

SUPREME COURT OF QUEENSLAND

CITATION: *Martens v Stokes & Anor* [2011] QSC 65

PARTIES: **FREDERICK ARTHUR MARTENS**
(Plaintiff)
v
TANIA ANN STOKES
(First Defendant)
COMMONWEALTH OF AUSTRALIA
(Second Defendant)

FILE NO/S: 613 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 30 March 2011

DELIVERED AT: Cairns

HEARING DATE: 18 February 2011

JUDGE: Jones J

ORDER: **1. The plaintiff's claim and the Statement of Claim are struck out.**

2. The plaintiff pay the defendants' costs of and incidental to the application and the action to be assessed on the standard basis.

CATCHWORDS: *Constitutional Law (Cth) – Federal Jurisdiction – Suit to which the Commonwealth is a party – Commonwealth Statute requiring rights of Commonwealth to be as nearly as possible the same as in a suit between subject and subject – Judiciary Act 1903 (Cth) s 64 – Australian Federal Police Act 1979 (Cth) s 64B.*

Constitutional law – Inconsistency of Commonwealth and State Laws – Covering the Field – The Constitution s 109.

Failure to Comply with Procedure – Uniform Civil Procedure Rules 1999 (Qld) r 149, 155 and 158 – Personal Injuries Proceedings Act 2002 (Qld) s 9.

COUNSEL: R W Gotterson QC with S McLeod for the defendants/applicants
M P Sumner-Potts for the plaintiff/respondent

SOLICITORS: Australian Government Solicitors for the applicants

Smithfield Law for the respondents

- [1] By this application, the first and second defendants seek orders that the plaintiff's claim be struck out or stayed on the grounds either that the Court has no jurisdiction to hear it or that the proceedings are irregular.
- [2] By his claim the plaintiff seeks damages and exemplary damages against the defendants under eight headings namely:
- That the defendants:
- (a) conspired to pervert the course of justice;
 - (b) maliciously prosecuted the plaintiff;
 - (c) were guilty of misfeasance in a public office;
 - (d) were guilty of breach of statutory duty;
 - (e) defamed the plaintiff to the world at large and, inter alia, to the owners of the Pajinka Resort on Cape York;
 - (f) breached its international obligations to the sovereign state of Papua New Guinea for their own purposes to the detriment of the plaintiff, and so that he would not have the safeguards and freedoms afforded to him by the Constitution thereof as a resident of Papua New Guinea;
 - (g) breached their duty of care to the plaintiff;
 - (h) committed perjury.¹
- [3] These allegations, as best as can be gleaned from a pleading which shows little regard to Rules 149, 155 and 158 of the *Uniform Civil Procedure Rules*, arise from the investigation by the Australian Federal Police (AFP) of complaints by two teenaged girls that the plaintiff engaged in sexual intercourse with them at Port Moresby, Papua New Guinea contrary to the provision of s 50BA of the *Crimes Act 1914 (Cwth)*.² The plaintiff contended that the girls' complaints were false and asked the AFP to investigate the circumstances in which the complaints were made. He contends either no such investigation was made, or it was so incompetently handled, that AFP continued to prosecute the complaints. One of the complainants subsequently recanted and the proceedings based on her complaint were withdrawn. The other complaint was pursued to trial whereupon the plaintiff was convicted and sentenced to a term of imprisonment. Appeals against conviction and sentence were dismissed. In later proceedings pursuant to s 672A of the *Criminal Code (Qld)*, the plaintiff sought an executive pardon. These proceedings were concluded in his favour in the Court of Appeal on 13 November 2009.³
- [4] The first defendant was at all material times an officer of the AFP and a member of the Transnational Crime Unit within the AFP. The allegation made against the first defendant is that on 24 August 2004 she arrested the plaintiff and charged him with the two offences.⁴ The further allegation is that the first defendant while giving evidence at the committal hearing, said that she would carry out the investigations suggested by the plaintiff and that she "failed, refused and neglected properly" to do

¹ Statement of Claim para [91]

² "50BA. A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16. Penalty: Imprisonment for 17 years.

³ [2009] QCA 351

⁴ Para 13 of Statement of Claim

so.⁵ The specific allegations were of not questioning the complainant about her differing statements⁶, a failure to trace the complainant's movements⁷ and failing to assess the credit worthiness of witnesses.⁸ Some general allegations of inaction and/or incompetence were raised against the Commissioner of AFP and the Officer-in-Charge of the AFP Standards and Ethics Unit.

- [5] Essentially, the claims are tortious in character. The damages sought are to compensate the plaintiff because, by the alleged actions of the defendants, he "has been severely injured, physically, emotionally, psychologically and financially"⁹.
- [6] On 4 January 2011, the defendants filed a conditional Notice of Intention to Defend contending that the Court does not have jurisdiction to entertain the plaintiff's claim because the plaintiff has not complied with the pre-court procedures as required by Chapter 2 of the *Personal Injury Proceedings Act 2002* (Qld) ("PIPA").
- [7] It is asserted on behalf of the defendants, and not denied by the plaintiff, that neither has been served with any Notice of Claim as required by s 9(1) of PIPA¹⁰.
- [8] The defendants argue that physical, emotional and psychiatric injury is a "personal injury" and the monetary claim as set out in the Statement of Claim is "damages" as those terms are defined in and for the purposes of PIPA.¹¹ They further argue that as the fundamental requirement of PIPA – giving of notice before action – has not been complied with, s 18 prevented the plaintiff from proceeding further and this claim should be struck out.
- [9] The decisions *Coffey v The State of Queensland*¹² and *Holmes v Adnought Sheet Metal Fabrication Pty Ltd*¹³ confirm the correctness of this argument.
- [10] The plaintiff's response, however, is to argue that the provisions of PIPA do not apply to his claim. The plaintiff contends that as this is a suit against the Commonwealth of Australia, the Court is exercising federal jurisdiction. He relies on various provisions of the Constitution, the *Judiciary Act 1903* (Cwth) and the *Australian Federal Police Act 1979* (Cwth) to assert that PIPA is in conflict with the *Australian Federal Police Act* and that such inconsistency results in the laws of the Commonwealth prevailing so as to exclude PIPA. The plaintiff further contends that PIPA does not apply to this claim because its purpose is limited to protecting insurers and this claim is not within the scope of the Act.
- [11] The plaintiff relies upon a combination of s 78 of the *Constitution* and s 64B of the *Australian Federal Police Act*, the latter of which makes the Commonwealth liable for torts committed by members of the AFP. The plaintiff contends that the AFP Act "covers the field to the extent that a State Act such as PIPA has no force or effect"¹⁴.

⁵ Ibid paras 16 and 17

⁶ Para 47 of Statement of Claim

⁷ Ibid para 52

⁸ Ibid para 62

⁹ Statement of Claim para [93]

¹⁰ Affidavit of Mark Kelly filed 16 February 2011

¹¹ See Schedule – "personal injury" includes...psychological or psychiatric injury; "damages" includes any form of monetary compensation

¹² [2005] QSC 212

¹³ [2004] 1 QdR 378

¹⁴ See written submissions at para 6

- [12] None of these arguments, in my view, can be sustained. Part 9 of the *Judiciary Act* provides for “**suits by and against the Commonwealth and the States**”. Section 56 provides that if a claim arises in a State or Territory that claim may be pursued in the Supreme Court or any other Court of competent jurisdiction in that State or Territory. The plaintiff thus properly commenced his claim in this Court and the Court will be obliged to apply relevant Commonwealth and State law. By s 64 the standing of the Commonwealth and the rights of the Commonwealth in this Court “shall be as nearly as possible the same...as in a suit between subject and subject. Prima facie then, the Queensland legislation will apply to the Commonwealth in a suit of this kind. This follows in light of the decision in *Commonwealth v Evans Deacon Industries Ltd*,¹⁵ where the High Court determined that Queensland legislation – *Subcontractors Discharges Act* – applied in proceedings instituted by a Queensland subcontractor against the Commonwealth as an employer. The majority judgment (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) said (at p 262):-

“(Maguire v Simpson)¹⁶ establishes that in every suit to which the Commonwealth is a party s 64 requires the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, **substantive and procedural**, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown. That result seems entirely just; the Commonwealth acquires no special privilege except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject. The section is ambulatory, and is therefore capable of applying rights resulting from changes made to State legislation after s 64 was enacted: There can be no doubt that the Commonwealth Parliament has full power to make laws governing the liability of the Commonwealth.” (my emphasis)

- [13] In *Dao v Australian Postal Commission*¹⁷ the High Court stressed that the provisions of s 64 are not to be construed such that direct application of State law would be invalidated by s 109 of the Constitution. Section 64 of *Judiciary Act* “should, and must, be construed as intended to extend a litigant’s rights in a suit in particular circumstances, only if, and to the extent that, there be no directly and inconsistent (in the relevant sense) Commonwealth law already regulating these circumstances”.¹⁸

- [14] The paramountcy of Commonwealth legislation arises by s 109 of the Constitution and that occurs only to the extent of inconsistency between Commonwealth and State laws. A similar issue was considered in *Re Residential Tenancies Tribunal ex parte Defence Housing Authority*¹⁹ where the Authority sought to avoid the determination of the Tribunal set up pursuant to State legislation. The High Court held that the matters which the Tribunal dealt with did not fall within the exclusive power of the Commonwealth. The Commonwealth Act did not provide a comprehensive and exclusive code, rather it assumed the operation of common law modified by statute. In that case the plural judgment (Dawson, Toohey and Gaudron JJ) said:

¹⁵ (1986) 161 CLR 254

¹⁶ (1977) 139 CLR 362

¹⁷ (1987) 162 CLR 317

¹⁸ Ibid at p 331

¹⁹ [1996-7] 190 CLR 410

“The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.”

- [15] The provisions of the *Australian Federal Police Act* do not, in my view, have the effect of covering the field in a way which limits the effect of s 64 of the *Judiciary Act*. There are some cases where s 64 will not operate to insert into consideration of the issue, provisions of State law. For example, in *Deputy Federal Commissioner of Taxation v Moorbank Pty Ltd*²⁰ it was held that in the general scheme of the *Income Tax Assessment Act 1936* (Cwth) providing for the collection and recovery of income tax “there is no room for the importation into them of such State Limitations Act provisions”.²¹
- [16] Counsel for the plaintiff does not point to any Commonwealth scheme which regulates the circumstances in which a person may pursue a claim for breach of duty against a member of the AFP. So far as I am aware, there is none.
- [17] Here, PIPA regulates the pursuit of claims for personal injury arising in the State of Queensland. It is a State law of general application and it applies both to the plaintiff and in this instance the Commonwealth alike. It does not attempt to impair the capacities of the Commonwealth executive but rather to regulate the manner in which claims, including claims against the Commonwealth, are pursued. That being so, the plaintiff’s claim for personal injuries can only be pursued under the statutory regime imposed by PIPA.
- [18] In this case, it is not disputed that the plaintiff has not pursued his claim in accordance with the PIPA provision. He was not, therefore, entitled to commence this proceeding. See ss 9 and 18 of PIPA. He has however, rendered himself liable to pay the respondents’ costs. See s 48(1)(a) of PIPA.
- [19] It follows that the plaintiff’s claim must be struck out with costs.

Orders

1. The plaintiff’s claim and Statement of Claim are struck out.
2. The plaintiff pay the defendants’ costs of and incidental to the application and this action to be assessed on the standard basis.

²⁰ (1987-8) 165 CLR 55

²¹ Ibid at p 66