



Eddie Obeid arrives at Darlinghurst Court complex for sentencing on 15 December 2016. Photo by Daniel Munoz / Fairfax Media

The duty of a member of parliament and exclusive cognisance

Bharan Narula reports on *Obeid v R* (2017) 350 ALR 103

Introduction

In *Obeid v R* (2017) 350 ALR 103; [2017] NSWCCA 221 (*Obeid*), the NSW Court of Criminal Appeal (constituted by Bathurst CJ, Leeming JA, R A Hulme, Hamill and N Adams JJ) considered, *inter alia*, the content of the duty of trust owed by a member of parliament and the contours of exclusive cognisance. The appellant had been found guilty of the common law offence of misconduct in public office following trial before Beech-Jones J (the trial judge) and a jury.

Background

The appellant was tried on an indictment that between August and November 2007, while a member of the Legislative Council of NSW, he wilfully misconducted himself by making representations to the Deputy CEO and GM of a division of the Maritime Authority of NSW (the officer) with the intention of securing an outcome favourable to Circular Quay Restaurants Pty Ltd (CQR) in respect of its tenancies of properties at Circular Quay, knowing at the time he made those representations that he or his family had a financial interest in the said tenancies which he did not disclose to the officer.

CQR had purchased two businesses oper-

ating at Circular Quay. Through a series of trusts, 90 per cent of the interest in the businesses flowed to a discretionary trust that included the appellant and his wife as potential beneficiaries. The purchases had been funded in part from the proceeds of a mortgage of the house in which the appellant and his wife lived and which was registered in the name of his wife.

The Crown case was that the appellant called the officer, expressing displeasure in strong terms about the way tenants at Circular Quay had been treated, and asked the officer to speak to a professional negotiator, who had been retained by three tenants (including CQR) to lobby the Maritime Authority to achieve better security of tenure and a change in the relevant competitive tender policy. The appellant did not indicate that he had any financial interest in any of the businesses, and the officer believed that the appellant was calling on behalf of constituents.

Duty of a member of parliament

The trial judge directed the jury in the following terms:

I direct you that, as a matter of law, in performing their functions members of the Legislative Council must act only

according to what they believe to be in the public interest and the interests of the electorate, and must not use their position for the purpose of promoting their own pecuniary interests or those of their family or entities close to them.

The appellant argued that there was no such duty and, to the extent there was, the formulation was erroneous. Consistent with the former submission, the appellant declined to proffer a formulation of the direction which should have been given.

The chief justice rejected the argument that the duty imposed on a parliamentarian was a matter of conscience not subject to legal sanction.¹ His Honour referred to several authorities which explained the high public duty imposed upon members of parliament,² including the prescription of Isaacs and Rich JJ in Boston (at 400) that the 'fundamental obligation' of a member of parliament is 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'. Bathurst CJ held at [62]:³

Members of parliament are appointed to serve the people of the state, including their constituents and it would seem that a serious breach of trust imposed on



them by using their power and authority to advance their own position or family interest rather than the interests of the constituents who they are elected to serve, could constitute an offence of the nature of that alleged.

Bathurst CJ further held that the trial judge's direction accurately identified the issues in the case and merely reflected the positive and negative elements of the duty. Questions of conflicting duties between the interests of the public and the interests of the electorate were not in issue at the trial, and the offence additionally requires wilfulness and seriousness of the conduct to be established.

Error in the formulation of duty

The appellant also criticised the trial judge's formulation because it did not cover the situation in which the appellant's purpose in speaking to the officer was not solely to advance his own pecuniary interests, and submitted that the trial judge failed to direct the jury that the improper purpose must be the substantial or dominant purpose. The chief justice noted the Crown case was one of sole purpose (or motivation), and the defence in closing submissions put in issue that the jury would not be satisfied that the sole purpose of the appellant in making the representations was to advance his pecuniary interests. In the circumstances, there was no misdirection and the direction was favourable to the appellant as it required the jury to be satisfied, beyond reasonable doubt, that the sole purpose of the representations was to promote his own interests or those of his family. It was thus unnecessary to consider whether it is sufficient to constitute the offence if the improper purpose or motivation is a dominant or causative purpose.⁴

Exclusive cognisance⁵

The appellant argued that the issues in the case were within the exclusive cognisance of the parliament of NSW and should not have been determined in the Supreme Court of New South Wales. In making that submission the appellant was faced with the ruling in *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 (*Obeid* (2015)) that the court had jurisdiction to hear the charge the subject of the indictment. The appellant argued that the court should exercise a self-denying ordinance and not exercise its jurisdiction. Bathurst CJ held that the reasons given earlier in *Obeid* (2015) were 'equally applicable' to the reframed argument. His Honour noted that exclusive cognisance was originally based on the proposition that parliament had its own peculiar law which was not known to the courts, however this has 'no bearing' on the court's jurisdiction, nor does it provide a basis to decline to exercise jurisdiction.

His Honour referred to the remarks of Lord Rodger in *R v Chaytor* [2011] 1 AC 684 at [108] that if the impugned conduct would constitute an offence under the ordinary criminal law of England, then the offence can be prosecuted in the criminal courts in the usual way. The chief justice held that the exceptions to this principle include where the existence of the parliamentary privilege makes it 'impossible to fairly determine the issues between the parties' or if the proceedings 'in fact interfered with the freedom of the House of Parliament to conduct its legislative and deliberative business without interference from the court'. Outside these exceptions, declining to exercise jurisdiction in many such cases would constitute 'an affront to the administration of justice'.

His Honour noted that s 14A of the *Constitution Act 1902* (NSW), which empowers the making of regulations relating to the

disclosure of a member's pecuniary interests, said nothing to suggest an exclusive jurisdiction of a chamber of parliament. Furthermore, s 13A of the Act, which entails that the composition of the chamber may be affected by a curial determination of criminality, was inconsistent with that submission.

The chief justice noted that other cases⁶ were consistent with the court having jurisdiction over members of parliament and also exercising it. Furthermore, the indictment did not make allegations of conduct within the walls of parliament relating only to the internal practices of the chamber; nor did it impugn speech within parliament.⁷ Leeming JA explained that it was 'very difficult to see how any of the offending conduct relates to proceedings in parliament'.⁸

Special leave

Special leave was declined on 23 March 2018 on the basis that there were insufficient prospects of success: *Obeid v The Queen* [2018] HCATrans 54 (Bell, Keane and Edelman JJ).

Conclusion

Obeid confirmed that a breach of the duty of trust owed by a member of parliament is capable of amounting to an offence. Furthermore, a close and direct connection with parliamentary proceedings would be required for the court to decline to exercise its jurisdiction. However, as the factual substratum rendered it unnecessary, the question of whether a breach of duty may be established if the impugned conduct occurred where the improper purpose or motivation is the dominant or causative purpose remains, for the moment, unanswered.

END NOTES

1 R A Hulme, Hamill and N Adams JJ agreeing (*Obeid* [336], [470], [474]); Leeming JA also agreed and gave additional reasons by way of elaboration rather than qualification (*Obeid* [291]; [330]).

2 Including *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494 and *R v Boston* (1923) 33 CLR 386 (*Boston*; *McCloy v State of NSW* (2015) 257 CLR 178 at [169]-[171] (Gageler J); *R Day (No. 2)* (2017) 91 ALJR 518 at [49]-[50] (Kiefel CJ, Bell and Edelman JJ); at [179] (Keane J) and at [269] (Nettle and Gordon JJ)).

3 See too *Obeid* [196]-[199].

4 *Obeid* [82]-[96], cf. *R v Macdonald; R v Maitland* [2017] NSWSC 337 (Adamson J) at [39].

5 This principle was subsequently referred to in *Alley v Gillespie* (2018) 92 ALJR 373 at [108], [112] (Nettle and Gordon JJ) in the context of s 47 of the Constitution (see too at [77] (Gageler J)). Professor Blackshield also discussed the principle in an article published on 3 April 2018 on AusPubLaw titled: 'Exclusive Cognisance' and Cognitive Dissonance: *Alley v Gillespie*.

6 *Boston; R v White* (1875) 13 SCR (NSW) (L) 322; *R v Greenway* [1998] PL 357.

7 Article 9 of Bill of Rights 1689 (1 Will & Mar sess 2 c 2) provides: '[t] hat the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament' (spelling modernised): *Obeid* (2015) [27].

8 *Obeid* [321].