Federal Court of Australia

Raghubir v Nicolopoulos [2022] FCAFC 97

|  |  |
| --- | --- |
| Appeal from: | *Raghubir v Nicolopoulos* [2021] FCA 1073 |
|  |  |
| File number(s): | NSD 1021 of 2021 |
|  |  |
| Judgment of: | **ALLSOP CJ, KENNY AND JAGOT JJ** |
|  |  |
| Date of judgment: | 3 June 2022 |
|  |  |
| Catchwords: | **HIGH COURT AND FEDERAL COURT** – appeal from single judge of the Federal Court – whether the Federal Court has jurisdiction to hear the appellants’ defamation claim – alleged defamatory publications made only within New South Wales – first respondent resident of New South Wales – other respondents being incorporated pursuant to the *Strata Schemes Management Act 2015* (NSW) – whether service within Australia but outside the Australian Capital Territory sufficient to enliven jurisdiction for *in personam* actions – appeal dismissed  |
|  |  |
| Legislation: | *Constitution*,s 122*Corporations Act 2001* (Cth), s 5F(2)*Federal Court of Australia Act 1976* (Cth), ss 18, 19(1)*Judiciary Act 1903*(Cth), s 39B(1A)*Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), s 9(3)*Service and Execution of Process Act 1901* (Cth), ss 4, 11 (repealed)*Service and Execution of Process Act 1992* (Cth), ss 12, 15*Federal Court Rules 2001* (Cth)*Civil Law (Wrongs) Act 2002* (ACT), s 123*Defamation Act 2005* (NSW)*Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT), s 4(1)*Strata Schemes Management Act 2015* (NSW), ss 8, 11–13*Supreme Court Act 1933* (ACT), s 20*Civil Procedure Rules 2006* (ACT), r 6430*Supreme Court Rules 1937* (ACT), Order 3, r 4 (repealed) |
|  |  |
| Cases cited: | *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16*Crosby v Kelly* [2012] FCAFC 96; 203 FCR 451*Cotter v Workman* (1972) 20 FLR 318*Dawson v Baker* (1994) 120 ACTR 11*Dow Jones & Co Inc v Gutnick* [2002] HCA 56; 210 CLR 575*Gosper v Sawyer* [1985] HCA 19; 160 CLR 548*Johnston v Road and Traffic Authority (NSW)* [1999] ACTSC 140; 30 MVR 212*Kontis v Barlin* (1993) 115 ACTR 11*Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583*Rana v Google Inc* [2017] FCAFC 156; 254 FCR 1*Renuka Raghubir v Christine Nicolopoulos* [2022] NSWSC 386*Swanson v Harley* (1995) 103 NTR 25*Thomson Australian Holdings Pty Ltd v Trade Practices Commission* [1981] HCA 48; 148 CLR 150*White Enhancements Pty Ltd v Quick Fit Tyre Service Pty Ltd* [2008] ACTSC 122; 221 FLR 409*Woodham v Lander* [2004] ACTSC 34; 192 FLR 1 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Number of paragraphs: | 42 |
|  |  |
| Date of hearing: | 17 May 2022  |
|  |  |
| Counsel for the Appellants: | The appellants appeared in person |
|  |  |
| Counsel for the First Respondent: | Ms Karen Conte-Mills |
|  |  |
| Solicitor for the First Respondent: | Harb Lawyers  |
|  |  |
| Counsel for Second, Third, Fourth, Fifth, Sixth and Seventh Respondents: | The second, third, fourth, fifth, sixth and seventh respondents did not appear |
|  |  |
| Amicus curiae: | Mr Richard Lancaster SC |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1021 of 2021 |
|   |
| BETWEEN: | RENUKA RAGHUBIRFirst AppellantVIRENDRA SINGHSecond Appellant |
| AND: | CHRISTINE NICOLOPOULOSFirst RespondentSTRATA MANAGER SP7526Second RespondentSTRATA TREASURER SP7526 (and others named in the Schedule)Third Respondent |

|  |  |
| --- | --- |
| order made by: | ALLSOP CJ, KENNY AND JAGOT JJ |
| DATE OF ORDER: | 3 June 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the first respondent’s costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. On 6 August last year, the appellants, Renuka Raghubir and Virendra Singh, filed an originating application in this Court claiming $5,504,100.00 in damages for defamation under the *Defamation Act 2005* (NSW). On 3 September 2021, a judge of the Court dismissed the proceeding for want of jurisdiction. This decision has the citation *Raghubir v Nicolopoulos* [2021] FCA 1073 (**PJ**). This is an appeal against his Honour’s judgment.
2. In his reasons for judgment (at PJ [2]-[5]), the primary judge outlined the appellants’ (then the applicants’) claims and the circumstances in which they arose as follows:

[2] The applicants claim that the first respondent, their former next-door neighbour, Christine **Nicolopoulos**, who was the chairperson and secretary of the strata corporation in which both the applicants and the first respondent then lived. They claimed that, commencing on 2 July 2019, the first respondent wrote a series of allegedly defamatory letters to the other owners, and their real estate agents, of units in the block in Bexley, a suburb of Sydney. The applicants rely on these letters to claim that the first respondent alleged to the local council, as well as to their then **landlord** who owned the unit the applicants were renting, the real estate **agent** of the landlord, the New South Wales police, New South Wales Fair Trading and other members of the owners corporation, that, among other things, the applicants had made false complaints about the first respondent’s **dog** and they had falsely impersonated a council officer in a telephone call to the first respondent.

[3] The quarrel escalated to the point where it became, literally, a backyard dispute with claims being made by the first respondent that the applicants were nailing material to her back fence, which she claimed was part of her own, and not common, property.

[4] The first respondent wrote several letters in 2019 to the agent. Acting on the owner’s instructions, and accepting, apparently, the first respondent’s side of the story, the agent, on the landlord’s instructions, engaged in conduct leading to the termination of the tenancy. There is some dispute as to whether or not the tenancy was terminated for non-payment of rent, or because of the conduct of the applicants.

[5] The applicants asserted, repeatedly, that they were unable to rent property anywhere in Australia because of the consequences of their dispute with their former landlord, the agent and their former neighbour. There was no evidence of any attempt that the applicants had made to rent property anywhere else in Australia, including within New South Wales.

(Bold in original)

1. The learned primary judge concluded (at PJ [15]) that his Honour was “satisfied beyond argument that this Court does not have jurisdiction to deal with a dispute about neighbours arguing over the back fence as to barking dogs and allegedly defamatory publications made as its consequence”.
2. The appellants have not had legal representation in this Court. The first respondent has been represented by counsel.
3. The Court was also assisted by Mr Richard Lancaster SC as amicus curiae appointed pursuant to orders made on 6 April 2022. Under these orders, the President of the Bar Association of New South Wales was requested to nominate counsel to assist the Court as amicus curiae. We are indebted to Mr Lancaster SC for his assistance in this capacity.

## Submissions before the Court on jurisdiction

1. In substance, the appellants submitted that the primary judge erred when his Honour held that the Court had no jurisdiction to hear and determine their originating application. They submitted that, due to the first respondent’s alleged defamatory conduct, they had been “blacklisted” on the National Tenancy Database, their tenancy had been terminated and they were made homeless. They further submitted that because the National Tenancy Database covered every Australian State and Territory, this “blacklisting” had damaged their reputations in every State and Territory. In these circumstances, the appellants submitted that the Court had jurisdiction to determine their defamation claim against the first respondent under s 9(3) of the ***Jurisdiction of Courts (Cross-vesting) Act*** *1987* (Cth), s 39B(1A) of the ***Judiciary Act*** *1903*(Cth) and s 19(1) of the ***Federal Court of Australia Act*** *1976* (Cth).
2. On the morning of the hearing of the appeal, the appellants forwarded to the bench a further “notice of appeal”. The document was not accepted by the Registry for filing. It was accompanied by submissions, which were in part repetitious of previous submissions. The documents were sent with a request or direction not to forward them to anybody, including the respondents. In accordance with the request the Court did not provide them to the respondents. A new allegation was purportedly made in that document directed to the Supreme Court of New South Wales complaining that it had blocked the appellants from its jurisdiction. We took it that the document had not been served on the State of New South Wales or the Supreme Court of New South Wales. Similar complaints were also made orally by the appellants as to how State courts had dealt with the appellants after the primary judge had dismissed the proceedings in this Court. These complaints against the Supreme Court and any other State courts form no part of this appeal or this controversy. Even if, which we do not consider to be the case, such were to be characterised as a coherent document and capable of giving rise to rational legal argument, it would be a matter in the original jurisdiction of this Court and entirely separate from the matter or controversy underlying and involving this appeal concerning the alleged defamation in the appellate jurisdiction.
3. At the hearing of the appeal, the appellants also submitted that they had a constitutional right to bring their defamation action in a Chapter III court since the Supreme Court of New South Wales had refused to hear them (see *Renuka Raghubir v Christine Nicolopoulos* [2022] NSWSC 386), and their claim could not be heard in the District Court of New South Wales or the New South Wales Local Court.
4. The appellants also made submissions in writing and at the hearing to the effect that certain judges, magistrates, other judicial officers, court staff and legal practitioners were unfair, dishonest, biased, and corrupt.
5. The first respondent submitted that the primary judge had correctly held the Federal Court had no jurisdiction over the matter and adopted part of the submissions of the amicus curiae. The first respondent submitted that the alleged defamation was a matter for determination by a court “in the jurisdiction of New South Wales” because both she and the appellants were ordinarily resident in New South Wales, service had been effected in that State, and “[t]he matter arose in relation to alleged incidents occurring in New South Wales only”. The first respondent further submitted that the Commonwealth legislation on which the appellant relied was “not applicable in this matter”, there being no evidence proffered of publication outside of New South Wales or comprehension by anyone outside of New South Wales.
6. The submissions of the amicus curiae addressed various matters. It suffices here to mention only those directly relevant to the present question of the Court’s jurisdiction. In this connection, the submissions identified that the proceeding involved a claim for an award of damages against a natural person, an owners corporation constituted by the ***Strata Schemes Management Act*** *2015* (NSW), and others possibly involved in the management by the owner’s corporation of the State’s strata scheme. Bearing this in mind, it was submitted that there was no basis on which it might be said that s 39B(1A)(c) of the *Judiciary Act* conferred jurisdiction because a respondent was a corporation constituted by, or regulated under, the ***Corporations Act*** *2001* (Cth): see ***Oliver v Nine Network*** *Australia Pty Ltd* [2019] FCA 583 at [16] (Lee J). The submissions of the amicus curiae also drew attention to the fact that on the face of the 14 publications referred to in the annexures accompanying the appellants’ statement of claim, the appellants complain of publications “sent and received by a person or persons within New South Wales” and nowhere else. Referring to ***Crosby v Kelly*** [2012] FCAFC 96; 203 FCR 451, it was further submitted that there was no possibility here that the Federal Court would have jurisdiction by virtue of s 9(3) of the Commonwealth *Jurisdiction of Courts (Cross-vesting) Act* and s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) (***ACT Cross-vesting Act***) since the alleged publication of the defamatory matters occurred wholly within New South Wales.

## Consideration – has the Court jurisdiction?

1. Although this Court is created by s 5 of the *Federal Court of Australia Act*, save for s 32, that Act does not bestow original jurisdiction. Section 32 is not presently relevant. The appellants’ reliance on s 19 of the Court’s constituting Act is misplaced. As stated in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* [1981] HCA 48; 148 CLR 150 at 161, s 19 of that Act “leaves it to the Parliament” to invest the Court with jurisdiction by other statutory provisions. Parliament has done this by statutory investment of a specific jurisdiction (e.g., *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 8(1)) and, relevantly in this case, by the statutory conferral of a more general jurisdiction under s 39B(1A) of the *Judiciary Act*. There is also the particular operation of the *Jurisdiction of Courts (Cross-vesting) Act* to be kept in mind.
2. We turn first to s 39B(1A) of the *Judiciary Act*, which provides:

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

1. Plainly enough, this is not a case in which the Commonwealth is seeking an injunction or a declaration so as to engage s 39B(1A)(a) of the *Judiciary Act*. Further, for the reasons set out below, this case does not concern any matter arising under the *Constitution* or involving its interpretation, or arising under any laws made by the Parliament of the Commonwealth so as to engage s 39B(1A)(b) and (c).
2. In order to determine whether s 39B(1A)(b) or (c) of the *Judiciary Act* confer jurisdiction on the Court, it is necessary to identify the claim that the appellants would have the Court hear and determine, including the parties to it. As the following discussion confirms, the appellants’ claim is for damages for defamation against a natural person, an owners corporation created and regulated by State law, and various entities and officers who might be involved in the management by the owners corporation of a State-based strata scheme.
3. The claimants – the appellants on the appeal – are natural persons. It may be inferred that they are residents of New South Wales as their notice of appeal gives their address as a shop in a suburb of Sydney and also gives a post box number in the same suburb. The first respondent is a natural person. It may also be inferred that she is a resident of New South Wales since she too has an address in suburban Sydney. The other respondents are the owners corporation of Strata Plan 7526 (also described as “Proprietors Strata Plan 7526”) and variously described bodies or officeholders possibly involved in the administration or management of “Strata Plan 7526”.
4. The appellants’ statement of claim alleges that the respondents published defamatory matter about them: see statement of claim at [7]. Eight subparagraphs below [7] list the persons and entities to whom one or other of the defamatory communications are said to have been published. The pleading does not, however, identify each of the publications in suit or which of the respondents is alleged to have published them. These details may be gleaned from the annexures to an affidavit filed by the appellants at the same time as their statement of claim, as well as from the “annexures” filed by them at a later date. By these annexures, it appears that the appellants intended to identify the publications in suit, as well as the person or body who allegedly made the relevant publications and to whom they were allegedly made.
5. The appellants’ statement of claim alleges that each of the appellants had a reputation in New South Wales, and that their reputations have been damaged by the publication of defamatory material sent by persons or entities within New South Wales to other persons or entities within New South Wales. Thus, they plead at [1], that their reputations with “the Landlord, Argy Property Kogarah, Bayside Council Rockdale, NSW Fair Trading, NSW Police and the neighbours, owners, tenants of the place we were renting” was damaged by the alleged defamatory publications. They reiterate this at [7], where they allege that their “reputation and character” has been damaged with:
6. Argy Property Real Estate Kogarah
7. The Landlords []
8. Bayside Council Rockdale
9. NSW Fair Trading
10. NSW Police
11. Neighbours, Owners, Agents, Tenants SP7526 of Villas 1, 2, 3, 4, 5 ... [address in NSW]
12. Neighbours, Owners, Agents, Tenants of Villas 1, 2, 3, 4, 5 ... [address in NSW]
13. Neighbours, Owners, Agents, Tenants of Villas 1, 2, 3, 4, 5 ... [address in NSW]
14. Again at [8] of their statement of claim, they plead damage to their reputation by the alleged defamatory publications “with the NSW Police, landlord, Landlord, Argy Property, Bayside Council, NSW Fair Trading, all the neighbours, all the Owners, Agents and Tenants”: see also [21]–[28].
15. We observe that the appellants do not plead that they had any reputation outside New South Wales. Nor do they plead that the alleged publication of the defamatory material was made either by or to persons and entities outside New South Wales.
16. We also observe at this point that the appellants cannot rely on any respondent’s incorporation under the *Corporations Act* as a possible basis to attract jurisdiction under s 39B(1A)(c) of the *Judiciary Act*: see *Oliver v Nine Network* at [16] (Lee J). This is because an owners corporation in respect of a New South Wales strata scheme is constituted and regulated under the *Strata Schemes Management Act*. The *Corporations Act* has no relevant operation with respect to an owners corporation: see *Strata Schemes Management Act*, s 8 and *Corporations Act*, s 5F(2).
17. Finally, we note that, although the *Strata Schemes Management Act* identifies various management bodies and persons who might assist in carrying out the management functions of the owners corporation (see ss 11–13 of that Act), the appellants have not identified the basis on which any such body or office holder is sued.
18. In considering the appellants’ claim, it is important to recognise that under Australian law the focus of the tort of defamation is on “publications causing damage to reputation”: ***Dow Jones*** *& Co Inc v Gutnick* [2002] HCA 56; 210 CLR 575 at 600 [25]. This means that “ordinarily, defamation is to be located at the place where the damage to reputation occurs … [which] will be where the material ... alleged to be defamatory is available in comprehensible form”: see *Dow Jones* at 606–607 [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ). As indicated already, the alleged publications set out in the various annexures filed by the appellant (see [17] above) indicate that they were all sent and received by a person or persons within New South Wales. There is nothing in the appellants’ pleading or these annexures to indicate that any allegedly defamatory publication was “available in comprehensible form” anywhere outside the State: see *Dow Jones* at 606–607 [44].
19. As stated above at [6], the appellants submitted that as a consequence of the alleged publication of the defamatory material, they have been “blacklisted” on the National Tenancy Database and that, on this account, their reputation and character has been damaged in every State and Territory. The basis for this submission does not appear in their pleading. Further, their pleading is inconsistent with the submission. As already stated, the appellants allege in their pleading that they had a reputation in New South Wales. They do not allege that they have a reputation anywhere else. There can be no damage to reputation outside New South Wales if that reputation did not exist. It must also be borne in mind that the publication is specifically alleged to have been made within New South Wales. Therefore, even if a person or entity to whom the alleged defamatory publication was made caused the appellants’ “blacklisting” on the National Tenancy Database, there is nothing to support the proposition that there was any relevant publication outside New South Wales. Rather, the appellants’ pleading is inconsistent with this proposition and therefore with the proposition that the alleged “blacklisting” was made available in comprehensible form to a person who comprehended it outside New South Wales.
20. There are other difficulties with this aspect of the appellants’ submissions and with other aspects of their pleading but it is unnecessary to consider these difficulties further as they do not bear on the question of the Court’s jurisdiction.
21. As we have said, it is clear that s 39B(1A)(a) of the *Judiciary Act* cannot apply in this case: see [14] above. It is equally clear that the appellants’ case does not concern a matter arising under the *Constitution* or involving its interpretation within s 39B(1A)(b) of the *Judiciary Act*. The appellants’ submission that they had a constitutional right to bring their defamation action in a Chapter III court since the Supreme Court of New South Wales had refused to hear them, and their claim could not be heard in the District Court of New South Wales or the New South Wales Local Court, does not attract the jurisdiction conferred by this provision.
22. By way of background, we note that the appellants commenced an action for defamation against the first respondent and others in the Supreme Court of New South Wales: see *Renuka Raghubir v Christine Nicolopoulos* [2022] NSWSC 386. A judge of that Court ordered that their statement of claim be struck out and the proceedings be dismissed because the matter as pleaded had no reasonable prospects of success. The assertion that the appellants have a constitutional right to bring their defamation case in these circumstances in this Court is incapable of rational legal argument and cannot therefore give rise to a matter “arising under the Constitution, or involving its interpretation” for the purpose of s 39B(1A)(b) of the *Judiciary Act*: see *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 at [35]–[36].
23. As we have seen, the appellants also relied on s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act*, but this provision does not permit the conclusion that the Court has jurisdiction in the present case. It may be accepted for present purposes that s 9(3) of that Act confers jurisdiction on the Court to hear and determine a claim for defamation where the proceeding would be within the jurisdiction of the Supreme Court of the Australian Capital Territory or the Northern Territory: see *Rana v Google Inc* [2017] FCAFC 156; 254 FCR 1 at 12 [40] referring to *Crosby v Kelly*. This is because s 9(3) “picks up”, as Commonwealth law, each of the relevant Territory laws conferring jurisdiction on each of the Territory Supreme Courts to hear and determine a matter: see *Crosby v Kelly* at 458 [35] (Robertson J, Bennett J agreeing); 452–453 [2] (Perram J). Here, as we have seen, the alleged publication of the defamatory material and resulting reputational damage was wholly within New South Wales: cf *Crosby v Kelly*.
24. The amicus, in written submissions, raised the possibility that, by reference to s 20 of the ***Supreme Court Act*** *1933* (ACT) and s 123 of the ***Civil Law (Wrongs) Act*** *2002* (ACT), this Court’s jurisdiction could be enlivened if:
25. the respondents had been duly served in the Australian Capital Territory (of which there was no evidence in this proceeding); or
26. the respondents were duly served within the territorial bounds of the Federal Court’s jurisdiction: that is, anywhere in Australia and the Territories within the meaning of s 18 of the *Federal Court of Australia Act*, without any requirement for a territorial nexus or other connection with the Australian Capital Territory.
27. The first of those propositions need not be dealt with as it cannot be inferred that there was service of the originating application on any of the respondents in the Australian Capital Territory.
28. The second of those propositions concerns service within Australia, but outside the Australian Capital Territory. Service of an originating process within Australia, but outside the Australian Capital Territory, without the underlying matter having any territorial or other nexus to the Australian Capital Territory, is insufficient to enliven this Court’s jurisdiction. Such a matter, including this proceeding, does not give rise to an “ACT matter” within the meaning of s 4(1) of the *ACT Cross-vesting Act*, and therefore this Court’s jurisdiction under s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act*. We explain as follows.
29. Before the introduction of the *Service and Execution of Process Act 1992* (Cth) (**SEPA 1992**), s 4(1) of the *Service and Execution of Process Act 1901* (Cth) provided that a “writ of summons issued out of … any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth”. However, by s 11, where an originating process was personally served outside a Territory, a plaintiff could only proceed in a suit without an appearance by the defendant where a criterion of territorial nexus (including where the act or thing for which damages was sought was done in the Territory (s 11(1)(d))) was satisfied. The effect of s 11 was that a “defendant … could choose not to submit to the command of originating process issued out of [the Supreme Court] unless there was a nexus between the subject matter of the action, or the defendant, and the Territory…”: ***Dawson v Baker*** (1994) 120 ACTR 11 at 16 (Higgins J, Miles CJ and Gallop J agreeing on this point); see also *Gosper v Sawyer* [1985] HCA 19; 160 CLR 548 at 566 (Mason and Deane JJ).
30. The ***Supreme Court Rules*** *1937* (ACT) in force as of April 1993, when SEPA 1992 was introduced, did not otherwise provide for service outside the Australian Capital Territory, but within Australia. Order 3, r 4 merely provided that a “writ of summons to be served out of the jurisdiction” was to be in accordance with certain forms.
31. By contrast, s 15 of the SEPA 1992 provides that an “initiating process” issued in a State (which is defined to include the Australian Capital Territory and Northern Territory: s 5(1)), “may be served in another State”. Section 12 provides that service pursuant to SEPA 1992 is effective as if it had been served in the place of issue. On this basis, the Supreme Court of the Australian Capital Territory has held that it has jurisdiction over all *in personam* actions where a person is validly served within Australia according to SEPA 1992, regardless of the nexus of that action to the Australian Capital Territory: see ***Kontis*** *v Barlin* (1993) 115 ACTR 11 at 18–19; *Dawson v Baker* at 16; *Johnston v Road and Traffic Authority (NSW)* [1999] ACTSC 140; 30 MVR 212 at 213 [8]; *Woodham v Lander* [2004] ACTSC 34; 192 FLR 1 and *White Enhancements Pty Ltd v Quick Fit Tyre Service Pty Ltd* [2008] ACTSC 122; 221 FLR 409 at 412–413 [18]; see also, with reference to the Northern Territory, *Swanson v Harley* (1995) 103 NTR 25. As stated by Master Hogan in *Kontis* at 19, applying SEPA 1992 and *Laurie v Carroll* [1958] HCA 4; 98 CLR 310 at 323:

After 12 April 1993, therefore, a plaintiff may issue a writ out of this court claiming damages for personal injury for service upon a defendant anywhere in Australia, in respect of a cause of action arising anywhere in Australia, and this court will have jurisdiction to entertain it.

While questions might arise as to whether a proceeding with no nexus or connection to the Australian Capital Territory should be stayed pursuant to s 20(3) of the SEPA 1992, or transferred to another court under s 5 of the *ACT Cross-vesting Act*, the Supreme Court undoubtedly has jurisdiction where there is effective service under SEPA 1992.

1. In this proceeding, the originating process was served, at least on the first respondent, within Australia. The service was effected pursuant to the *Federal Court Rules 2001* (Cth), not SEPA 1992. But this does not matter. The question is whether, the Supreme Court having jurisdiction in defamation proceedings where service is effected in Australia, this Court has jurisdiction by reason of s 4(1) of the *ACT Cross-vesting Act* and s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act*.
2. The answer to that question in this proceeding, which has no proven territorial or other nexus to the Australian Capital Territory, is no. This is because the sole reason for the Supreme Court’s jurisdiction in *in personam* actions served in Australia, but not within the Australian Capital Territory (and with no territorial nexus or connection), is or would be effective service in accordance with SEPA 1992, a law of the Commonwealth. Indeed, rule 6430 of the *Civil Procedure Rules 2006* (ACT) provides that service outside the Australian Capital Territory but within Australia must be “in accordance with” SEPA 1992.
3. An “ACT matter” in s 4(1) of the *ACT Cross-vesting Act* is defined in the Dictionary to that Act as (relevantly) “in which the Supreme Court has jurisdiction **otherwise than by reason of a law of the Commonwealth** or of another State” (emphasis added). As the Supreme Court’s jurisdiction in defamation proceedings served within Australia, but outside the Australian Capital Territory, with no territorial or other nexus, is only effective “by reason of a law of the Commonwealth”, namely SEPA 1992, it is not an ACT matter over which this Court is conferred jurisdiction under and by reference to s 4(1) of the *ACT Cross-vesting Act*.
4. If the Australian Capital Territory did purport to confer jurisdiction on the Federal Court over matters which had no territorial or other nexus to the Territory, such a law may raise questions as to its constitutional validity under or by reference to s 122 of the *Constitution*: *Cotter v Workman* (1972) 20 FLR 318 at 327.
5. It is unnecessary to deal with this.
6. The amicus also referred to s 123 of the *Civil Law (Wrongs) Act*, which provides that choice of law for defamation proceedings in the Australian Capital Territory where publication occurs wholly within a particular “Australian jurisdictional area” (such as a State: s 123(5)) is the substantive law of that jurisdiction, as inferentially supporting the Supreme Court’s jurisdiction where publication occurs wholly in another State or Territory. But s 123 is not a law that purports to confer jurisdiction on the Supreme Court: see s 20(1)(b) of the *Supreme Court Act*.
7. For these reasons, service of the originating process in this proceeding, within Australia, but outside the Australian Capital Territory, is insufficient in and of itself to enliven this Court’s jurisdiction.

# disposition

1. For the reasons stated, no error attaches to the judgment of the primary judge in dismissing the proceeding for want of jurisdiction. The appeal should be dismissed, with costs. Counsel appeared for the first respondent and did not announce an appearance otherwise. Thus the costs awarded should be of the first respondent who appeared. The possible impecuniosity of the appellants is not a reason to depart from the ordinary rule.

|  |
| --- |
| I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Kenny and Jagot. |

Associate:

Dated: 3 June 2022

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | STRATA COMMITTEE SP7526 |
| Fifth Respondent: | CHAIRPERSON SP7526 |
| Sixth Respondent: | SECRETARY SP7526 |
| Seventh Respondent: | OWNERS CORPORATION OF STRATA PLAN 7526 |