr Phillips contravened the CADA and rejected the argument that the CADA was inconsistent with the principle of religious freedom provided by the First Amendment.

This ruling was affirmed by the full Colorado Civil Rights Commission. An appeal to the Colorado Court of Appeal affirmed the decision of the Colorado Civil Rights Commission. The Colorado Supreme Court declined to hear the case.

The procedural history is significant in that it included an event which was dispositive of the appeal before the US Supreme Court.

During the formal hearing before the Colorado Civil Rights Commission, one commissioner stated that freedom of religion and religion 'has been used throughout his-



The US cake shop now has this disclaimer on their website:-

'Masterpiece Cakeshop will happily create custom cakes for anyone. But like many cake artists, Jack cannot create all custom cakes. He cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs.'

tory, whether it be slavery, whether it be the holocaust, whatever it be – I mean, we-we can list hundreds of situations where freedom or religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to-to use their religion to hurt others.'

Returning to the UK, Mr Lee made a complaint to the Equality Commission for Northern Ireland (ECNI). With the support of the ECNI, Mr Lee brought a claim against Ashers in the District Court. The District Court held that Ashers had engaged in direct discrimination and Mr Lee was awarded damages of £500.

Ashers appealed to the Court of Appeal, which dismissed that appeal in October 2016.

The Attorney General sought to have the Court of Appeal refer the matter to the Supreme Court on two issues but the Court of Appeal concluded the Attorney General had no power to do so as the proceedings had ended. As part of its judgment, the Supreme Court resolved this jurisdictional issue, permitting the appeal before the Supreme Court to be determined on the merits, with Lord Mance writing a judgment on this issue with whom all members of the Court agreed.

In both cases, the *bona fides* of the religious

beliefs of the relevant individuals was not the subject of challenge.

The outcome

It is convenient to deal first with the decision of the UK Supreme Court, even though it came later in time.

The judgment on the substantive issue was written by Lady Hale (with whom the other members of the Supreme Court agreed). As described by Lady Hale at [1], the substantive question in the case was 'whether it is unlawful discrimination, either on grounds of sexual orientation, or on grounds of religious belief or political opinion, for a bakery to refuse to supply a cake iced with the message 'support gay marriage' because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God'.

As to the first ground (concerning sexual orientation), the Supreme Court characterised Ashers' objection to baking the cake as one directed 'to the message, not the messenger' (at [22]), in that '[a]nyone who wanted that message would have been treated in the same way' (at [23]). Therefore, the Supreme Court held that since 'the objection was to the message and not to any particular person or persons ... there was no discrimination on grounds of sexual orientation in this case' (at [34]-[35]).

An argument of associative discrimination was rejected on the basis there was no finding that Ashers refused to supply a cake to Mr Lee because he associated with gay people.

The Supreme Court held further that a denial of service because of someone's race, gender, disability, sexual orientation or any other 'protected characteristic' did not occur in this case and 'it does the project of equal treatment no favours to seek to extend it beyond its proper scope' (at [35]).

The ground based on political beliefs also was rejected (at [45]) on the basis the prohibition under the relevant legislation must be in respect of the religious belief or political opinion of someone other than the person said to be engaged in discriminatory conduct. In other words, the protected characteristic was the religious beliefs of the McArthurs, not the consequences of such beliefs as regards Mr Lee who did not hold similar beliefs.

The Supreme Court also noted (at [47]) that the answer to the claim based on political beliefs may, like the claim based on sexual discrimination, also be that there was no less favourable treatment on this ground because anyone else would have been treated the

same way and 'the less favourable treatment was afforded to the message' and not to the individual.

As to the European Convention on Human Rights, there were two issues. The first issue was the effect that Convention had on the legislation prohibiting discrimination based on religious or political beliefs. The Supreme Court held (at [56]) that the relevant legislation should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree unless justification is shown for doing so. The Supreme Court earlier noted (at [50]) that 'obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights'.

A second issue was whether the company (Ashers) could be liable where the McArthurs were not. The Supreme Court rejected that proposition stating (at [57]) that to hold the company liable when the McArthurs were not 'would effectively negate their convention rights' and that in so holding that the company was not liable, the Court was not holding that the company has rights under article 9 but, rather 'it is upholding the rights of the McArthurs under that article'.

By reason of the Supreme Court's decision, an additional issue as to the validity of the applicable legislation and whether both pieces of legislation should be read down due to their incompatibility with articles 9 and 10 of the European Convention on Human Rights did not need to be decided.

The Supreme Court referred to *Masterpiece* in a postscript. The Supreme Court noted the factual differences between the two cases. It stated (at [62]) that the 'important message' from *Masterpiece* 'is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics'. The Supreme Court reiterated that 'in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics'. Thus, there was no discrimination on grounds of sexual orientation.

This suggests that the UK Supreme Court may have taken a different view if the refusal to bake the cake was by reason of the characteristics of a particular customer. If that is so, the issue unresolved by the Supreme Court as to whether the applicable legislation should be read down due to incompatibility with the



European Convention on Human Rights may have arisen for determination.

The opinion of the US Supreme Court in *Masterpiece* was delivered by Justice Kennedy with whom Justices Kagan, Gorsuch, Alito and Thomas joined, with concurring opinions filed by Justices Kagan, Gorsuch and Thomas, those concurring opinions joined by other members of the Court. The dissenting opinion was issued by Justice Ginsburg with whom Justice Sotomayor joined.

The Supreme Court determined the case on narrow grounds. The Court held that the Colorado Civil Rights Commission did not employ religious neutrality, thus violating Mr Phillips' right, guaranteed by the First Amendment, to the free exercise of religion. The dispositive error was the Commission acting in a 'manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices' in violation of the First Amendment (at 1731) such that 'the Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral towards religion' (at 1732). The relevant conduct of the Colorado Civil Rights Commission was the statement to which reference has been made above. A point to which Justice Kennedy noted (at 1731) was that the First Amendment bars even 'subtle departures from neutrality'.

Justice Kennedy also referred to instances where the Commission had treated conscience-based objections to the provisions of cakes as legitimate, that having occurred where the cake-maker considered the proposed text to be hateful or derogatory. Justice Kennedy said that in acting in such a manner, the Commission acted in contravention of the principle that a difference in treatment 'cannot be based on the government's own assessment of offensiveness' (at 1731).

The Supreme Court therefore held that when the Colorado Civil Rights Commission considered the complaint in that case, 'it did not do so with the religious neutrality that the Constitution requires' (at 1724).

In so holding that there was a contravention of the First Amendment by the Commission, the Supreme Court was not required to consider the broader question of how to resolve

a case which raises the intersection between anti-discrimination laws, the free exercise of religion and freedom of speech.

A sense of the competing views can be seen in the concurring opinion of Justice Thomas and the dissenting opinion of Justice Ginsburg. Justice Thomas, who considered that the issue of freedom of speech also arose in the case, said that because the Court's decision 'vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day'. However, 'in future cases, the freedom of speech could be essential to preventing *Obergefell v Hodges* 135 S.Ct. 2584 (2015) from being used to 'stamp out every vestige of dissent' and 'vilify Americans who are unwilling to assent to the new orthodoxy'.

Justice Ginsburg, while not discounting the hostility of the Colorado Civil Rights Commission towards Mr Phillips' religious beliefs, considered that that matter should not overcome Mr Phillips' refusal to sell the wedding cake, with her Honour also noting that the proceeding 'involved several layers of independent decision-making, of which the Commission was but one' (at 1751).

Justice Ginsburg also drew a point of factual distinction between the situation in *Masterpiece* and other instances of conscience-based refusal to sell cakes such as those refusals which occurred where the proposed message was known and bakeries would not sell a cake with that message to any customer (at 1750). In that regard, her Honour's comments appeared broadly consistent with the approach taken by the UK Supreme Court in *Lee*.

Application to Australia?

The High Court has not yet had to consider an analogous case following the passing of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). If a case does arise, it is doubtful that the decision in *Masterpiece* will be of particular relevance, as it was determined based on the US Supreme Court's conclusion that the Colorado Civil Rights Commission had not afforded Mr Phillips religious neutrality as required by the First Amendment. However, depending on the specific facts, the decision in *Lee* may be relevant. This is because the UK Supreme Court's decision did not turn on the applicability of the European Convention on Human Rights but, rather, the manner in which Ashers' objection to baking the cake was to be characterised.