



## ***Lee v. Ashers Baking Company Ltd and Ors [2018] UKSC 49***

### **The Facts**

1. Asher's bakery is run by a Christian couple (the McArthurs). They offer a 'build a cake' service which allows customers to request particular images or inscriptions to be iced onto a cake.
2. Mr Lee had bought cakes from Ashers in the past, although he was not known personally to the staff or owners of the bakery. Neither the bakery's owners nor their staff knew of Mr Lee's sexual orientation. In May 2014, Mr Lee was invited to a private party to mark the end of Northern Ireland anti-homophobia week and the political momentum towards same-sex marriage. The party also followed the narrow defeat of a motion supporting same-sex marriage in the Northern Ireland Assembly. Mr Lee went to the bakery and, taking advantage of the 'build a cake' service, placed an order for a cake to be iced with his own design. This was a coloured picture of 'Bert and Ernie', the QueerSpace (which is not a campaigning organisation but supports same-sex marriage) logo and the headline 'Support Gay Marriage'.
3. The order was accepted. Over the weekend, the owners of the bakery reflected on the issue and decided that they could not, in good conscience, make the cake with that slogan. They telephoned Mr Lee on the Monday and explained that because they were a Christian business they could not print the slogan requested. They apologised to Mr Lee and he was given a full refund. Mr Lee obtained a cake for the party from another bakery. He complained to the Equality Commission for Northern Ireland ('ECNI') who supported him in bringing a claim for direct and indirect discrimination.
4. The facts as found by the District Judge at first instance were that the bakery did not refuse to make the cake because of Mr Lee's actual or perceived sexual orientation. She found that they '*cancelled this order because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs*'. They would have sold a cake to Mr Lee without the message and they would have refused to supply a cake with that message to a hetero-sexual customer. As the Supreme Court said '*The objection was to the message, not the messenger*'.

### **The Reasoning by the Supreme Court, in Summary**

5. The Supreme Court found for the owners of the Bakery. Its reasoning was, in summary, as follows:
  - (a) It noted the concern expressed by the Court of Appeal in Northern Ireland that the ECNI may have created the impression that it was not interested in assisting members of the faith community when they found themselves in difficulties as a result of their deeply

held religious beliefs (religious belief is a 'protected characteristic' under the equalities legislation). The Supreme Court said:

*'(paragraph 14) It is obviously necessary for a body such as the ECNI to offer its services to all people who may need them because of a protected characteristic and not to give the impression of favouring one such characteristic over others'*

(b) In relation to Mr Lee's claim under the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* ('SOR'):

- (paragraph 34) it held that there was no breach of these Regulations because: *'In a nutshell, the objection was to the message and not to any particular person or persons'*;
- (paragraph 25) it rejected the legal argument that the criterion used by the bakery was 'indissociable' from the protected characteristic and the District Judge's conclusion that support for same sex marriage was indissociable from sexual orientation. The Supreme Court said that this was to *'misunderstand the role that 'indissociability' plays in direct discrimination'*. It said *'People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation'*;
- (paragraphs 33 and 34) it characterised the case for the purposes of legal analysis by saying that *'this was a case of 'associative discrimination' or it was nothing'*. It referred to the guidelines that apply in Great Britain (but not Northern Ireland) which say that direct discrimination can occur when a person treats another person less favourably on the grounds of the sexual orientation / perceived sexual orientation of another person with which they associate. The Supreme Court said:

*'that is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is 'on the grounds of' sexual orientation. There must, in my view, be a closer connection than that.'*

- (paragraphs 35 and 36) it concluded its reasoning in this part of the judgment by saying:

*In reaching the conclusion that there was no discrimination on grounds of sexual orientation in this case, I do not seek to minimise or disparage the very real problem of discrimination against gay people. Nor do I ignore the very full and careful consideration which was given to the development of the law in this area, to which Mr Allen QC drew our attention at considerable length. Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is "born free and equal in dignity and rights". Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a*

*service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.*

*It follows that there is no need to consider whether it is necessary to read down the SORs to take account of the appellants' Convention rights or indeed to consider whether there was power to make them. The SORs do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.*

(c) In relation to Mr Lee's claim for discrimination on the basis of his political beliefs (The *Government of Ireland Act 1920, the Northern Ireland Constitution Act 1973 and the Fair Employment and Treatment (Northern Ireland) Order 1998 ('FETO')*), the Supreme Court:

- (paragraph 41) accepted that support for gay marriage is a political opinion for these purposes;
- said that the motive of the alleged discriminator is irrelevant, the focus is on the beliefs of the alleged victim (paragraphs 43 to 45); and
- (paragraphs 47 to 48) concluded on this part of the case that:

*It may well be that the answer to this question is the same as the answer to the claim based on sexual orientation. There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man... . The evidence was that they were quite prepared to serve him in other ways. The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.*

*However, there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are "indissociable" for the purpose of direct discrimination on the ground of political opinion. This would not always be the case, because the person ordering a particular message may in fact be indifferent to it. But in this case Mr Lee was perceived as holding the opinion in question. It becomes appropriate, therefore, to consider the impact of the McArthurs' Convention rights upon the meaning and effect of FETO.*

(d) In relation to Article 9 of the *European Convention on Human Rights* (the right to freedom of thought, conscience and religion) and Article 10 (the right to freedom of expression), the Supreme Court:

- (paragraph 49) Quoted the classic statement by the European Court of Human Rights that:

*“As enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”*

- (paragraphs 50 – 52) said that both Article 9 and Article 10 prohibit obliging a person to hold or manifest beliefs that they do not hold. Article 10 also includes a right not to express a particular opinion; and
- (paragraph 55) concluded that:

*Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim.*

6. This is an important case setting the boundaries of the equalities legislation and the relationship between the equalities legislation and Convention rights. It is one that will apply to Catholics both because religion is a ‘protected characteristic’ under the equalities legislation and because of the protections in Articles 9 and 10 of the European Convention.
7. Members should also be aware of the postscript to the judgment that deals with the decision of the United States Supreme Court in *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission* in somewhat Delphic terms. Reading between the lines of those paragraphs suggests that refusing to make a wedding cake with no message for a same-sex marriage might well fall foul of the equalities legislation. However, the Supreme Court did not say that in terms.
8. The judgment is freely available on the internet: <http://www.bailii.org/uk/cases/UKSC/2018/49.html> or on the Supreme Court website (where there is also a press summary).