

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**FEBRUARY 2023**

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## **BA v THE KING (S101/2022)**

Court appealed from: Court of Criminal Appeal of the Supreme Court of  
New South Wales  
[2021] NSWCA 337

Date of judgment: 20 August 2021

Special leave granted: 17 June 2022

BA and his former partner (“the Complainant”) were named as the tenants in an agreement (“the lease”) governed by the *Residential Tenancies Act 2010* (NSW) (“the RT Act”), for their occupation of an apartment in which they resided. BA moved out of the apartment following the breakdown of the relationship. Early one morning BA returned to the apartment to collect a few remaining items. The front door was locked by three locks. After screaming at the Complainant to let him in, BA kicked the door open, causing damage to the wooden doorframe. Once inside, BA grabbed the Complainant by her shoulders and shook her and yelled at her.

BA subsequently stood trial on a charge of breaking and entering, with the commission of intimidation in the aggravating circumstance of the use of corporal violence, under s 112 of the *Crimes Act 1900* (NSW) (“the Crimes Act”). At the close of the Crown case against him, BA’s counsel applied for a directed verdict of not guilty. This was on the basis that the Crown had not established an essential precondition to liability for the charged offence, namely, that BA lacked a legal right to enter the apartment. Judge Williams granted the application and BA was acquitted. His Honour held that despite BA having forcibly entered the apartment, BA could not have committed a “break” because he had a contractual right to enter the premises as a tenant under the lease.

An appeal by the Crown was unanimously allowed by the Court of Criminal Appeal (“CCA”) (Brereton JA, Fullerton and Adamson JJ), which quashed the acquittal and ordered a retrial of BA. Brereton JA and Fullerton J each did so on the basis that the focus of s 112 of the Crimes Act was the protection of the security of the occupant of premises. The legal entry of residential premises by any person, including one who has a contractual or other right of occupancy, requires the express or implied consent of any person in occupation of the premises at the time. It was a lack of consent of the Complainant which the Crown was obliged to prove in BA’s case.

Adamson J found that a tenant’s entry of premises obtained by the use of damaging force would breach s 51(1)(d) of the RT Act, which prohibits a tenant from intentionally or negligently causing damage to the leased premises. Her Honour held that BA’s entry of the apartment was therefore unauthorised on that basis, and that Judge Williams consequently had erred by holding that BA could not have committed a “break”.

The sole ground of appeal is:

- The CCA erred in concluding that there should not have been a directed acquittal for the offence against s 112(2) of the Crimes Act.

The Respondent seeks leave to file out of time a notice of contention, by which it seeks to raise the following ground:

- BA did not have a right to break and enter the apartment in the manner that he did so as to negate a “break” for the purpose of s 112(2) of the Crimes Act, because that conduct exceeded the scope of the authority conferred upon him by the landlord and reflected in s 51(1)(d) of the RT Act.

## **VUNILAGI v THE QUEEN & ANOR (C13/2022)**

Court appealed from: Court of Appeal of the Supreme Court of the  
Australian Capital Territory  
[2021] ACTCA 12

Date of judgment: 9 November 2021

Special leave granted: 17 June 2022

In 2020, the Appellant and three other men were jointly tried in the Supreme Court of the Australian Capital Territory (“the Court”) on various charges of sexual intercourse with, and acts of indecency on, a woman without her consent, being offences prescribed in the *Crimes Act 1900* (ACT). The trial was impacted by the COVID-19 pandemic.

On 8 April 2020, amendments made to the *Supreme Court Act 1933* (ACT) (“the SC Act”) included the insertion of s 68BA, which related to what it defined as “the COVID-19 emergency period” from 16 March until 31 December 2020. That section provided that where the trial of a criminal proceeding was to be conducted in the emergency period, the Court may order that the proceeding be tried by a judge alone, after giving notice to the parties and inviting submissions on the proposed course. The power to make such an order was given in s 68BA(3), which required the Court first to be satisfied that the order would ensure the orderly and expeditious discharge of the Court’s business, and that it was otherwise in the interests of justice (“the Conditions”).

In May 2020, the Court took the view that jury trials would not be feasible for some time in matters involving multiple accused, and on 18 June 2020, the Court gave notice under s 68BA(4) to the Appellant, to the co-accused and to the Crown.

On 9 July 2020, s 68BA was repealed. Transitional provisions inserted into the SC Act (ss 115-117) however had the effect that where notice had been given before 9 July 2020, the Court could still make an order under s 68BA after that date.

At a hearing on 13 August 2022 before the trial judge, Murrell CJ, both the Appellant (who was on bail) and the Crown opposed a judge-alone trial, whereas the three co-accused (who were all incarcerated) supported the making of an order under s 68BA. Murrell CJ proceeded to make such an order, after considering various practical constraints (including the need for jurors to socially distance) which militated against a jury trial, and after finding that it was otherwise in the interests of justice that the trial proceed before a judge alone, rather than be delayed until such time as a trial before a jury might be conducted.

Murrell CJ subsequently found the Appellant guilty of sexual intercourse without consent (seven counts) and one act of indecency without consent, and sentenced the Appellant to imprisonment for six years, three months and 14 days, with a non-parole period of three years and one month.

On an appeal against his conviction, the Appellant challenged the validity of s 68BA of the SC Act. This was on grounds that included: (1) s 68BA compromised the institutional integrity of the Court because it was incapable of equal application to accused persons in the same position and/or the Conditions were incapable of

judicial application; and (2) trial by a judge alone was precluded by the guarantee of trial by jury in s 80 of the *Constitution*.

The Court of Appeal (Mossop, Loukas-Karlsson and Abraham JJ) unanimously dismissed the Appellant's appeal, holding that s 68BA of the SC Act was not invalid. Their Honours considered there was no factual basis for the Appellant's argument based on a potential inequality of the application of s 68BA, as the various factors relevant in the Appellant's case were not demonstrated to have been present in any other case. Further, it was always possible in criminal proceedings that the exercise by trial judges of discretionary powers of case management could lead to different outcomes in relevantly identical cases.

The Court of Appeal found that judicial consideration was involved in an application of the Conditions, rather than the outcome being mandated by s 68BA(3). This was partly because a trial judge was faced with the consideration of a variety of changing circumstances that impacted on the Court's business in a time of pandemic. A trial judge was also required to consider, as Murrell CJ had done in the Appellant's case, any factors which were in favour of a conclusion that it would *not* be in the interests of justice to order a judge-alone trial before deciding whether to make an order under s 68BA(3).

Their Honours held that s 68BA of the SC Act was not invalid on account of inconsistency with s 80 of the *Constitution*, as the latter provision did not qualify either the law-making power in respect of Australia's territories in s 122 of the *Constitution*, or the law-making power in s 22 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

The grounds of appeal are:

- The Court of Appeal erred in finding that s 68BA (now repealed) of the SC Act, in its continuing operation on the Appellant by virtue of s 116 of that Act, did not contravene the limitation deriving from the High Court's decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- The Court of Appeal erred in finding that s 68BA (now repealed) of the SC Act, in its continuing operation on the Appellant by virtue of s 116 of that Act, was not inconsistent with the requirement in s 80 of the *Constitution* that the appellant's mode of trial be by jury.

The Appellant has filed a Notice of a Constitutional Matter. The Attorneys-General of the Commonwealth and the Northern Territory are intervening in the appeal.

## **BARNETT v SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE (S142/2022)**

Court appealed from: Full Court of the Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction  
[2022] FedCFamC1A 20

Date of judgment: 18 February 2022

Special leave granted: 21 October 2022

On 30 August 2020, the Appellant (“the mother”), a dual citizen of Ireland and Australia, left Ireland with her infant child, unbeknown to the child’s father. The mother took the child to live with her in Australia.

The father commenced proceedings in Ireland for orders of guardianship and for directions as to custody of his child, under the *Guardianship of Infants Act 1964* (IR) (“the Guardianship Act”). He also sought the return of the child to Ireland.

In February 2021 the Respondent, having received a request from the relevant authority in Ireland, applied to the Family Court of Australia, under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (“the Regulations”), for orders that the child be returned to Ireland. This was on the basis that the child had wrongfully been removed by the mother. The Regulations enable Australia to perform its obligations under the *Hague Convention on the Civil Aspects of International Child Abduction* (“the Convention”).

On 12 April 2021, a District Court in Ireland declared the father to be a guardian of the child by virtue of the circumstances set out in s 2(4A) or s 6B(3) of the Guardianship Act (“the Declaration”). The circumstances prescribed in each of those provisions were that a father have cohabited with a child’s mother for at least twelve consecutive months, including at least three consecutive months of cohabitation with both mother and child after the child’s birth. The District Court adjourned generally the father’s application for directions (under s 11 of the Guardianship Act) as to custody.

On 25 June 2021, the Family Court proceedings were determined by Williams J, who ordered that the child be returned to Ireland. This was after her Honour had found that the child’s removal from Ireland was in breach of the father’s “rights of custody”, a requirement prescribed in reg 16(1A) of the Regulations for the making of a return order.

The term “rights of custody” is defined in reg 4 of the Regulations to include rights relating to the care of a child, and in particular the right to determine the child’s place of residence. Expert evidence given in the proceedings as to the father’s rights under Irish law in view of the Declaration included that there was “a real sustainable argument to be made that ... [the father’s] rights did amount to a right of custody within the Convention.” Williams J found that the Declaration conferred rights on the father that amounted to rights of custody within the meaning of reg 4. Her Honour also found that in view of the circumstances prescribed in the Guardianship Act to which the Declaration referred, the making of the Declaration necessarily involved a finding by the District Court that such circumstances had been met by 30 August 2020. Williams J held that the decision of the District Court

in making the Declaration gave rise to an issue estoppel such that the mother could not seek that the Family Court undertake a factual enquiry to determine for itself whether the father had rights of custody under Irish law at the time when the mother removed the child.

An appeal by the mother was unanimously dismissed by the Full Court of the Federal Circuit and Family Court of Australia (Aldridge, Hogan and Hannam JJ). Their Honours considered that the expert evidence did not give rise to such uncertainty in the content of the law of Ireland as to prevent Williams J from making findings as to it. The Full Court held that Williams J was correct in holding that the Declaration gave rise to an issue estoppel in relation to the father's rights of custody under the law of Ireland.

The ground of appeal is:

- The Full Court erred in holding that the Declaration created an issue estoppel that prevented the Family Court of Australia from determining for itself whether, under Irish law, the father of the Appellant's child had rights of custody as at 30 August 2020, as defined by reg 4 of the Regulations. The Full Court ought to have held that no such issue estoppel existed, and should have remitted the proceeding for determination of whether the father had such rights.

## **VANDERSTOCK & ANOR v THE STATE OF VICTORIA** **(M61/2021)**

Date special case referred to Full Court: 2 June 2022

Since December 2020, the First Plaintiff has been the registered operator within the meaning of the *Road Safety Act 1986* (Vic) (“Road Safety Act”) of an electric vehicle. Since August 2017, the Second Plaintiff has been the registered operator of a plug-in hybrid electric vehicle. The *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (“ZLEV Charge Act”) commenced on 1 July 2021. Each Plaintiff’s vehicle is an electric vehicle (“ZLEV”) within the meaning of the ZLEV Charge Act.

Each Plaintiff was required by s 10(1)(a) of the ZLEV Charge Act to lodge with the Secretary of the Department of Transport, within 14 days after 1 July 2021, an initial declaration in relation to each of their vehicles providing the odometer reading. By s 7(1) the registered operator of a ZLEV must pay a charge for use of the ZLEV on specified roads (“ZLEV charge”), which is to be determined and paid in accordance with the ZLEV Charge Act and the regulations. By s 8(1)(a), the rate of the ZLEV charge for each kilometre travelled on specified roads during the financial year starting on 1 July 2021, was 2.5 cents for an electric vehicle or hydrogen vehicle, and 2.0 cents for a plug-in hybrid electric vehicle. Section 11(1)(b) required each Plaintiff to lodge a subsequent declaration within 14 days of the last day of the relevant registration period. That declaration was required to set out the odometer reading of the ZLEV as at the time the declaration was lodged and set out the distance, if any, travelled by the ZLEV since the previous declaration that was not on specified roads (s 11(3)(a) - (c)). Each Plaintiff complied with the stated obligation. The Secretary then issued to each Plaintiff, under s 18, an invoice for payment of the ZLEV charge, which, under s 19(1), each Plaintiff was obliged to pay (and which each Plaintiff did).

The Plaintiffs filed a writ on 16 September 2021 seeking a declaration that s 7(1) of the ZLEV Charge Act is invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*. The Plaintiffs’ argument is that s 90 of the *Constitution* prohibits the States from imposing an inland tax on the consumption or use of goods, and that s 7(1) of the ZLEV Charge Act imposes such a tax. On 2 June 2022, Justice Steward referred the Special Case for the consideration of the Full Court. An amended Special Case was filed on 6 September 2022.

A Notice of Constitutional matter has been filed. Each of the States and Territories has intervened in support of the Defendant. The Commonwealth has intervened in support of the Plaintiffs. The Australian Trucking Association has been granted leave to present written submissions as amicus curiae in support of the Plaintiffs.

The questions in the Special Case are:

- Is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?
- Who should pay the costs of the proceeding?