

SUPREME COURT OF QUEENSLAND

CITATION: *Markan v Bar Association of Queensland* [2013] QSC 146

PARTIES: **PETER MARKAN**
(plaintiff)
v
BAR ASSOCIATION OF QUEENSLAND
(defendant)

FILE NO/S: 928 of 2013

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 24 April 2013

JUDGE: Atkinson J

ORDER:

- 1. The claim filed on 4 February 2013 and the amended claim filed on 7 March 2013 be set aside pursuant to r 16(e) of the *Uniform Civil Procedure Rules 1999*.**
- 2. The statement of claim filed on 4 February 2013 and the amended statement of claim filed on 7 March 2013 be struck out pursuant to r 171(1)(a) and (c) of the *Uniform Civil Procedure Rules 1999*.**
- 3. The plaintiff pay the defendant's costs of and incidental to the proceeding to be assessed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – ORIGINATING PROCESS – where the plaintiff made complaints to the defendant about two barristers in relation to the plaintiff's representation in the Court of Appeal and one barrister in relation to memoranda of advice provided to the plaintiff after his unsuccessful appeal in the Court of Appeal – where the Legal Services Commissioner referred the complaints to the defendant – where the defendant wrote to the plaintiff about the complaints which had been referred to it by the Legal Services Commission – where the defendant prepared reports to the Legal Services Commissioner recommending the complaints be dismissed – where the Legal Services Commission dismissed all of the plaintiff's complaints – where the plaintiff filed a claim and statement of claim and later purported to amend his claim and statement

of claim – where the defendant applied for the claim and statement of claim to be struck out and later amended its application to have the amended claim and statement of claim struck out – whether the purported amended claim should be set aside as leave of the court was not sought or given – whether the claim should be set aside as disclosing no reasonable cause of action, being scandalous and an abuse of process of the court

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – whether the statement of claim and amended statement of claim should be struck out as disclosing no reasonable cause of action, being scandalous and an abuse of process of the court

Australian Consumer Law 2010 (Cth), s 18, s 20, s 21, s 21(1), s 21(4)(b), s 29, s 29(1)(b), s 60, s 224
Competition and Consumer Act 2010 (Cth), Sch 2
Fair Trading Act 1989 (Qld), s 92, s 93, s 95
Legal Practice Act 1996 (Vic), s 141, s 146, s 149, s 299
Legal Profession Act 2007 (Qld), s 435(2), s 439, s 439(3), s 447, s 451(1), s 475(1)(b), s 475(3)(c), Part 4.7, Sch 2
Trade Practices Act 1974 (Cth), s 4, s 51AA, s 52
Uniform Civil Procedure Rules 1999 (Qld), r 7, r 16, r 16(e), r 149(1)(b), r 171, r 171(1)(a), r 171(1)(c), r 377, r 378

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, cited
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [\[2011\] QCA 252](#), cited
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; [1990] HCA 17, considered
Davis v The Commonwealth of Australia (1986) 61 ALJR 32; [1986] HCA 66, cited
Dey v Victoria Railways Commissioners (1949) 78 CLR 62; [1949] HCA 1, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, considered
Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86, cited
Johnstone v Victorian Lawyers RPA Ltd (2003) 132 FCR 411; [2003] FCA 1052, applied
Madden v Kirkegard Ellwood and Partners [1983] 1 Qd R 649, cited
Markan v Bar Association of Queensland (No 1) [2013] QSC 108, related
Markan v Bar Association of Queensland (No 2) [2013] QSC 109, related
Markan v The Queen [2010] HCASL 241, cited
Platinum United II Pty Ltd v Secured Mortgage Management

Ltd (in liq) [\[2011\] QCA 162](#), cited
R v Markan [\[2009\] QCA 110](#), cited
Ronbar Enterprises Pty Ltd v Elliot Harvey Securities [2011] QSC 239, cited
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, cited
Stone v ACE-IRM Insurance Broking P/L [\[2003\] QCA 218](#), cited
von Risefer v Permanent Trustee Company Limited [2005] 1 Qd R 681; [\[2005\] QCA 109](#), cited

COUNSEL: The plaintiff appeared on his own behalf
D G Clothier with P J McCafferty for the defendant

SOLICITORS: The plaintiff appeared on his own behalf
Bartley Cohen for the defendant

- [1] The plaintiff, Peter Markan, filed a claim and statement of claim in this court on 4 February 2013. On 26 February 2013 the defendant, the Bar Association of Queensland ("BAQ"), filed an application seeking various forms of relief.
- [2] Paragraph 1 of that application sought an order that the time set for the defendant to file a defence in the proceeding be extended pursuant to r 7 of the *Uniform Civil Procedure Rules 1999* ("UCPR") until seven days after the determination of the relief claimed in paragraphs 3 and 4 of the application. An order was made in those terms by Dalton J of this court on 5 March 2013. The application was otherwise adjourned to 14 March 2013.
- [3] On 7 March 2013 the plaintiff filed another claim and statement of claim which purported to amend the claim and statement of claim filed on 4 February 2013. It had handwritten on it:
"Amended [*sic*] pursuant to order of Justice Dalton on 05.03.2013."
- [4] That note appears to have been signed and dated by the plaintiff. There is no record on the file of any order being made for the claim to be amended on that or any other date.
- [5] On 14 March 2013 Philippides J of this court adjourned the application to the week commencing 22 April 2013. Her Honour also ordered "if there is an objection, it will be advised in writing, and the basis of the objection will be set out in that advice by 12 noon on 26 March 2013."
- [6] Objections were made by the plaintiff to my hearing the matter and those objections have been dealt with and are the subject of *ex tempore* judgments delivered on 17

April 2013¹ and 24 April 2013.² I therefore proceeded to hear the balance of the adjourned application on 24 April 2013.

- [7] Paragraph 3 of the application sought the following order:
 "That the claim be struck out as:
 (a) Disclosing no reasonable cause of action;
 (b) Having a tendency to prejudice or delay the fair trial of the proceedings;
 (c) Being unnecessary or scandalous;
 (d) Being frivolous or vexations [*sic*]; and
 (e) Being an abuse of the process of the Court.
 Pursuant to the inherent jurisdiction of the Court and Rule 16 of the UCPR."
- [8] Paragraph 4 of the application sought the following order:
 "That the statement of claim be struck out as:
 (a) Disclosing no reasonable cause of action;
 (b) Having a tendency to prejudice or delay the fair trial of the proceedings;
 (c) Being unnecessary or scandalous;
 (d) Being frivolous or vexations [*sic*]; and
 (e) Being an abuse of the process of the Court.
 Pursuant to the inherent jurisdiction of the Court and Rule 171 of the UCPR."
- [9] The application also sought an order that the plaintiff pay the defendant's costs on the indemnity basis and such further or other order as the court considers appropriate. Filed with the application was an affidavit by Cameron McLeod, a solicitor from the firm Bartley Cohen who acted on behalf of the defendant. An affidavit by Daniel O'Connor, Deputy President of the Industrial Relations Commission, who was the Chief Executive of the BAQ at the relevant time, was filed on behalf of the defendant on 1 March 2013. Further affidavits were filed on behalf of the defendant on 5 March and 12 March 2013.
- [10] On 13 March 2013 the defendant filed an amended application. In paragraph 3 of the amended application it sought that the amended claim be struck out pursuant to the inherent jurisdiction of the court and r 16 of the UCPR as:
 "(a) Disclosing no reasonable cause of action;
 (b) Having a tendency to prejudice or delay the fair trial of the proceedings;
 (c) Being unnecessary or scandalous;
 (d) Being frivolous or vexatious; and
 (e) Being an abuse of the process of the Court."

¹ *Markan v Bar Association of Queensland (No 1)* [2013] QSC 108.

² *Markan v Bar Association of Queensland (No 2)* [2013] QSC 109.

- [11] Paragraph 4 of the amended application sought the striking out of the amended statement of claim pursuant to the inherent jurisdiction of the court and r 171 of the UCPR on similar grounds to that set out in paragraph 3.
- [12] I shall therefore examine both the claim and statement of claim and the purported amended claim and amended statement of claim to determine whether they should be struck out. In doing so I have considered the material filed and the oral and written submissions of the parties as well as relevant case law and the rules of court.

Uniform Civil Procedure Rules

- [13] Rule 16 of the UCPR provides:

"16 Setting aside originating process

The court may—

- (a) declare that a proceeding for which an originating process has been issued has not, for want of jurisdiction, been properly started; or
- (b) declare that an originating process has not been properly served; or
- (c) set aside an order for service of an originating process; or
- (d) set aside an order extending the period for service of an originating process; or
- (e) set aside an originating process; or
- (f) set aside service of an originating process; or
- (g) stay a proceeding; or
- (h) set aside or amend an order made under rule 127; or
- (i) make another order the court considers appropriate."

- [14] Rule 171 provides:

"171 Striking out pleadings

- (1) This rule applies if a pleading or part of a pleading—
 - (a) discloses no reasonable cause of action or defence; or
 - (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
 - (c) is unnecessary or scandalous; or
 - (d) is frivolous or vexatious; or
 - (e) is otherwise an abuse of the process of the court.
- (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
- (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

The factual background

Complaints

- [15] In order to understand the plaintiff's pleadings it is necessary to explain some of the factual background to his claim in so far as it concerns the defendant. The first relevant correspondence from the plaintiff to the defendant was on 19 May 2011. This correspondence contained complaints about three barristers who had acted for or advised Mr Markan.
- [16] The circumstances in which they came to be acting for Mr Markan were as follows. Mr Markan was convicted in the District Court before a jury on one count of grievous bodily harm. He represented himself during that trial. He was sentenced to four years imprisonment and was given a parole eligibility date of 29 October 2010, which was after he served two years' imprisonment. He appealed against the conviction. He was represented on the appeal by T Carmody SC ("Carmody") and D R Wilson ("Wilson").
- [17] His appeal was heard by the Court of Appeal on 27 March 2009 and on 1 May 2009 was dismissed by each of the three judges constituting the court: *R v Markan*.³ He applied for special leave to appeal to the High Court. His application to extend time was granted but the application for special leave was dismissed on 4 November 2010: *Markan v The Queen*.⁴
- [18] Mr Markan's complaints concerned his representation in the Court of Appeal and memoranda of advice provided by Paul Smith ("Smith") after his unsuccessful appeal in the Court of Appeal. On 4 July 2011, the plaintiff sent a follow up letter.

Referral by Legal Services Commissioner

- [19] On 5 July 2011, the Legal Services Commissioner ("the Commissioner") referred a complaint by Mr Markan about Smith to the BAQ for investigation pursuant to s 435(2) of the *Legal Profession Act 2007* ("LPA"). On 6 July 2011, the Commissioner also referred complaints by Mr Markan about Carmody and Wilson to the BAQ for investigation pursuant to s 435(2) of the LPA.
- [20] Once a complaint has been referred to a regulatory authority, defined as a bar association or law society in Schedule 2 of the LPA, by the Legal Services Commission ("LSC"), its investigative role is set out in s 439 of the LPA:
- "439 Role of law society or bar association**
- (1) If a complaint or investigation matter is referred to a regulatory authority, it must investigate the complaint or investigation matter and report to the commissioner about the complaint or matter by the

³ [2009] QCA 110.

⁴ [2010] HCASL 241.

stated date or a later date stated in an extension by the commissioner.

- (2) For subsection (1), the regulatory authority may investigate a complaint or investigation matter by an investigator investigating the complaint or matter and presenting evidence to the authority for its consideration and report.
- (3) The report to the commissioner by the regulatory authority must—
 - (a) be in an approved form approved by the commissioner; and
 - (b) include a recommendation about whether a proceeding before a disciplinary body in relation to the complaint or investigation matter should be started.
- (4) Without limiting the matters to which the regulatory authority may have regard when making a recommendation as mentioned in subsection (3)(b), the authority may have regard to the following—
 - (a) the public interest in the complaint or investigation matter being heard and decided by a disciplinary body;
 - (b) the likelihood of a finding of—
 - (i) unsatisfactory professional conduct or professional misconduct against an Australian legal practitioner; or
 - (ii) misconduct of a law practice employee in relation to a relevant practice;
 - (c) any other action or proceeding that may have started or finished in relation to the conduct the subject of the complaint or investigation matter or to the same practitioner or law practice employee.
- (5) If the regulatory authority recommends making a discipline application, the report must also include a draft of the application and the evidence to support the application."

[21] On 1 August 2011, the BAQ wrote to Mr Markan about the complaints which had been referred to it by the LSC for investigation. The letters set out how his complaints would be dealt with in the following terms:

"The investigation will be conducted by the Professional Conduct Committee ('PCC') of the Association.

The procedure adopted by the Association for investigating complaints is as follows:

- The complaint is recorded in the Complaints Register kept by the Association;

- The complaint will be forwarded to the PCC for its consideration;
- The PCC will require the Barrister to respond to your complaint;
- The PCC may require further written information and/or documentation from you in order to assist with the investigation of the complaint;
- The PCC may also need to make enquiries of third parties for information relating to your complaint.

Under the *Legal Profession Act 2007*, the role of the Association is to:

- Investigate matters referred to it by the LSC, and
- Report to the LSC on the outcome of its investigation, including a recommendation about whether a proceeding before a disciplinary body in relation to the complaint should be started.

Responsibility for deciding whether a disciplinary proceeding is commenced rests with the LSC.

The Association will conduct its investigation as expeditiously as possible, but you should be aware that some investigations do take some time to complete. I will contact you again if any further information concerning the complaint is required, and otherwise will advise you when the Association has reported to the LSC."

- [22] Part 4.7 of the LPA deals with what happens when an investigation has been or is being conducted. The Commissioner may commence a proceeding under Chapter 4 of the LPA before a disciplinary body: LPA s 447. The Commissioner has a duty to keep a complainant informed about the way the complaint is being dealt with: LPA s 451(1).
- [23] As a regulatory authority, the BAQ is immune from liability for, *inter alia*, anything done or omitted to be done for the purpose of performing the functions or exercising the powers of the Commissioner under Chapter 4, unless it is not done in good faith: LPA s 475(1)(b), (3)(c).

Reports to Commissioner

- [24] On 4 April 2012, the BAQ prepared reports to the Commissioner. After considering the relevant material, the reports recommended to the Commissioner that the complaints against Smith, Carmody and Wilson be dismissed. On 4 May 2012, the Council of the BAQ adopted the reports of the PCC and endorsed the recommendation of the Chair of the PCC that the complaints against Smith, Carmody and Wilson be dismissed.

- [25] On 16 May 2012, the BAQ sent copies of its reports to the Commissioner as required by s 439(3) of the LPA and wrote to Mr Markan at the address he gave in his letters of complaint informing him that its reports about Smith, Carmody and Wilson had been completed and sent to the Commissioner. On 11 July 2012, the BAQ received the letters it sent to Mr Markan on 16 May by mail returned to sender.
- [26] On 31 May 2012, the LSC informed the BAQ that all of Mr Markan's complaints had been dismissed.

The claim, amended claim, statement of claim and amended statement of claim

- [27] The claim filed on 4 February 2013 was in the following terms:⁵
- "The plaintiff claims:
1. The Defendant (the commercial corporation – ABN 78 009 717 739) failed to provide the service of ' INVESTIGATION ' as promised in their 3 letters from 01.08.2011. The delivery of the service was promised in irrevocable terms .
 2. By failing to perform without a legitimate legal excuse their lawful , legal obligation they breached the contract undertaken by them voluntarily . After 20 months since making the legal promise it is obvious that the Defendant will not complete the work agreed to . (anticipatory breach , breach of promise , breach of trust , material breach , fundamental breach) .
 3. The Plaintiff therefore seeks monetary compensation of A\$ 10 000 000.13 (ten milion Australian dollars and thirteen cents) which he demands to be paid by the Defendant as damages for the losses suffered by the Plaintiff .
 4. The Plaintiff reserves the right to add to this claim the legal costs and others suffered in the course of pursuing this claim and the interest calculated at the commercial rate .
 5. Due to the established case of the defendant organisation being knowingly involved in the protection and encouragment of criminal conduct the Plaintiff request the Court to issue the order declaring the Bar Association of Queensland as criminal organisation and to order its dissolution .
 6. Due to the fact that personel of Bar Association of Queensland , shareholders and people having working participation with this commercial organisation have been involved in criminal conduct themselves (perverts of justice) and displayed the substantial defects of character - the Plaintiff requests the Court to declare those people as ' not fit and proper ' of holding any position in Queensland requiring trustworthness and honesty and to issue the order

⁵ The quotations are verbatim.

prohibitting those people from applying or holding such positions in Queensland ."

[28] On 7 March an amended claim was filed. Paragraphs 1 and 2 of the claim filed on 4 February were deleted. A new paragraph 1 was added in the following terms:

"1. The Plaintiff demands that the Defendant makes the public apology for the harm and the distress caused utilizing all major public media available in a clear and highly visible manner ."

[29] Paragraphs 3, 4, 5 and 6 of the claim filed on 4 February were re-numbered as paragraphs 2, 3, 4 and 5 of the amended claim filed on 7 March in substantially the same form. A new paragraph 6 was added in the following terms:

"6. Due to cold and calculated criminal conduct and the unrepentant attitude by the Defendant (which affects the fundation and the legitimacy of legal arrangements in the State) the Plaintiff request the Court to consider issuing the recommendation that the people associated with Bar Association of Queensland to be sent to re-education facilities where they will be subjected to hard physical labour to instill in them the respect for other people in the community."

[30] The statement of claim filed on 4 February 2013 was in the following terms:

"1. The Bar Association of Queensland is a commercial organization registered with ASIC - ABN 78 009 717 739 , duly incorporated according to law and capable of being sued in its own name .

The Defendant is subject to all laws applicable to any Australian company , including but not limited to ' Corporations Act 2011' , ' Trade Practices Act 1974 ' , ' Fair Trading Act 1989 ' , ' Competition and Consumer Act 2010 ' .

2. As the result of the correspondence between parties their offer of ' Investigation ' (expressed in 3 letters from 01.08.2011) was accepted by the Plaintiff in the letter from 11.08.2011. The delivery of the service was promised in irrevocable terms .

3. There is another legal party to the contract – Legal Services Commission (actng under provisions of Legal Profession Act 2007). However they choose to tolerate the breach by the Defendant and contempt for the law for reasons known only to them . When approached by the Plaintiff they choose not to respond .

4. The conditions of the contract and the delivery of the service were accepted , both parties were aware of the legal concequences and due to the nature of the intended service the consideration element was clearly expected to be beneficial to both parties . The Defendant possessed the capacity to fulfill the required service and the intention of the parties that they are legally bound by the contract is beyond doubt .

5. The Plaintiff on 2 documented occasions in clear terms asked the Defendant to fulfill the terms of the contract and to deliver the service . On both occasions there was no response from the Defendant .

6. It has to be noted that the Defendant cynically claims to possess ' professional ' knowledge of the laws in this country, therefore there are no mitigating elements of unconscious conduct due to the lack of awareness – on the contrary ! – it is deliberate and premeditated action of arrogant mafia organisation operating to subvert the government and community institutions .

7. Bar Association of Queensland is involved in deception and fraudulent claims and on the other hand hypocritically accusing at any occasion other people of being 'criminals'. It is also involved in flagrant contempt of laws in this country .

8. The defendant has been involved in unlawful act indicating gross malice and ill will – breach of contract and the breach of trust not on individual scale but affecting the whole society , eroding public confidence in the operation of justice system .

9. The Plaintiff makes this claim relying on the provisions of law : ' Competition and Consumer Act 2010 ' - ss 18,20 , 21-4b, 29-1b, 60 , 224-1a1,2 ; ' Fair Trading Act 1989 ' – ss 92 , 93 , 95 ."

[31] The amended statement of claim retained paragraphs 1 and 2 but deleted paragraph 3. Paragraphs 4 and 5 were re-numbered as paragraphs 3 and 4. In paragraph 4 of the amended statement of claim the words "(28.11.2011 and 09.04.12)" were added after the words "2 documented occasions". The amended statement of claim contained new paragraphs 5, 6, 7 and 8 in the following terms:

"5. The Defendant failed to provide the service of ' INVESTIGATION ' in honest , fair and reasonable manner according to law. (Competition and Consumer Act 2010 – Part 2-2 - Unconscionable conduct - s20,21).

By failing to perform without a legitimate excuse their legal obligation they breached the lawfully made promise resulting in legal consequences of this claim .

6. On 4.03.2013 the Plaintiff received documents indicating that Bar Association provided reports in this matter to Legal Services Commissioner (dated 04.04.2012). From the documents attached to the Affidavit of Mr.O'Connor (pages 31,32,47) it is apparent that Bar Association was aware that the Plaintiff was not informed about those reports therefore the job cannot be considered to be done unless they informed the Plaintiff about completion .

7. Bar Association has a history of ignoring correspondence or negligently sending it to wrong addresses as admitted by them in the submission to Court on 05.03.2013 (points 13, 14) .

8. The content of the Bar Association reports reinforces the Plaintiff claim of great dishonesty , deception , unconscionable conduct , manifest disregard for laws and evidence and the policy of mafia style protection of crooks in their organization . The reports contain false , misleading , untrue statements indicating contemptuous attitude and encouragement to predatory means when dealing with other members of the community ."

[32] Paragraphs 6, 7, 8 and 9 from the statement of claim filed on 4 February 2013 were re-numbered 9, 10, 11 and 12 in the amended statement of claim. In paragraph 12 the following words were inserted between "The Plaintiff" and "makes this claim":

"feels offended and vilified by being subjected to such conduct , his private rights and interests have been (or will be) adversely affected by the wrong done and".

[33] The relief claimed in both the statement of claim and the amended statement of claim was somewhat different from that found in the claim or amended claim. In the statement of claim, the plaintiff claimed the following relief:

- "1. The Plaintiff asks the court to order the Defendant to pay the fair and reasonable monetary compensation of A\$ 10 000 000.13 (ten milion Australian dollars and thirteen cents) as damages for the losses suffered by the Plaintiff .
(anticipatory breach , breach of promise , breach of trust , material breach , fundamental breach)
 - a. **Compensatory damages – the amount claimed – 1 666 666.68833333**
 - b. **Consequential damages – the amount claimed – 1 666 666.68833333**
 - c. **Agravated damages – the amount claimed – 1 666 666.68833333**
 - d. **Exemplary damages – the amount claimed – 1 666 666.68833333**
 - e. **Parasistic damages – the amount claimed – 1 666 666.68833333**
 - f. **Restitution damages – the amount claimed – 1 666 666.68833333**
2. The Plaintiff reserves the right to add to this claim the legal costs and others suffered in the course of pursuing this claim and the interest calculated at the commercial rate .
3. Due to the severity of the unlawful conduct the Plaintiff demands that the Defendant makes the public apology for the harm and the distress caused utilizing all major public media available in a clear and highly visible manner .
4. Due to the established case of the defendant organisation being knowingly involved in the protection and encouragement of criminal conduct the Plaintiff request the Court to issue the order declaring the Bar Association of Queensland as criminal organisation and to order its dissolution .
5. Due to the fact that personel of Bar Association of Queensland , shareholders and people having working participation with this commercial organisation have been involved in criminal conduct themselves (perverts of justice) and displayed the substantial defects of character by being extremists of crime -
the Plaintiff requests the Court to declare those people as ' not fit and proper ' of holding any position in Queensland requiring trustworthness and honesty and to issue the order

prohibitting those people from applying or holding such positions in Queensland."

- [34] In the amended statement of claim paragraph 3 of the relief sought in the statement of claim became paragraph 1; paragraphs 1 and 2 of the relief sought in the statement of claim became paragraphs 2⁶ and 3; paragraphs 4 and 5 were unchanged. The plaintiff added a new paragraph 6 which was in the same terms as paragraph 6 of the amended claim:

"6. Due to cold and calculated criminal conduct and the unrepentant attitude by the Defendant (which affects the fundation and the legitimacy of legal arrangements in the State) the Plaintiff request the Court to consider issuing the recommendation that the people associated with the Bar Association of Queensland to be sent to re-education facilities where they will be subjected to hard physical labour to instill in them the respect for other people in the community ."

Amendment of claim and statement of claim

- [35] An originating process such as a claim may not be amended except in accordance with r 377 of the UCPR. Such an amendment, with limited exceptions which do not apply in this case, requires the leave of the court. No such leave has been sought or given. There is no similar limitation on the amendment of a pleading or interlocutory application which is governed by the more general words of r 378 which provide that:

"Before the filing of a request for trial date, a party may, as often as necessary, make an amendment for which leave from the court is not required under these rules."

- [36] It follows that the purported amended claim should be set aside pursuant to r 16(e) of the UCPR as it was filed without the requisite leave having been granted.

- [37] I shall now consider the claim filed on 4 February 2013, the statement of claim filed on the same date and the amended statement of claim filed on 7 March 2013.

Principles to be applied

- [38] There is a distinction between striking out a claim and striking out a statement of claim. Striking out a claim is the end of the proceeding whereas the striking out of a statement of claim does not necessarily, by itself, put an end to the proceeding, except in a case where the claim has also been struck out or the plaintiff is refused leave to replead: *Ronbar Enterprises Pty Ltd v Elliot Harvey Securities* [2011] QSC

⁶ The following was omitted: "(anticipatory breach , breach of promise , breach of trust , material breach , fundamental breach)".

239 at 1-7 citing *von Risefer v Permanent Trustee Company Limited* [2005] 1 Qd R 681.

- [39] The case must be very clear to justify the summary intervention of the court to prevent a party from presenting its case for determination at trial. Those principles were set out by the High Court in *Dey v Victoria Railways Commissioners*.⁷ Barwick CJ summarised the authorities with regard to summary dismissal in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129:

"... these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action – if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal – is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'."

- [40] The defendant must demonstrate "a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."⁸

Should the claim be set aside and the statement of claim and amended statement of claim be struck out?

- [41] The claim filed on 4 February 2013 pleaded damages (or monetary compensation) for breach of contract. The statement of claim pleaded that a contract existed between the BAQ and the plaintiff and the LSC. The amended statement of claim pleaded a contract between the plaintiff and the BAQ. None of the facts pleaded sustain any suggestion that there was a contract between the plaintiff and the BAQ or between the plaintiff, the BAQ and the LSC. The letters from the BAQ of 1 August 2011 do not, as pleaded, purport to be an offer capable of acceptance. They merely inform the plaintiff of the statutory responsibilities of the BAQ under the LPA and inform him of the way in which the BAQ will undertake those statutory responsibilities. There is no possible cause of action in breach of contract as, on the facts pleaded, there was no contract between the plaintiff and the BAQ or the LSC. Accordingly it is appropriate to set aside the claim and strike out the statement of claim and the amended statement of claim in so far as they relate to any action in contract.

⁷ (1949) 78 CLR 62 at 91. See also *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at 91; *Davis v The Commonwealth of Australia* (1986) 61 ALJR 32 at 35; *Madden v Kirkegard Ellwood and Partners* [1983] 1 Qd R 649 at 652; *Stone v ACE-IRM Insurance Broking P/L* [2003] QCA 218 at [5]; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [24]; *Spencer v The Commonwealth* (2010) 241 CLR 118 at [24].

⁸ *Agar v Hyde* (2000) 201 CLR 552 at 576 [57]; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 275 [46]; *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq)* [2011] QCA 162 at [13].

- [42] Accordingly it is appropriate to set aside as disclosing no reasonable cause of action, paragraphs 1, 2, 3 and 4 of the claim and strike out paragraphs 2, 3, 4, 5 and 8 (in so far as it relates to breach of contract) of the statement of claim and 2, 3, 4 and 11 (in so far as it relates to breach of contract) of the amended statement of claim.
- [43] The next matter to consider is the reference in paragraph 9 of the statement of claim and paragraph 12 of the amended statement of claim to s 18, s 20, s 21-4b, s 29-1b, s 60, s 224-1a, 1, 2 of the *Competition and Consumer Act* 2010 and s 92, s 93 and s 95 of the *Fair Trading Act* 1989 (FTA).
- [44] Section 92 of the FTA deals with offences against the FTA and s 93 deals with certain continuing offences. Neither of those sections gives rise to any civil liability and cannot found a cause of action. Section 95 is a section which deals, *inter alia*, with how the state of mind of a body corporate may be determined and the deeming of conduct engaged in on behalf of a body corporate to be the conduct of the body corporate. None of these sections founds a cause of action under the FTA and the reference to them should be struck out as disclosing no reasonable cause of action.
- [45] I turn to the provisions of the *Competition and Consumer Act* which are pleaded. It is immediately apparent that what the plaintiff intended to plead was not the sections of the *Competition and Consumer Act* referred to but rather those sections of Schedule 2 of that Act which is referred to as the Australian Consumer Law (ACL). That error would be capable of amendment so I will refer to the sections of the ACL.
- [46] The first one is s 18 which provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive. Section 20 provides that a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time, of the States and Territories. Section 20 does not apply to conduct prohibited by s 21. Section 21(1) provides that a person must not, in trade or commerce, engage in conduct that is unconscionable in connection with the supply or acquisition or possible supply or acquisition of goods or services. The plaintiff relies on s 21(4)(b) which says merely that s 21 is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour.
- [47] Section 29(1)(b) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of services, make a false or misleading representation that services are of a particular standard, quality, value or grade.
- [48] Section 60 of the ACL provides that if a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill. Section 224 of the ACL deals with the payment of civil penalties

to the Commonwealth, State or Territory governments and so is irrelevant to any action for damages payable to a private individual.

- [49] It follows that the provisions of the ACL referred to in paragraph 9 of the statement of claim and paragraph 12 of the amended statement of claim capable of giving rise to a cause of action are s 18 (misleading or deceptive conduct), s 20 (unconscionable conduct other than in the supply of goods and services), s 29 (false or misleading representation as to services being of a particular standard, quality, value or grade) and s 60 (guarantee that services rendered to a consumer will be rendered with due care and skill). In each case the conduct complained of must have been conducted in trade or commerce.
- [50] There are a number of flaws in the plaintiff's pleading which mean that he would not be able to make out any of these causes of action. He fails to plead the material facts on which he relies for any such cause of action. Pursuant to r 149(1)(b) of the UCPR, each pleading must contain a statement of all the material facts on which the party relies.
- [51] Further, to the extent that facts are pleaded, they are the facts said to give rise to a contractual claim – a claim which has no basis in law.
- [52] There are no paragraphs in the claim which seek relief for any alleged breach of the ACL.
- [53] The only pleading in the amended statement of claim which pleads a fact referable to the ACL is paragraph 5 which alleges the BAQ "failed to provide the service of ' INVESTIGATION ' in honest , fair and reasonable manner according to law. (Competition and Consumer Act 2010 – Part 2-2 - Unconscionable conduct - s20,21)..."
- [54] Section 20 of the ACL is in similar terms to and replaces s 51AA of the *Trade Practices Act 1974* (TPA). In *Johnstone v Victorian Lawyers RPA Ltd*⁹ Sundberg J dealt with a quite similar case under s 51AA of the TPA. In that case the applicant was a legal practitioner who had been the subject of a complaint by another legal practitioner. On 11 September 2003, a delegate of the respondent wrote to the applicant setting out that she had a statutory duty to investigate the complaint pursuant to s 149 of the *Legal Practice Act 1996* (Vic) and asking for his explanation relevant to the complaint. The respondent was a recognised professional association accredited under s 299 of the *Legal Practice Act* to undertake investigation of complaints. The applicant sought relief against the respondent in respect of the 11 September letter claiming that the writing of the letter constituted unconscionable conduct under s 51AA of the TPA. The application was struck out because it was doomed to fail.

⁹ (2003) 132 FCR 411; [2003] FCA 1052.

[55] The legal analysis by Sundberg J as to why the application was doomed to fail is relevant to the prospects of pleading a cause of action known to law by the plaintiff in this case.

[56] The first legal obstacle is that the conduct of the respondent in that case, which is similar to the conduct of the BAQ complained of in this case, was not conduct "in trade or commerce." Sundberg J referred to the decision of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*¹⁰ where the court referred to the restrictive operation to be given to the phrase "in trade or commerce" in s 52 of the TPA. Mason CJ, Deane, Dawson and Gaudron JJ held:¹¹

"The phrase 'in trade or commerce' in s 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind. As a matter of language, a prohibition against engaging in conduct 'in trade or commerce' can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business. If the words 'in trade or commerce' in s 52 are construed in that sense, the provisions of the section would extend, for example, to a case where the misleading or deceptive conduct was a failure by a driver to give the correct handsignal when driving a truck in the course of a corporation's haulage business. It would also extend to a case, such as the present, where the alleged misleading or deceptive conduct consisted of the giving of inaccurate information by one employee to another in the course of carrying on the building activities of a commercial builder. Alternatively, the reference to conduct 'in trade or commerce' in s 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed ... the words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business."

The court held that the latter interpretation was to be preferred.

[57] After citing that passage and another passage from *Concrete Constructions* at 604, Sundberg J concluded with regard to the investigation of complaints under a statutory scheme:¹²

"In my view it is clear beyond serious argument that the despatch by the respondent of the letter of 11 September was not conduct in trade or commerce. Once the respondent had decided not to dismiss the complaint under s 141 of the *Legal Practice Act*, it came under a mandatory obligation, imposed by s 146, to investigate the complaint. In sending the letter it was discharging that obligation. The letter was part of the respondent's function of investigating

¹⁰ (1990) 169 CLR 594; [1990] HCA 17.

¹¹ At 602-603.

¹² At [14].

complaints against practitioners and firms. The letter does not have a commercial or trading character. It is the letter of a body, which may be assumed to be a 'corporation' as defined in s 4 of the *Trade Practices Act*, exercising a regulatory function imposed on it by statute in relation to the professional conduct of legal practitioners."

- [58] The investigation of a complaint against a legal practitioner pursuant to a statutory duty to do so cannot be said to be activity engaged in "in trade or commerce" so as to attract the operation of the ACL.
- [59] Furthermore, as Sundberg J held, the sending of a letter in the carrying out of such an investigation whether to a complainant or to the legal practitioner against whom such a complaint is made could not be said to be unconscionable conduct. His Honour described that conclusion as "also clear beyond argument". As his Honour found the respondent, there, as here, was "simply discharging the duty, imposed on it by [the relevant statute] of investigating a complaint made to it by exercising [its statutory powers]."
- [60] No reasonable cause of action has been revealed by the pleading of breach of the *Competition and Consumer Act*.
- [61] The remaining portions of the claim and statement of claim and amended statement of claim merely make scandalous accusations of criminal or other serious misconduct without pleading any material facts which could be said to support such allegations. Much of the relief sought, even if there were a cause of action which could give rise to a claim for relief, is unknown to law.

Conclusion

- [62] I am therefore satisfied that the claim filed on 4 February 2013 and the purported amended claim filed on 7 March 2013 should be set aside pursuant to r 16(e) of the UCPR and the statement of claim filed on 4 February 2013 and the amended statement of claim filed on 7 March 2013 should be struck out pursuant to r 171(1)(a) and (c) of the UCPR. To allow such pleadings to continue would be an abuse of process of the court.

Costs

- [63] The defendant, the BAQ, has sought costs of the application including reserved costs on an indemnity basis as well as the costs of the plaintiff's recusal application. Whilst the claim is in my view an abuse of the court's process and contains, as the defendant alleges, numerous baseless and scandalous allegations of dishonest conduct, in my view it is not appropriate to order costs on an indemnity basis. The defendant's application has brought an end to proceedings by an unrepresented litigant whose claim was completely misconceived. The plaintiff should pay the defendant's costs of and incidental to the proceeding to be assessed.