

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B51 of 2017



BETWEEN:

TONI MAREE GOVIER
Appellant

and

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THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q)
(ABN 25 548 385 225)
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

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I certify that this Outline of Oral Argument is in a form suitable for publication on the internet.

Part II:

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1. There can be no doubt that common law (whether contract or tort) and legislation do not operate alone, but in a "symbiotic relationship". *Paige* [92] citing Gleeson CJ in *Brodie v Singleton Shire Council* (2001) 206 CLR 512.
2. Hence the careful statements in *Sullivan* at [42], [50], [55] and [60] to properly and carefully assess incompatibility.
3. But we submit that in this case the duty owed in tort or contract, and rights and obligations created by statute are not "irreconcilable".
4. The state of pleadings and evidence in respect of contract is scant. A contract of employment is pleaded (AB2, 7) but, oddly, denied (AB 13, 15). There is little in the evidence about a contract (Argument 26).
5. The legislation, the *Industrial Relations Act 1992*, in the relevant sections, is directed solely to the termination of employment as a result of misconduct, or the wrongful determination of employment.

Contrast the statutory regimes in:

- *Sullivan* [19] to [22] (Argument 17, 18, 19, 20, 21, 22, 23);
- *Paige* [52] to [62], [67], [69] (Argument 15, 16, 24, 36).

6. *Sullivan* says:

- Not every foreseeable harm attracts liability [42]. So much must be accepted;
- Different problems arise relating to the existence, nature and scope of duty, including coherence with other legal principles [50] [53];
- But people may be subject to a number of duties so long as they are not “irreconcilable” [60] (Argument 22)

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7. In *Paige*, Spigelman CJ, in considering whether a duty which may sound in damages existed –

- Cited *Sullivan* [82] (Argument 16)
- Says that the Court must give “close consideration to the statutory scheme” to identify if there is inconsistency or incompatibility, or whether another duty “distorts the focus” of it [93]
- Identified the incompatibilities in that case as:
 - a duty on the Director General to ensure the effective operation of the school system [101];
 - the fundamental obligation of care and protection of young people [103];
 - inhibiting investigations [114], [115];
 - expeditious charging process [123] [129];
 - statutory scheme of unfair dismissal [154] [155];
 - laws relating to judicial review [177] (Argument 24, 36).

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8. The legislation in this case does no more than regulate the termination of employment, and does not purport to affect tortious liability in respect of other matters.
9. *Hayes* is a lack of support case. Here, instead of supporting the Appellant the damage occurred by the delivery of two letters, positive acts by the employer, that were found to be a breach of duty at trial, and were not challenged on appeal (Trial Judges Reasons [173], [174], [176], AB 412, 413; Reasons of Fraser JA [65], AB 452).
10. The errors we submit with the greatest of respect, in the Court of Appeal were:
- Failing to identify any inconsistent or incompatible statutory issues (Argument 32);
 - Finding that the ratio of *Paige* was that “to supply a safe system of investigation would involve a novel duty of care” (Fraser JA [77] AB 455) (Argument 36).
11. The ratio of *Page*, we submit, is that a duty said to be owed to a person investigated and dismissed would be incompatible with the matters set out in paragraph 7 above (Argument 36).
12. The appeal ought to be allowed, and judgment orders sought in Part VIII of the Appellant’s Submissions be made.

Dated: 12 April 2018



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Name: Kenneth Fleming QC