COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 3595/13
5272/13

Appellant: **PETER MARKAN**

AND

Respondent: **BAR ASSOCIATION OF QUEENSLAND**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE RESPONDENT

Introduction

1. The appellant has commenced two related appeals:

   (a) *First,* an appeal against an order made by the primary judge (Atkinson J) on 17 April 2013 dismissing the appellant's application for an order that the primary judge be recused from hearing the respondent's amended application to strike out the proceeding (3595/13).

   (b) *Secondly,* an appeal against orders made by the primary judge on 7 June 2013 which had the effect of striking out the proceeding (5272/13).

2. By direction of the Registrar the appeals are to be heard consecutively. There is authority to the effect that first appeal should be dealt with first: *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [117]. The respondent relies on its submissions filed in Court on 16 July 2013 in relation to the first appeal.

3. These submissions address the second appeal. In summary, the respondent submits that the appellant has not demonstrated any error in the findings of the primary judge. The primary judge was correct to find that the proceeding was an abuse of process and should be struck out because it disclosed no reasonable cause of action, contained scandalous allegations without pleading any material facts and sought relief unknown to law.

The factual background, the proceeding and its procedural history

4. The proceeding stemmed from the respondent's investigation under the *Legal Profession Act* 2007, following referral from the Legal Services Commissioner, of complaints made by the appellant against 3 barristers who formerly represented him. In each case the respondent recommended to the Legal Services Commissioner that the complaint be dismissed and the Legal Services Commissioner adopted that course. In consequence, the appellant commenced the proceeding against the respondent alleging (amongst other things) breach of contract,

contraventions of provisions of the *Fair Trading Act* 1989, contraventions of provisions of the *Australian Consumer Law* (incorrectly pleaded as the *Competition and Consumer Act* 2010 (Cth)) and criminal and other misconduct. A detailed description of the factual background to the proceeding is contained in paragraphs [15] to [34] of the Reasons.

5. A chronology of the procedural history of the proceeding is as follows:

4 February 2013 – The proceeding is commenced by claim and statement of claim.

26 February 2013 – The respondent files an application for an extension of time to file a defence and to strike out the claim and statement of claim.

5 March 2013 – Justice Dalton orders that the time for the respondent to file a defence be extended until 7 days after the determination of the respondent's strike out application.

7 March 2103 – The appellant files an amended claim and amended statement of claim. The amended claim is endorsed that it is amended pursuant to an order of Dalton J made on 5 March 2013.

13 March 2013 – The respondent files an amended application to strike out the amended claim and amended statement of claim.

14 March 2013 – Justice Philippides declines to hear the respondent's amended application because she is a judicial member of the respondent. Her Honour adjourns the respondent's amended application to the week commencing 22 April 2013 and orders that any objection to the primary judge hearing it and the grounds for objection be notified in writing by noon on 26 March 2013.

18 March 2013 – The appellant files an application for an order that the primary judge be recused from hearing the respondent's amended application.

4 April 2013 – The appellant's application comes before de Jersey CJ who adjourns it to be heard before the primary judge on 17 April 2013.

17 April 2013 – The primary judge hears and dismisses the appellant's application: *Markan v. Bar Association of Queensland* [2013] QSC 108.

19 April 2013 – The appellant commences the first appeal and files an application in this Court for a stay of the order of the primary judge made 17 April 2013.

24 April 2013 – The appellants makes an oral application to the primary judge for a stay of the order made on 17 April 2013. The primary judge dismisses the stay application (*Markan v. Bar Association of Queensland* [2013] QSC 109) and proceeds to hear the respondent's amended application.

7 June 2013 – The primary judge makes orders on the respondent's amended application which have the effect of striking out the proceeding: *Markan v. Bar Association of Queensland* [2013] QSC 146.

12 June 2013 – The appellants commences the second appeal.

The findings of the primary judge

6. In determining the respondent's amended application the primary judge appreciated that it sought the summary disposition of the proceeding. The primary judge correctly identified the caution with which the Courts adopt such a course: Reasons, paras [38]-[40].

7. The primary found that the amended claim was filed without leave being given under r.377 of the UCPR and therefore ought to be set aside pursuant to r.16(e): Reasons, paras [35]-[36].

8. The primary judge also found that the claim ought to be set aside pursuant to r.16(e) of the UCPR and the statement of claim and the amended statement of claim ought to be struck out pursuant to rr.171(1)(a) and (c) of the UCPR because:

   (a) The appellant purported to plead cause of action for breach of contract based on allegations that 3 letters from the respondent dated 1 August 2011 constituted offers to provide investigation services to the appellant which the appellant accepted. The letters in question did not purport to be offers capable of acceptance and that no reasonable cause of action for breach of contract was therefore disclosed: Reasons, paras [21] & [41]-[42].

   (b) The pleadings referred to the offence related provisions of ss.92, 93 and 95 of the *Fair Trading Act* 1989. None of those provisions founded a cause of action: Reasons, paras [43]-[44].

   (c) The pleadings referred to ss.18, 20, 21, 29, 60 and 224 of the *Australian Consumer Law* (incorrectly pleaded as the *Competition and Consumer Act* 2010 (Cth)). Section 224 is a civil penalty provision and is irrelevant. In contravention of r.149(1)(b) of the UCPR, material facts were not pleaded in support of causes of action based upon the other provisions. In any event, none of those provisions was engaged because the respondent did not act in trade or commerce. Conduct in the course of investigation of a legal practitioner pursuant to a statutory duty was not of that kind. Also, no relief was sought under the *Australian Consumer Law*. Accordingly, no reasonable cause of action for contravention of the *Australian Consumer Law* was disclosed: Reasons, paras [45]-[59].

   (d) The remaining allegations were merely scandalous accusations of criminal and other serious misconduct without pleading any material facts which could be said to

support such allegations. Much of the relief sought was unknown to law: Reasons, para [61].

(e) The proceeding was an abuse of the Court's process: Reasons, para [62].

The appeal

9. Before considering the notice of appeal and the appellant's arguments in support of it, it should be noted that the appellant does not challenge the following findings of the primary judge:

(a) That ss.92, 93 and 95 of the *Fair Trading Act* 1989 did not found a cause of action.

(b) That s.224 of the *Australian Consumer Law* is an irrelevant civil penalty provision.

(c) That material facts were not pleaded in support of causes of action based on ss.18, 20, 29 and 60 of the *Australian Consumer Law*.

(d) That material facts were not pleaded in support of the allegations of criminal and other serious misconduct.

(e) That much of the relief sought was unknown to the law.

10. Further, in large measure, the notice of appeal and the appellant's outline of argument refer to scandalous and irrelevant matters and are not directed towards identifying any error in the other findings of the primary judge. The limited extent to which a challenge is mounted to the primary judge's findings is as follows.

11. Ground 2(f) appears to be directed towards challenging the primary judge's finding that the letters from the respondent dated 1 August 2011 pleaded as constituting offers for the provision of investigation services did not purport to be offers capable of acceptance and that no reasonable cause of action for breach of contract was therefore disclosed. The appellant contends that the primary judge ignored evidence before her in the form of the Balfour Declaration and that it was not referred to in the Reasons.

12. The appellant attempted to tender a copy of the Balfour Declaration before the primary judge. Objection was taken to the tender on the ground it was irrelevant. The primary judge upheld the objection and rejected the tender. The copy of the Balfour Declaration was therefore not in evidence before the primary judge and there was no occasion to refer to it in the Reasons.

13. There is no ground of appeal to the effect that the primary judge erred in rejecting the tender. In any event, the ruling was plainly correct. The copy of the Balfour Declaration was irrelevant to the sustainability of the appellant's allegation that the letters constituted offers in a contractual sense.

14. Apart from the respect just referred to, the appellant does not challenge the primary judge's conclusion that the letters did not purport to be offers capable of acceptance. In any event, the conclusion was also plainly correct. There was no dispute about the letters. Their terms are set out in paragraph [21] of the Reasons. On their face, they did not constitute offers capable of acceptance.

15. Grounds 2(g) and 2(h) appear directed towards challenging the primary judge's finding that no cause of action was disclosed under ss.18, 20, 29 and 60 of the *Australian Consumer Law* because none of the alleged conduct was in trade or commerce. As mentioned above, the primary judge also concluded that the pleading of these provisions was flawed because of the absence of any pleading of material facts. By itself, this conclusion (which is not challenged by the appellant) was sufficient to justify the primary judge's finding that no reasonable cause of action was disclosed. In any event the primary judge's finding about trade or commerce was plainly correct.

16. The appellant contends that the respondent is a commercial organisation and that the purchase and sale of goods and services is trade. Even accepting these contentions, they do not advance the appellant's position.

17. The primary judge found that the appellant did not have a sustainable claim in contract. For him to rely on the proposition that the purchase and sale of goods is trade goes nowhere because he did not have a sustainable claim of a transaction of that kind. Indeed, the submission of the appellant in this regard demonstrates how his claims under the *Australian Consumer Law* were inextricably bound with his hopeless claim in contract.

18. Further, to say (as the appellant does) that the respondent is a commercial organisation is to fail to address the correct question. To engage the provisions of the *Australian Consumer Law* which the appellant pleaded requires the pleading of conduct in trade or commerce i.e. in the course of those activities or transactions which, of their nature, bear a trading or commercial character: *Concrete Constructions (NSW) Pty Ltd v. Nelson* (1990) 169 CLR 594 at [8]. As the primary judge found, conduct of a regulatory authority engaged in the statutory function of investigating and reporting to another authority in connection with disciplinary complaints is not of that character. In this regard the primary judge followed the decision in *Johnstone v. Victorian Lawyers RPA Ltd* (2003) 132 FCR 411. Nothing in the appellant's outline of argument casts doubt on the correctness of that decision or on the primary's judge's findings in reliance on it.

19. Ground 2(f) contends that the primary judge's conclusion that the claim, the statement of claim and the amended statement of claim made scandalous accusation is not supported by any explanation. This contention is not developed in the appellant's outline of argument. The

complete finding of the primary judge is set out above, namely that the "remaining portions of the claim and statement of claim and amended statement of claim merely make scandalous accusations of criminal and other serious misconduct without pleading any material facts which could be said to support such allegation". This finding is amply justified on reading of the documents in question. The primary judge referred to their contents in full in paragraphs [27]-[34] of the Reasons.

20. In addition to the above, the appellant's outline of argument advances a number of contentions which are divorced from any ground of appeal. They are addressed below for the sake of completeness.

21. Paragraphs 8 of the appellant's outline of argument identifies the primary judge's reference in paragraph [23] of the Reasons to the respondent's immunity under s.475 of the *Legal Profession Act* 2007 for relevant acts done by it unless not done in good faith. The reference was in the context of the primary judge's recitation of relevant statutory provisions. It required no further elaboration or finding. However, in paragraphs 9 and 10 the appellant contends that the primary judge simply gave the respondent the benefit of this privilege and that this constitutes evidence of bias. The primary judge did not give the respondent the benefit of any privilege. The primary judge analysed the proceedings and the uncontroversial facts and dealt with the respondent's amended application on its merits.

22. Paragraph 14 of the appellant's outline of argument contends that the primary judge was incorrect in finding that the appellant amended the claim without leave: Reasons, para [35]. The primary judge was correct in making that finding. Although the appellant foreshadowed before Dalton J that he may amend the statement of claim, no leave to amend was sought or granted. In any event the contention goes nowhere because the primary judge's reasons otherwise amply justified the striking out of the proceeding.

Orders

23. It is submitted that the appeal should be dismissed with costs.

Dated: 31 July 2013
Mr DG Clothier QC and Mr P McCafferty of Counsel
Counsel for the Respondent