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NEW SOUTH WALES v KABLE (2013) 298 ALR 144

I Introduction

In *New South Wales v Kable* ('*Kable [No 2]*'),[1] the High Court of Australia considered whether an order made under the *Community Protection Act 1994* (NSW) permitted the lawful detention of Gregory Wayne Kable when the judicial nature of that order had been questioned. This case note compares the High Court's decision with that in *Kable v Director of Public Prosecutions (NSW)* ('*Kable [No 1]*')[2] in light of the difficulties faced by appellate courts when confronted with apparently contradictory and restrictive authorities.

II Background

A *The Original Proceedings: Kable [No 1]*

On 23 February 1995, Levine J of the Supreme Court of New South Wales ordered that Mr Kable be detained in custody for six months.[3] No criminal trial took place before his Honour; the order was instead made under s 9 of the *Community Protection Act 1994* (NSW) ('the *CPA*'). This unique piece of legislation permitted 'the preventive detention … of Gregory Wayne Kable'[4] upon application by the Director of Public Prosecutions,[5] provided the Supreme Court of New South Wales ('the Supreme Court') was satisfied that Mr Kable was likely to commit a 'serious act of violence'[6] and that he posed a prospective threat to the community.[7]

Mr Kable appealed unsuccessfully[8] to the New South Wales Court of Appeal.[9] He was ultimately granted special leave to appeal to the High Court. In separate judgments delivered long after the six month period of imprisonment had expired, the majority of Toohey, Gaudron, McHugh and Gummow JJ upheld Mr Kable's

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1 (2013) 298 ALR 144.

2 (1996) 189 CLR 51.

3 Ibid 146.

4 *CPA* s 3(1).

5 Ibid s 5(1).

6 Ibid s 5(1)(a).

7 Ibid s 5(1).

8 Ibid s 25.

9 *Kable v DPP (NSW)* (1995) 36 NSWLR 374.

appeal.[10] Their Honours found that the *CPA* was invalid because it bestowed a power upon the Supreme Court that was incompatible with its capability to exercise federal jurisdiction under Ch III of the *Commonwealth Constitution*.[11] The judgments of Gaudron, McHugh and Gummow JJ in particular focused on the non-judicial nature of the power exercised under the *CPA*, finding it to be more in line with an exercise of executive power.[12]

B *The Present Case at First Instance*

Following the High Court's decision, Mr Kable issued proceedings against the State of New South Wales ('the State') seeking damages for false imprisonment, and later adding claims for abuse of process and malicious prosecution.[13] At first instance, Hoeben J found for the State.[14]

C *In the New South Wales Court of Appeal*

Mr Kable lodged a partially successful appeal to the New South Wales Court of Appeal ('the Court of Appeal'). The Court of Appeal found for Mr Kable on the issue of false imprisonment, holding that the order of Levine J did not provide lawful authority for Mr Kable's detention.[15] Based on their interpretation of *Kable [No 1]*, the Court of Appeal perceived the detention order as 'an invalid non-judicial order'.[16] In a particularly striking judgment, Allsop P concluded that in exercising the non-judicial power conferred by the *CPA*, the Supreme Court had stepped outside its role as a superior court of record. His Honour found that it essentially acted as an extension of the executive arm of government.[17]

D *In the High Court: Kable [No 2]*

The State was granted special leave to appeal to the High Court ('the Court'). The Court unanimously allowed the State's appeal and set aside the orders of the Court of Appeal, ordering that the appeal to that court be dismissed.[18] The Court accepted that the *CPA* was an invalid law. However, the Court found that the preventive detention order made by Levine J provided an independent source of authority for Mr Kable's detention until it was set aside: on their Honours' interpretation, it *was* a judicial order made by a superior court.[19]

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10 *Kable [No 1]* (1996) 189 CLR 51.

11 Ibid 99 (Toohey J), 107 (Gaudron J), 124 (McHugh J), 144 (Gummow J).

12 Ibid 106 (Gaudron J), 122 (McHugh J), 132 (Gummow J).

13 *Kable [No 2]* (2013) 298 ALR 144, 146.

14 *Kable v New South Wales* (2010) 203 A Crim R 66.

15 *Kable v New South Wales* (2012) 293 ALR 719, 759, 762.

16 Ibid 758 (Basten JA).

17 Ibid 722 (Allsop P).

18 *Kable [No 2]* (2013) 298 ALR 144, 155.

19 Ibid 151 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 163 (Gageler J).

The plurality of French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ contradicted the Court of Appeal's interpretation of *Kable [No 1]*. Their Honours stated that the decision in *Kable [No 1]* was predicated upon the Supreme Court being required to act as a court while exercising a quasi-executive power that was incompatible with that role.[20] On this analysis, the problem with the *CPA* emanated from the *requirement* that the Supreme Court maintain its role as a superior court of record when making a preventive detention order.

Their Honours also placed significant weight on the process adhered to in the original proceedings. It was never disputed that the orders of Levine J and those of the Court of Appeal engaged and fell within the High Court's appellate jurisdiction.[21] Their Honours explained that by allowing the appeal to the Court of Appeal and setting aside the order of Levine J in *Kable [No 1]*, the High Court treated Levine J's decision as if it were a judicial order.[22]

The plurality distinguished the making of the detention order from cases where judges exercised executive power[23] by examining the manner in which the power was exercised by Levine J. They concluded that because the detention application was heard inter partes, some of the rules of evidence applied, and the decision was appealable, the order of Levine J was properly characterised as judicial.[24] Their Honours denied that Levine J's exercise of federal jurisdiction (in deciding that he *had* jurisdiction to make an order) and the exercise of power in making the detention order under the *CPA* required separate consideration.[25] The legal effect of Levine J's order derived not from the invalid power purportedly conferred by the *CPA*, but from its status as a judicial order of a superior court, valid until set aside even if made beyond jurisdiction.[26]

In a separate judgment, Gageler J focused almost exclusively on the effect of the appeals in the original proceedings. The High Court heard the appeal in *Kable [No 1]* pursuant to s 73 of the *Commonwealth Constitution*. This only permitted the High Court to determine an appeal from 'a decision made in the exercise of judicial power'.[27] The High Court proceeded to set aside the orders of Levine J and ordered instead that the application under the *CPA* should be dismissed.[28] Because the orders of Levine J could only have been treated in that way in the exercise of judicial power, his Honour concluded that the Court of Appeal in the original proceedings must also have exercised judicial power in considering the orders of Levine J.

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20 Ibid 148.

21 Ibid 148–9; *Commonwealth Constitution* s 73(ii).

22 *Kable [No 2]* (2013) 298 ALR 144, 149, 151.

23 See, eg, *Love v A-G (NSW)* (1990) 169 CLR 307, 321–2.

24 *Kable [No 2]* (2013) 298 ALR 144, 151.

25 Ibid 153–4.

26 Ibid 153.

27 Ibid 162.

28 Ibid.

His Honour acknowledged that the Court of Appeal sometimes reviewed administrative decisions, but found no reason to treat the order of Levine J differently to the judicial order of the Court of Appeal: both orders were purportedly made under the *CPA*, which intended for them to be made in adversarial conditions.[29] Upon finding that the order of Levine J was a judicial order made by a superior court, Gageler J accepted that the order was valid until set aside.[30]

III *Kable [No 2]*: Clarification or Confusion?

A *Inconsistencies*

The reasons in *Kable [No 2]* are somewhat difficult to reconcile with the majority's reasoning in *Kable [No 1]*. Certainly, the Court of Appeal could be excused for interpreting comments found in *Kable [No 1]* as declaring the order of Levine J an 'invalid non-judicial order'.[31] Suggestions that the power was 'non-judicial'[32] but was 'purely executive in nature'[33] would lead reasonable minds to that conclusion.

Further inconsistencies with *Kable [No 1]* are apparent in the Court's view of the very character of judicial power and process. In *Kable [No 2]*, the Court concluded that the exercise of power by Levine J bore many of the hallmarks of judicial process: the application was heard inter partes, some of the rules of evidence applied, and the decision involved adjudication upon the rights of the parties.[34] On the other hand, the majority in *Kable [No 1]* found that the way the power was to be exercised under the *CPA* was 'repugnant to the judicial process in a fundamental degree'[35] and represented 'the antithesis of the judicial process'.[36] Gaudron J could not accept that the decision to be made by Levine J involved the 'resolution of a [civil] dispute between contesting parties as to their respective legal rights and obligations'.[37] The decision bore no more resemblance to an assessment of criminal liability. Her Honour concluded that despite being dressed up as a legal proceeding, the process under the *CPA* involved guesswork based in part on ordinarily inadmissible evidence.[38]

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29 Ibid.

30 Ibid 158, 163.

31 *Kable v New South Wales* (2012) 293 ALR 719, 758.

32 *Kable [No 1]* (1996) 189 CLR 51, 132.

33 Ibid 122.

34 *Kable [No 2]* (2013) 298 ALR 144, 151 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 163 (Gageler J).

35 *Kable [No 1]* (1996) 189 CLR 51, 132.

36 Ibid 106.

37 Ibid.

38 Ibid 106–7.

B *The Effect on Appellate Courts*

In *Kable [No 2]*, the Court attempted to avoid an undesirable application of the principles outlined in *Kable [No 1]* without purporting to overrule the earlier decision. This approach creates problems for other appellate courts as they act in their role to not only interpret the law, but to gradually develop and clarify it.[39] Contradictory authorities slow development and make clarification virtually impossible.

For example, the Court of Appeal in these proceedings made a clear attempt to directly apply the principles outlined in *Kable [No 1]*. Although it is a role of the High Court to review the decisions of appellate courts, the decision in *Kable [No 2]* effectively took away the Court of Appeal's power to adjudicate the matter based on authority. In particular, the narrow reasoning employed by Gageler J took the matter out of the Court of Appeal's hands: upon noting that the appellate court in the original proceedings had accepted its task of reviewing the decision of Levine J, the Court of Appeal should not have embarked upon an application of the principles outlined in *Kable [No 1]*. Essentially, it was not permitted to conclude that the order of Levine J was anything other than a judicial order. The proliferation of this kind of reasoning creates a minefield for appellate courts endeavouring to interpret, apply, and build upon the highest common law authorities.

Going forward, the inconsistencies between *Kable [No 1]* and *Kable [No 2]* may continue to cause confusion. As highlighted above, the two decisions took opposing approaches to defining the character of judicial process. They assigned differing levels of importance to the indicators that judicial process had been followed, and interpreted the nature of the judicial process in different ways. However, both approaches appear to remain good law. Clarification of this issue is likely to be slow, barring a suggestion that parts of *Kable [No 1]* have been overruled.

C *An Alternative Solution*

There is no doubt that finding the State liable in tort for complying with a purportedly judicial order would have been an unsatisfactory result. Indeed, the plurality drew attention to what appeared to be policy reasons for denying Mr Kable relief in the circumstances: if the order of Levine J had no lasting legal effect until it was subjected to final review, the parties would be caught between their obligation to obey the order and the possibility of incurring tortious liability for doing so until final review occurred.[40] However, the Court could have solved this conundrum by acknowledging that lawful justification for false imprisonment included the enforcement of a superior court order that was prima facie valid. This argument was put forward by counsel for the State, but was not explored by the Court.[41] The required

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39 J D Heydon, 'Judicial Activisim and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 124.

40 *Kable [No 2]* (2013) 298 ALR 144, 154.

41 Ibid.

expansion of the scope of lawful justification would be small,[42] and it would only be necessary to apply the expanded doctrine in limited circumstances where a detention order made by a superior court is found to lack validity.

IV Conclusion

Despite avoiding an undesirable outcome, the Court in *Kable [No 2]* failed to directly address the apparent inconsistencies between their decision and that in *Kable [No 1]*. Some aspects of the Court's reasoning were overly restrictive, while other aspects contradicted *Kable [No 1]* without purporting to disturb its authority. This makes the role of appellate courts difficult as they attempt to clarify and develop the common law. The Court's narrow reasoning has a direct effect on courts of appeal by curbing their power to adjudicate the matters brought before them. The inconsistencies between the two High Court decisions also ensure that the definitive indicators of judicial process will remain elusive. Where a minor development in the law of false imprisonment would have sufficed, the Court chose to perpetuate confusion.

42 It already extends to orders made by judicial officers beyond jurisdiction: *Von Arnim v Federal Republic of Germany [No 2]* [2005] FCA 662 (3 June 2005) [6].