

SUPREME COURT OF QUEENSLAND

CITATION: *Petersen v Nolan* [2019] QSC 216

PARTIES: **PATRICIA PETERSEN**
(Respondent/Plaintiff)
v
RACHEL GENEVIEVE NOLAN
(Applicant/Defendant)

FILE NO: BS No 612 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 22 May 2019

JUDGE: Martin J

ORDERS:

- 1. The Seventh Amended Statement of Claim is struck out.**
- 2. I give judgment for the defendant on the claim.**
- 3. The plaintiff is to pay the defendant's costs on the indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the plaintiff ran against the defendant in a State election – where the defendant was the incumbent – where the plaintiff alleges that the defendant caused the local council to seize the plaintiff's signs and fine the plaintiff – where the plaintiff seeks damages against the defendant for misfeasance in public office and/or negligence – where the defendant seeks an order striking out the statement of claim – where there is no evidence which supports in any way the plaintiff's allegation – whether the plaintiff's pleading discloses no reasonable cause of action

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – where the plaintiff ran against the defendant in a State election – where the defendant was the incumbent – where the plaintiff alleges that the defendant caused the local council to seize the plaintiff's signs

and fine the plaintiff – where the plaintiff seeks damages against the defendant for misfeasance in public office and/or negligence – where the defendant seeks an order for judgment against the plaintiff – where there is no evidence which supports in any way the plaintiff’s allegation – whether the plaintiff has no real prospect of succeeding on all of her claim and there is no need for a trial of the claim

Uniform Civil Procedure Rules 1999, r 171, r 293

Calveley v Chief Constable of Merseyside [1989] AC 1228, cited

Commissioner of Taxation of the Commonwealth of Australia v Day (2008) 236 CLR 163, cited

Davis v Commonwealth (1986) 68 ALR 18, cited

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited

Northern Territory v Mengel (1995) 185 CLR 307, cited

Morris v Redland City Council & Anor [2015] QSC 135, followed

Royalene Pty Ltd v Registrar of Titles & Anor [2007] QSC 059, cited

Sanders v Snell (1998) 196 CLR 329, cited

The Beach Club Port Douglas P/L v Page [2006] 1 Qd R 307, cited

COUNSEL: The respondent/plaintiff appeared on her own behalf
JB Rolls for the applicant/defendant

SOLICITORS: The respondent/plaintiff appeared on her own behalf
Bold Lawyers for the applicant/defendant

- [1] On 24 March 2012 an election was held for the Legislative Assembly for the State of Queensland. Ms Petersen (the respondent to this application and plaintiff in the main proceeding) was an independent candidate for the seat of Ipswich. Ms Nolan (the applicant/defendant) was the incumbent and the endorsed candidate of the Australian Labor Party for the same seat. She was also the Minister for Finance, Natural Resources and the Arts in the then State government.
- [2] At that election the Labor Party was defeated and the new government was formed by the Liberal National Party. Ms Nolan lost the election for the seat of Ipswich.
- [3] In this action Ms Petersen seeks damages against Ms Nolan in the order of \$6,840,000 (including \$2,000,000 “punitive or aggravated damages”) for misfeasance in public office or negligence. The action against the second defendant (Andrew Antonioli – the former mayor of Ipswich) and the third defendant (Ipswich City Council) was discontinued.

- [4] Ms Nolan seeks orders striking out the statement of claim and for judgment against the plaintiff.

This application

- [5] Ms Petersen originally sought that this hearing be adjourned on the basis of ill-health but, when the matter came on, she was content to proceed. Two days after the hearing Ms Petersen filed (and sent a copy to my Associate) a further submission. I accepted that apart from one paragraph which was the subject of objection by the defendant.

The power to strike out

- [6] The court has power to strike out a pleading under r 171 of the *Uniform Civil Procedure Rules* (UCPR):

“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.”

- [7] The volumes of reports are replete with cautions against using the power to strike out. The guiding principles are:

- (a) The discretion should only be exercised in clear cases.¹
- (b) An order will only be made in a plain and obvious case.²
- (c) The case must be so clearly untenable that it cannot possibly succeed.³
- (d) Rule 171(1)(a) permits a pleading to be struck out if it “discloses no reasonable cause of action”. What is a “reasonable cause of action” can be understood only by reference to the state of law as it exists now, and not at some indeterminable future time when it may have evolved in ways beyond present recognition.⁴

¹ *Royalene Pty Ltd v Registrar of Titles & Anor* [2007] QSC 059 at [6].

² *Davis v Commonwealth* (1986) 68 ALR 18 at 23.

³ *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130.

⁴ *The Beach Club Port Douglas P/L v Page* [2006] 1 Qd R 307 at [23].

- [8] Ms Nolan relies on the “no reasonable cause of action” ground on this application.
- [9] On applications of this nature, the facts as pleaded are not contested, but the court may receive evidence under r 171(3) of the UCPR.

What is pleaded against Ms Nolan?

- [10] The application was brought with respect to the Sixth Amended Statement of Claim. By the time this matter came on for hearing, the respondent had filed another iteration – the Seventh Amended Statement of Claim. It is that version which became the subject of argument.
- [11] The claim pleaded by Ms Petersen can be summarised as follows:
- (a) Ms Nolan knew that Ms Petersen was refusing to preference her at the election and that if Ms Petersen did not preference her then she would most likely lose the seat of Ipswich.
 - (b) Ms Petersen lawfully displayed election signs during the campaign period.
 - (c) The Ipswich City Council seized the plaintiff’s election signs and fined her in respect of those signs.
 - (d) Ms Nolan caused the Council to seize the signs and to fine Ms Petersen.
 - (e) Ms Nolan intentionally aimed to cause harm to the plaintiff by arranging for her signs to be seized and for her to be fined.
 - (f) Ms Nolan could foresee the harm that would result from the seizure of the signs and the fine being imposed.
 - (g) Ms Nolan was recklessly indifferent to the likely harm to be caused to Ms Petersen by the signs being seized and her being fined.
 - (h) Ms Nolan arranged for the signs to be seized and for Ms Petersen to be fined because she wanted: to politically benefit from doing so, to win the seat of Ipswich, Labor to win the election.
 - (i) Ms Nolan, as a holder of public office, aimed to cause harm in her capacity as the Member for Ipswich and a Minister in the government by demanding that the Council seize the signs and fine Ms Petersen.
 - (j) Ms Nolan used her position and power as the Member for Ipswich and a Minister in order to: intentionally harm the plaintiff and intentionally gain a benefit for herself by intentionally harming the plaintiff.
 - (k) The harmful actions of the defendant were done in the exercise of powers attaching to a public office, that is, as the Member for Ipswich and a Minister.
 - (l) Ms Nolan owed a duty of care to Ms Petersen because she was the Member for Ipswich and a Minister and therefore owed a duty of care not to harm the plaintiff.

- (m) Ms Nolan breach that duty by failing to exercise reasonable care in fulfilling the duty that she owed, that being not to harm the plaintiff .
- (n) Ms Nolan intentionally aimed to harm, and did harm, the plaintiff.
- (o) The plaintiff has suffered loss and damage for misfeasance in public office and/or negligence.
- (p) Ms Nolan, by demanding the Council seize the signs and fine the plaintiff, caused the following harm:
 - (i) indignity,
 - (ii) damage to reputation,
 - (iii) loss of liberty, and
 - (iv) loss of earnings.

[12] Ms Petersen claims the same relief under either misfeasance or negligence. The damages are claimed in the alternative or cumulatively:

- (a) indignity: \$20,000,
- (b) damage to reputation: \$50,000,
- (c) loss of liberty: \$50,000,
- (d) consequential economic loss:
 - (i) loss of earnings to date of trial: (estimate) \$800,000,
 - (ii) loss of earning capacity in the future (estimate): \$1,500,000, and
- (e) \$1,000,000 (for punitive or aggravated damages).

[13] The causes of action identified in the pleading are: misfeasance in public office and negligence. I will deal with those in turn.

Misfeasance in public office?

[14] The precise limits of this tort remain undefined⁵ but there is general agreement about the elements which make it up. In order to constitute the tort there must be:

- (a) an invalid or unauthorised act or omission, which is
- (b) done maliciously or knowingly, by
- (c) a public officer,
- (d) in the purported discharge of the duties of that public office, which

⁵ *Sanders v Snell* (1998) 196 CLR 329 at [42].

(e) causes loss or harm.⁶

- [15] Misfeasance in public office is concerned with misuse of public power.⁷ At the heart of the tort is the requirement that there has been bad faith in the exercise of public powers.
- [16] In *Calveley v Chief Constable of Merseyside*⁸ Lord Bridge put it in the following way:
- “... the tort of misfeasance in public office ... must ... involve an act done in the exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds ...”
- [17] Many of the cases on this subject are concerned with the proper identification of a “public officer”. In this situation it is not disputed that Ms Nolan was, at the relevant times, a public officer. The question which is of importance in this application is whether what has been alleged can be described as a misuse of public power.
- [18] The claim against Ms Nolan is that she “caused” the Council to seize the signs and then fine Ms Petersen. Ms Nolan did not, either as a member of parliament or as a Minister, have any power to “cause” the Council to do anything, let alone either of those things. Nowhere in the pleading does Ms Petersen identify the “public power” alleged to have been misused.
- [19] Ms Petersen argues that Ms Nolan did exercise a power that was “an incident of that office”. She identifies a number of matters in her submissions which, she says, show that Ms Nolan’s actions were the exercise of a power that was an incident of the office she held. None of those were pleaded, but for the sake of completeness, I will deal with them. They consist of assertions that, when making the “demands”, Ms Nolan: identified herself, used her electorate office email address and her ministerial email address, used her parliamentary telephone, signed documents as the member for Ipswich and as a Minister, and that she was acting as such when she did those things. Assuming for these purposes that all of that is true, it is still not an exercise of some power or authority which she had by virtue of the offices she held.
- [20] Ms Petersen did advance an argument to the effect that it is questionable whether public officials can avoid liability for misfeasance on the basis that their acts do not involve the exertion of public power. She contended that the reasoning in the authorities such as those set out above may not prevail. To that end she referred to the High Court decision in *Commissioner of Taxation of the Commonwealth of Australia v Day*⁹ and, in particular, to [34] in the reasons of Gummow, Hayne, Heydon and Kiefel JJ. I cannot see any rational connection between what is said there (concerning the tax deductibility of legal expenses for a public servant) and the facts of this case. In any event, this application is to be decided on what the law is, not what it might become.
- [21] The pleading does not disclose a cause of action for misfeasance in public office.

⁶ See *Northern Territory v Mengel* (1995) 185 CLR 307.

⁷ *Sanders v Snell* at [37].

⁸ [1989] AC 1228 at 1240.

⁹ (2008) 236 CLR 163; [2008] HCA 53.

Breach of duty?

[22] The duty of care is pleaded in this way:

“23a. The First Defendant was the Member for Ipswich and a Minister and therefore owed a duty of care to the Plaintiff to not harm the Plaintiff.”

[23] The pleading then goes on to conflate negligence and intention. It is pleaded that Ms Nolan both failed to take reasonable care and intentionally harmed Ms Petersen. Although it is not clearly pleaded I have assumed that Ms Petersen relies on the allegations pleaded with respect to the claim in misfeasance as supporting her claim in negligence.

[24] There is no basis for accepting that, in these circumstances, a member of parliament or a Minister owes a duty of care of the type pleaded. It is not pleaded that Ms Petersen fell into any of the categories which might normally give rise to such a duty.

[25] The allegations against Ms Nolan reduce to this: she complained about the election signs and induced or directed the Council to seize them and fine Ms Petersen. In doing so she interfered with a legal right of Ms Petersen (the erection and display of election signs) and, in doing so, caused her damage. Of itself, that does not give rise to tortious liability. Nothing in the pleading bespeaks negligence – it is concerned with intentional acts.

[26] The manner in which Ms Petersen alleges the intentional acts of Ms Nolan varies from paragraph to paragraph. In one she says that Ms Nolan “caused” the seizure, in another the seizure was achieved by “arranging” for it to happen, and in another the seizure was “demanded”. But, even if I were satisfied that the pleading did reveal a cause of action in tort I am satisfied, in the words of r 293, that the plaintiff has no real prospect of succeeding on all of her claim and there is no need for a trial of the claim.

[27] The Council did impose a fine. Ms Petersen did not contest it. She started an action in the Magistrates Court for recovery of her signs but did not pursue it. That application was dismissed. There is no evidence which supports in any way her allegation – however expressed – that the seizure and fine were the result of arrangement, demand or any other form of persuasion by Ms Nolan.

[28] In *Young v Crime and Corruption Commission*¹⁰ I considered whether, on a strike-out application, leave should be given to re-plead. My remarks then¹¹ are apposite in this case:

“[17] It sometimes occurs on applications such as this that the Court will allow a misguided plaintiff an opportunity to put into a sensible form the claim which the plaintiff has. This is not a case where the error is one of the expression of the cause of action. On the material before me, I can see no basis for any of the claims made by the plaintiff and it would be inappropriate to expose the defendant to a further claim based upon the assertions which are contained in the current pleading. The statement of claim discloses no reasonable cause or causes of action.”

[29] The plaintiff has had seven attempts to formulate a viable statement of claim. It does justice to no one to allow for this to be repleaded.

¹⁰ [2018] QSC 12.

¹¹ Adopted by Atkinson J in *Giffin v Telstra Corporation Limited* [2018] QSC 111.

Should judgment be given against Ms Petersen?

[30] Judgment is also sought pursuant to r 293 of the UCPR. It provides:

“(1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.

(2) If the court is satisfied—

(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff’s claim; and

(b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff’s claim and may make any other order the court considers appropriate.”

[31] In the absence of any viable cause of action and in the absence of any evidence which suggests that some other cause of action might exist, it must follow that Ms Petersen has no real prospect of succeeding on all or a part of her claim and that there is no need for a trial.

Conclusion

[32] The Seventh Amended Statement of Claim is struck out.

[33] I give judgment for the defendant on the claim.

[34] This was a case which was doomed to fail. Notwithstanding the many attempts to draw a claim that was recognised at law, this had such a remote prospect of success that it should never have been brought.¹² I order that the plaintiff pay the defendant’s costs on the indemnity basis.

¹² *Morris v Redland City Council & Anor* [2015] QSC 135 at [76].