



STATE-BASED CLASS ACTIONS AVAILABLE IN AUSTRALIA

On 27 September 2013, Garling J of the Supreme Court of New South Wales handed down his judgment in the first class action proceeding to be brought in New South Wales pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW): *Konneh v State of NSW* (No. 3) [2013] NSWSC 1424.

Part 10 was inserted into the *Civil Procedure Act 2005* (NSW) so as to make “representative proceedings” available in NSW courts.¹ Part 10 commenced on 4 March 2011 and supplements the class action procedures that exist at the federal level and in the State of Victoria.²

Unlike most other class action proceedings, which have been in the area of commercial law such as securities and cartel class actions, or product liability claims, *Konneh v State of NSW* dealt with children who were detained by police for breach of bail conditions. The claims dealt with two categories of case: (i) where a group member was not subject to bail but

was nevertheless arrested for being in breach of bail conditions, and (ii) where a group member was subject to a bail condition which had been varied but was arrested for being in breach of the original bail condition. The proceedings claimed damages for wrongful arrest, false imprisonment and assault.

Garling J managed the class action through four questions to be determined separately, and in advance of all other questions pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005. This decision illustrates how “separate questions” can be used effectively to resolve issues quickly and efficiently with benefits for the parties involved as well as reducing the burden on the court system.

Furthermore, this decision serves to remind us of the wide-ranging uses of the class action procedure—in this case, in the area of human rights and personal liberty.

ISSUES

The separate questions examined whether s 50(1)(a) of the *Bail Act 1978* (NSW) applied so as to afford

¹ *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

² See Part IVA *Federal Court of Australia Act 1976* (Cth) and Part 4A *Supreme Court Act 1986* (Vic).

a defence to the State in relation to the claims in the class action. The claims and separate questions were grouped into two different scenarios: first, where Mr Konneh or a group member was not subject to bail at the time of arrest, and second, where Mr Moffitt or a group member was subject to a bail condition but it had been varied at the time of arrest.

The State submitted that s 50 should be interpreted in a way which had the consequence that if the police officer formed a belief on reasonable grounds, albeit a mistaken belief, and if a person had been released on bail and had failed to comply with a condition of that bail, then an arrest is not unlawful. The plaintiff submitted that the sphere of permissible mistake of an arresting officer extended only to whether the person had engaged in particular conduct and *not to the existence or content of the bail undertaking itself or of any of the conditions imposed.*

DECISION

For the first group of plaintiffs, it was determined that the New South Wales police could not rely on s 50(1) of the *Bail Act 1978* (NSW) to justify the arrest of any child or young person who was not on bail at the time of arrest. Garling J found that the police had no lawful excuse for mistakenly arresting young people who were not on bail. Emphasising the importance of personal liberty, Garling J stated, “It would be a significant abrogation of a person’s fundamental right to be at liberty if a police officer was entitled to arrest them on the mistaken belief that they were the subject of a grant of bail, unless there is a clear indication in the words in the *Bail Act* that this is so”.³

³ *Konneh v State of NSW* (No. 3) [2013] NSWSC 1424 at [58].

For the second group of plaintiffs, Garling J qualified his answer in the affirmative by stating that it depended on the facts, matters and circumstances established by the evidence. His Honour held that s 50(1) of the *Bail Act 1978* (NSW) may apply to this group. However, the arresting police officers must be able to demonstrate that they had “reasonable grounds” for their mistaken belief. Garling J stated, “In circumstances where the terms of the condition are capable of being readily objectively ascertained, it may be very difficult for an arresting officer who has a mistaken belief as to those terms, to demonstrate that such belief was one held on reasonable grounds, however, that must be, in each case, a matter for evidence”.

LAWYER CONTACTS

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